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THE

CODE OF PROCEDURE

OF THE

STATE OF NEW YORK,

AS AMENDED TO 1868.

WITH NOTES AND INDEX;

ALSO

ADDITIONAL NOTES OF THE DECISIONS TO 1868.

NINTH EDITION,

BY

JOHN TOWNSHEND,

EDITOR OF THE PRECEDING EDITIONS.

NEW YORK:
BAKER, VOORHIS & CO., PUBLISHERS,
(Successors to John S Voorhies,)
66 NASSAU STREET.
1868.

L22819

FEB 26 1943

Entered according to Act of Congress, in the year 1851, by
JOHN S. VOORHIES,
In the Clerk's office of the District Court of the United States for the Southern District of New York.

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NOTE TO NINTH EDITION.

Following the Index are "ADDITIONAL NOTES," arranged according to the numerical order of the sections of the Code and the paging of the book. Each additional note refers conspicuously to the section of the Code and the preceding page to which such additional note applies.

After consulting the body of the work, reference should in every case be had to the "Additional Notes." Their arrangement makes such a reference a matter easy to accomplish.

Besides these additional notes, in an Appendix will be found the Amendments to the Code of Procedure made in the years 1865, 1866, and 1867.

☞ Where changes have been made in any sections of the Code since 1864, the fact is indicated by a * in front of the section, and a note at foot of the page, referring to the Appendix.

EDITOR'S PREFACE

TO

THE EIGHTH EDITION.

I take occasion on presenting to public notice this the Eighth Edition of my notes to the CODE OF PROCEDURE to express my thanks for the cordial reception vouchsafed to the previous editions, and to state that, I have spared no pains within the limited leisure the kindness of my friends and clients has allowed me, to render the present edition complete, useful and reliable

JOHN TOWNSHEND.

NEW YORK HERALD BUILDING,
New York, September, 1864.

EXPLANATORY NOTE.

It will be observed that some of the sections are twice numbered, as thus—138 [116],—while other sections are only once numbered; also that some sections are preceded with the word and figures (am'd 1849), or (am'd 1849—1851), &c., while others have no such prefix; and, further, that some sections have the words "*existing suits*" prefixed, and others have not.

The reason for those prefixes or the omission of them, is to give the reader at a glance, the history of each section; as thus:—

When a section is only once numbered, as § 227, it indicates that it is one of the sections added in 1849.

When a section is twice numbered, as § 348 [297], it indicates, 1, That the section is one of those which existed in the code of 1848, and, 2, that in that code it was numbered as within the brackets [ ]. When the words "*existing suits*" are prefixed to a section, they indicate that the section is one of those which the provisions of the supplementary act apply to suits pending on July 1, 1848, When the word and figures (am'd 1849), or as the case may be, are prefixed they signify that the section was amended in the year or years which the figures indicate.

Howard's Practice Reports are cited as "How."; Abbott's Practice Reports as "Abb."; Bosworth's Superior Court Reports as "Bosw." The references to the Revised Statutes, not otherwise marked, are to the first edition.

THE

CODE OF PROCEDURE.

WITH AMENDMENTS OF 1865, 1866, AND 1867, IN APPENDIX.

[The figures within brackets, placed after the number of the section, show the number of the corresponding section in the Code of 1848.]

AN ACT

To simplify and abridge the practice, pleadings, and proceedings of the courts of this State.

WHEREAS, it is expedient that the present forms of actions and pleadings in cases at common law should be abolished, that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding, in all cases, should be established; therefore,

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

GENERAL DEFINITIONS AND DIVISIONS.

SECTION 1. Division of remedies.
2. Definition of an action.
3. Definition of a special proceeding.
4. Division of actions into civil and criminal.
5. Definition of a criminal action.
6. Definition of a civil action.
7. Civil and criminal remedies not merged in each other.
8. Subjects embraced in this act.

§ 1. [1.] *Remedies.*

Remedies in the courts of justice are divided into,

1. Actions.
2. Special proceedings.

§ 2. [2.] (Am'd 1849.) *Action.*

An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

a. WHAT IS AN ACTION:—

A creditor's suit (*Quick* v. *Keeler*, 2 Sand. 231; *Dunham* v. *Nicholson*, *ib.* 636).

A proceeding for partition (*Backus* v. *Stillwell*, 3 How. 318; 1 Code R. 70; *Myers* v. *Rasback*, 2 Code R. 13; 4 How. 88; *Myers* v. *Borland*, *ib.*; qualified, *Traver* v. *Traver*, 3 *ib.* 351).

A proceeding to dissolve a moneyed corporation (*Kattenstroth* v. *Astor Bank*, 2 Duer, 632).

Quo warranto (*The People* v. *Cook*, 4 Selden, 71; *The People* v. *Clarke*, 11 Barb., 337).

Scire facias (*Cameron* v. *Young*, 6 How., 372; *Alden* v. *Clark*, 12 *ib.*, 212).

A proceeding to determine adverse claims to real property (*Mann* v. *Provost*, 3 Abb. 446).

Any judicial proceeding which, if conducted to a determination, will result in a judgment (*Harris, J. The People* v. *County Judge of Rensselaer*, 13 How. 400.)

A proceeding by mandamus (*The People* v. *Colborne*, 20 How. 378.)

A summary proceeding by a landlord to dispossess a tenant (*Deuel* v. *Rust*, 24 Barb. 444).

b. WHAT IS NOT AN ACTION:—

A proceeding under section 376 of the Code (*Mills* v. *Thursby*, 2 Abb. 432).

A proceeding under section 372 of the Code (*Lang* v. *Ropke*, 1 Duer 702).

An application for an injunction (*Becker* v. *Hagar*, 8 How. 68).

A proceeding to obtain discovery of books, &c. (*Follett* v. *Weed*, 3 How. 303; 1 Code R. 65).

A proceeding to foreclose a mortgage by advertisement (*Hall* v. *Bartlett*, 9 Barb. 297).

A reference of a claim against the estate of a deceased person (*Coe* v. *Coe*, 14 Abb. 86).

A proceeding to attach for contempt (*Holstein* v. *Rice*, 15 Abb. 307; *Gray* v. *Cook*, 15 Abb. 308 note).

§ 3. [3.] *Special proceeding.*

Every other remedy is a special proceeding.

a. WHAT IS A SPECIAL PROCEEDING.

A proceeding before referees appointed to hear appeals from orders of Commissioners of Highways (*The People* v. *Flake*, 14 How. 527).

A proceeding to assess damages on the laying out a plank road under Laws of 1847, ch. 210 (*Ex parte Ransom*, 3 Code R. 148).

A proceeding by commissioners to appraise compensation for lands to be taken under the general Railroad Act (*Re N. Y. Cent. R. R. Co.* v. *Marvin*, 1 Kernan, 277).

A proceeding to open streets in New York city, query (*Re the Bowery*, 12 How. 97.)

A certiorari (*The People* v. *Stillwell*, 19 N. Y. 532).

A proceeding to attach for contempt (*Holstein* v. *Rice*, 15 Abb. 307; *Gray* v. *Cook*, 15 Abb. 308 note).

a. WHAT IS NOT A SPECIAL PROCEEDING.

A proceeding supplementary to an execution (*Dresser* v. *Van Pelt*, 15 How. 19; contra, *Davis* v. *Turner*, 4 *id.* 190).

§ 4. [4.] *Division of actions.*

Actions are of two kinds:

1. Civil.
2. Criminal.

§ 5. [5.] (Am'd 1849.) *Criminal action.*

A criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offence, for the punishment thereof.

§ 6. [6.] *Civil action.*

Every other is a civil action.

§ 7. [7.] *Remedies not merged.*

Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

§ 8. [8.] (Am'd 1849.) *Division of act.*

This act is divided into two parts:

The first relates to the courts of justice, and their jurisdiction;

The second relates to civil actions commenced in the courts of this State after the first day of July, 1848, except when otherwise provided therein, and is distributed into fifteen titles. The first four [§§ 69 to 126, both inclusive] relate to actions in all the courts of the State; and the others, to actions in the supreme court, in the county courts, in the superior court of the city of New York, in the court of common pleas for the city and county of New York, in the mayor's courts of cities, and in the recorders' courts of cities, and to appeals to the court of appeals, to the supreme court, to the county courts, and to the superior court of the city of New York.

b. This section limits the provisions of the code to proceedings in suits commenced after the code took effect. (*Merritt* v. *Wing*, 4 How. 14; *Clarke* v. *Cran-*

dall, *id.* 127; 2 Code R. 70; *Truscott* v. *King*, 4 How. 173; *Thompson* v. *Blanchard*, *id.* 260; *Doty* v. *Brown*, *id.* 429. See, however, *Kanouse* v. *Martin*, 2 Sand. 739; 3 Code R. 203; and § 459, *post.*)

a. All the provisions of the code apply to all recognizances forfeited in any court of general sessions, or oyer and terminer within the State. (Laws 1855, p. 305, ch. 2, s. 1.)

b. There is no longer any appeal to the superior court. (See *Wood* v. *Kelly*, 2 Hilton, 336; *Hawkins* v. *Mayor of N. Y.*, 5 Abb. 344.)

PART I.

OF THE COURTS OF JUSTICE AND THEIR JURISDICTION.

TITLE I. Of the Courts in general.
II. Of the Court of Appeals.
III. Of the Supreme Court, Circuit Courts, and Courts of Oyer and Terminer.
IV. Of the County Courts.
V. Of the Superior Court and Court of Common Pleas in the City of New York, and the Mayors' and Recorder's Courts in other cities.
VI. Of the Courts of Justices of the Peace.
VII. Of Justices' and other inferior courts in cities.

TITLE I.

Of the Courts in general.

Section 9. The several courts of this State.
10. Their jurisdiction generally.

§ 9. [9.] (Am'd 1849.) *The several courts.*
The following are the courts of justice of this State.
1. The court for trial of impeachments.
2. The court of appeals.
3. The supreme court.
4. The circuit courts.
5. The courts of oyer and terminer.
6. The county courts.
7. The courts of sessions.
8. The courts of special sessions.
9. The surrogates' courts.
10. The courts of justices of the peace.
11. The superior court of the city of New York.
12. The court of common pleas for the city and county of New York.
13. The mayors' courts of cities.

14. The recorders' courts of cities.
15. The marine court of the city of New York.
16. The justices' [district] courts in the city of New York.
17. The justices' courts of cities.
18. The police courts.

a. This enumeration is far from complete; at least, it omits the City Court of Brooklyn, and the Superior Court of the city of Buffalo.

§ 10. [10.] *Their jurisdiction generally.*

These courts shall continue to exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by this act.

b. If two actions between the same parties, and upon the same subject matter, are brought in two different courts, the court which first acquires jurisdiction should dispose of the whole controversy (*McCarthy* v. *Peake*, 9 Abb. 164).

c. THE COURTS HAVE JURISDICTION

Of an action for an assault committed in the Brooklyn Navy Yard, although the State has ceded exclusive jurisdiction of that place to the United States (Culver, City Judge, *Armstrong* v. *Foote*, 11 Abb. 384 overruling 19 How. 237).

Foreign governments may sue and be sued in the courts of this State in their federative name (*Republic of Mexico* v. *Arrangois*, 11 How. 1; 2 Abb. 437; 3 *id.* 470; *Manning* v. *State of Nicaragua*, 14 How. 517; *Delafield* v. *State of Illinois*, 26 Wend. 192; *Burrall* v. *Jewett*, 2 Paige, 134; *Gibson* v. *Woodworth*, 8 *id.* 132).

Although a State of the United States has adopted an ordinance of secession, it may nevertheless sue in the courts of this state (*U. S.* v. *Victor*, 16 Abb. 153).

The United States or a State may consent to be sued in a State court (*The People of Michigan* v. *Phœnix Bank*, 4 Bosw. 382).

Of actions against foreign executors or administrators who are residents of the State. (*Gulick* v. *Gulick*, 33 Barb. 92, 21 How. 22; *Moutalvan* v. *Clover*, 32 Barb. 190; and see *Sere* v. *Coit*, 5 Abb. 482 and *post*, in note to § 142, sub. 1, *Plaintiff suing as executor.*)

Of an action against officers of the United States Government in certain cases. See *Ripley* v. *Gelston*, 9 Johns. 201; *Re Stacey*, 10 *id.* 328; *Hoyt* v. *Gelston*, 13 *id.* 141; *Wilson* v. *McKenzie*, 7 Hill, 95; *Teall* v. *Felton*, 1 Coms. 537; S. C. 3 Barb. 512; *McButt* v. *Murray*, 10 Abb. 196.

To compel a party to convey lands in another State. (*Bailey* v. *Rider*, 10 N. Y. 363; *Gardner* v. *Ogden*, 22 N. Y., 327; *Newton* v. *Bronson*, 13 N. Y., 587; *Fenner* v. *Sanborn*, 37 Barb. 610.)

For a fraudulent conspiracy formed by defendants in another State, to divest plaintiff of his title to lands in this State where the relief sought is damages for the wrong (*Mussina* v. *Belden*, 6 Abb. 165).

To discharge on habeas corpus persons enlisted in the U. S. army (*Re Carlton*, 7 Cow. 471; see *Re Dabb*, 12 Abb. 113; *Re Phelan*, 9 *id.* 286; *U. S.* v. *Wyngall*, 5 Hill, 16; *Re Ferguson*, 9 Johns. 239; *Re Husted*, 1 Johns. Cas. 136 see *Re Hopson*, 40 Barb. 34).

Of actions on bonds given for duties to the U. S. (*U. S.* v. *Dodge*, 14 Johns. 95).

On actions by collectors of U. S. customs upon receiptor's agreement for safe-keeping of forfeited goods (*Sailly* v. *Cleveland*, 10 Wend. 156).

Of actions for torts at sea (*Percival* v. *Hickey*, 18 Johns. 257; and see *Novion* v *Hullett*, 16 *id.* 327; *Wilson* v. *McKenzie*, 7 Hill, 95; *Gardner* v. *Thomas*, 14 Johns. 134).

Of actions respecting real estate out of this State (*Watts* v. *Kinney*, 6 Hill 83; *Mussina* v. *Belden*, 6 Abb. 165; *Ward* v. *Arredondo*, Hopk. 213; *Shattuck* v. *Cassidy*, 3 Edw. 152; *Slatter* v. *Carroll*, 2 Sandf. Ch. 573; *De Klyn* v. *Watkins*, 3 *id.* 185; *D'Ivernois* v. *Leavitt*, 23 Barb. 63).

Of an action on a contract made in a foreign country, not stamped as required by the law of the country where made (*Skinner* v. *Tinker*, 34 Barb. 333).

Of an action upon a policy of insurance issued within this State by a resident agent of a foreign insurance company (*Burns* v. *Provincial Ins. Co.*, 35 Barb. 325; and see *Watson* v. *Cabot B'k.*, 5 Sand. 423, affirmed in the Court of Appeals so said, 4 Duer, 606, and see *post*, sec. 427).

THE COURTS HAVE NOT JURISDICTION

To entertain an action brought against the State itself except as authorized by statute (*Kiersted* v. *The People*, 1 Abb. 385; *Garr* v. *Bright*, 1 Barb. ch. 157).

Of an action in which a foreign consul is defendant, either alone or with others (*Rock River Bank* v. *Hoffman*, 14 Abb. 72); and it is no answer to an application to vacate the proceedings in such an action that since the action was commenced the exequator of the said consul has been revoked (*id.*); nor in the case of a consul sued jointly with others can the State court retain jurisdiction of the action by striking out the name of the consul, and proceeding against the other defendants (*id.*), and see *Taaks* v. *Schmidt*, 19 How. 413; *Valarino* v. *Thompson*, 8 Selden, 576. The exemption of a consul is not personal, and he cannot waive it (*Valarino* v. *Thompson*, 8 Selden, 576; and see 1 Barb. 449; 1 Sand. 690).

For a trespass on real property in another State (*Hurd* v. *Miller*, 2 Hilton, 540; *Watts* v. *Kinney*, 23 Wend. 484).

To restrain the prosecution of an action in another State (*Williams* v. *Ayrault*, 31 Barb. 364; *Mitchell* v. *Bunch*, 2 Paige, 606; *Meade* v. *Merritt*, *id.* 402; *Baily* v. *Rider*, 10 N. Y. 363; see, however, *Field* v. *Holbrook*, 3 Abb. 377; *McKee* v. *Voorhies*, 7 Cranch, 279; *Phelan* v. *Smith*, 8 Cal. 520; *Diggs* v. *Wolcott*, 4 Cranch, 179; *Hill* v. *Hill*, 28 Barb. 23; and see in note to § 219, *post*).

To declare void a proceeding in a court of another State (*Hill* v. *Hill*, 28 Barb. 23), unless there is an attempt to enforce such proceeding in a court of this State. (*Id. Dobson* v. *Pearce*, 2 Kernan, 156.)

Of an action on contract against an Indian (*Hastings* v. *Farmer*, 4 Coms. 293).

Of actions between citizens of another State for personal torts, as assault or false imprisonment, committed within the jurisdiction of that other State. (*McIvor* v. *McCabe*, 16 Abb. 320; 26 How. 257; *Smith* v. *Bull*, 17 Wend. 323; *Lester* v. *Wright*, 2 Hill, 320; *Black* v. *Bay State Co.*, 27 Barb. 248; 6 Abb. 415; 16 How. 1; and see *Armstrong* v. *Foote*, 11 Abb. 384; 19 How. 287; *Martin* v. *Hill*, 12 Barb. 631; and *Molony* v. *Dows*, 8 Abb. 316; *contra.*)

The courts of this State will not enforce the penal laws of the United States (*U. S.* v. *Lathrop*, 17 Johnson, 9) nor of any other State (*Scoville* v. *Canfield*, *id.* 338) nor a foreign bankrupt or revenue law (*Mosselman* v. *Caen*, 34 Barb. 66; *Skinner* v. *Tinker*, 34 Barb. 333).

Nor adjudicate on the right to salvage (*Baker* v. *Hoag*, 3 Selden, 563; *Frith* v. *Crowell*, 5 Barb. 209; see, however, *Cashmere* v. *Crowell*, 1 Sand. 715; *Cashmere* v. *De Wolf*, 2 *id.* 379).

For damages for infringement of a patent (*Burrall* v. *Jewett*, 2 Paige, 134), or copyright (*Dudley* v. *Mayhew*, 3 Coms. 9), or where the existence and validity of a patent for invention must necessarily be shown to enable the plaintiff to recover (*Tomlinson* v. *Battell*, 4 Abb. 266).

As to the territorial jurisdiction of the State. See 1 R. S. 61; *Manly* v. *The People*, 3 Selden, 297; *The People* v. *Hulse*, 3 Hill, 309.

As to the jurisdictions of the several courts. See post; titles II, III, IV, V, VI, VII.

The judges of the State courts have no power to issue a writ of *habeas corpus* in cases of commitment or detainer under the authority of the United States. (*Re Hopson*, 40 Barb. 34.)

b. ACTIONS AND PROCEEDINGS AGAINST THE MAYOR, &C., OF NEW YORK.—The supreme court in the first district, the court of common pleas and the

superior court of the city of New York have *exclusive* jurisdiction of all actions or special proceedings wherein the Mayor, Aldermen and Commonalty of said city are parties defendant (Laws 1860, p. 645, ch. 379, s. 1). See *The People* v. *N. Y. & Harlem R. R. Co.*, 26 How. 54.

No action or special proceeding can be maintained against said Mayor, &c., unless it "appear by and as an allegation in" the complaint or moving papers that at least twenty days have elapsed since the claim on which such action or proceeding is founded was presented to the Comptroller of said city for adjustment, and that, upon a second demand *in writing* being made on "said Comptroller after the expiration of said twenty days," said Comptroller "neglected or refused to make an adjustment or payment" of said claim. (*Id.* s. 2.)

Judgment for plaintiff in any such action or proceeding carries costs without regard to the amount of the recovery. (*Id.* s. 2.)

In the adjustment of claims by the Comptroller, he may administer oaths to claimants and witnesses, and examine them on all matters pertinent to the claim. (*Id.* s. 3.)

All process and papers for the commencement of actions and proceedings against the Corporation of said City must be served on the Mayor, Comptroller, or Counsel to the Corporation. (*Id.* s. 4.)

No execution can be levied on the property of said city until after ten days' notice in writing of the issuing said execution has been given to the Comptroller of said city. (*Id.* s. 5.)

The preceding provisions only apply to actions or proceedings commenced after April 14, 1860. (*Id.* s. 6.)

As to costs and as to appeals in actions against municipal corporations. (See laws 1859, ch. 262, s. 2; laws 1858, ch. 334, in notes to sections 303, 322, and 354 post.)

TITLE II.

*The Court of Appeals.**

SECTION 11. Its jurisdiction.
12. Power of Court.
13. Terms. Preference of causes.
14. Judgment, how given.
15. Sheriffs to provide rooms, &c.
16. Court, where held, adjournment.

* § 11. [11.] (Am'd 1849, 1851, 1852, 1857, 1862.) *Jurisdiction.* The court of appeals shall have exclusive jurisdiction to review upon appeal every actual determination hereafter made at a general term by the supreme court, or by the superior court of the city of New York, or the court of common pleas for the city and county of New York, or the superior court of the city of Buffalo,† in the following cases, and no other:

1. In a judgment in an action commenced therein or brought there from another court; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

* 2. In an order affecting a substantial right, made in such action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken, and when such order grants or refuses a new trial; but no appeal to the court of appeals, from an order granting a new trial, shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant that if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal from an order granting a new trial, if the court of appeals shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages, or other proceedings to render the judgment effectual, may be there had, in cases where such subsequent proceedings are requisite.

* 3. In a final order affecting a substantial right made in a special proceeding, or upon a summary application, in an action after judgment.

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* See Rules, in Appendix. † Laws 1857, vol. 1, p. 753, § 3.

* *Amended—See Appendix.*

But such appeal shall not be allowed in an action originally commenced in a court of a justice of the peace, or in the marine court of the city of New York, or in an assistant justice's court of that city, or in a justice's court of any of the cities of this State, unless any such general term shall, by order duly entered, allow such appeal before the end of the next term after which such judgment was entered. The foregoing prohibition shall not extend to actions discontinued before a justice of the peace, and prosecuted in another court, pursuant to sections sixty and sixty-eight of this code.

OTHER JURISDICTION:

a. This court has also jurisdiction of all cases pending in the late court of errors on the first Monday of July, 1847, and on that day transferred to this court by the constitution, and now remaining undetermined (Laws of 1847, p. 322, s. 12); and this court or any judge thereof, in term or vacation, has power upon satisfactory proof that any final order or decree of the late court of chancery has not been properly enrolled, to make an order for the due enrollment thereof, or for an amendment of the enrollment thereof, to the same extent, and with the like effect that the said court of chancery might have done (Laws of 1853, p. 820); and see note to s. 333, *post;* and see Judiciary Act, Laws 1847, p. 320, ss. 4, 13; *Ib.* p. 638, ss. 1, 23.

b. Note to subd. 3.—Leave to appeal to the court of appeals from a judgment in the New York common pleas in an action commenced in an inferior court, will only be granted where the case involves great interests, or settles a principle of law affecting the decision of numerous other cases. (*Jackson* v. *Purchase*, 1 Hilton, 357; 14 How. 230; and see *Palmer* v. *Moeller*, 9 Abb. 20, *note*; 2 Hilton, 421.)

c. An affidavit stating that the counsel for the moving party argued the case without full preparation, and that as he believes he did not make the court understand his points, does not furnish any ground for allowing an appeal to the court of appeals. (*Drucker* v. *Patterson*, 2 Hilton, 135.)

d. Where the decision of the New York common pleas on the question presented by the appeal is in direct conflict with a decision of the general term of the supreme court in the first district, a case is shown for granting leave to appeal to the court of appeals. (*Clapp* v. *Graves*, 2 Hilton, 243.)

e. The time fixed for the allowance of an appeal to the court of appeals in an action originating in a justices' court, cannot be enlarged. (*Wait* v. *Van Allen*, 22 N. Y. 319.) Accordingly where an action was commenced in a justices' court, a judgment rendered for the plaintiff, a renewal of that judgment by the county court, and a refusal of the county court judgment by the supreme coust at a term in September, 1858, and judgment perfected 22d October following. The next general term of the supreme court in that district was in January 1859, at which term a motion was made for leave to appeal to the court of appeals. No decision was made on that motion until the following general term, when the motion was allowed. At the next general term in May, 1859, defendant moved for leave to enter the order giving permission to appeal *nunc pro tunc* as of the general term of January, 1859; that motion was granted, and the order entered accordingly; on motion to dismiss the appeal it was held that the order was not made in time, that the defect could not be cured by entering the order *nunc prò tunc*, and the appeal was dismissed. (*Id.*)

f. This decision seems adverse to *Clapp* v. *Graves*, 9 Abb. 20; 2 Hilton, 317, in which it was held sufficient if the application for leave to appeal to the court of appeals under this section is made and heard during the next term after judgment was entered; and though the court do not decide upon the applica-

tion until a subsequent term, they may then order the application to be allowed and the order entered as of the proper term.

a. Where in an action in the marine court the plaintiff succeeded on the trial; again, on appeal to the general term of that court; and again, on appeal to the common pleas,—the court refused an order allowing an appeal to the court of appeals (*Purchase* v. *Jackson*, 14 How. 230; 1 Hilton, 357).

§ 12. [12.] *Power of the court.*

The court of appeals may reverse, affirm, or modify, the judgment or order appealed from, in whole or in part, and as to any or all of the parties; and its judgment shall be remitted to the court below, to be enforced according to law.

* § 13. [13.] (Am'd 1851, 1852, 1858, 1859, 1862, 1863.) *Terms. Preference of causes.*

There shall be four terms of the court of appeals in each year, to be held at the capitol in the city of Albany, on the first Tuesday of January, the fourth Tuesday of March, the third Tuesday of June, and the last Tuesday of September, and continued for as long a period as the public interests may require. But the judges of said court may in their discretion appoint one of said terms in each year to be held in the city of New York. Additional terms shall be appointed and held at the same place by the court when the public interest requires it. The court may, by general rules, provide what causes shall have a preference on the calendar. On a second and each subsequent appeal to the court of appeals, or when an appeal has once been dismissed for defect or irregularity, the cause shall be placed upon the calendar as of the time of filing the first appeal; and whenever in any action or proceeding in which the people of this state or any state officer, or any board of state officers, is or are sole plaintiff or defendant, an appeal has been or shall be brought from any judgment or order for or against him or them, in any court, such appeal shall have a preference in the supreme court and in the court of appeals, and may be moved by either party out of the order on the calendar.

For other cases that have a preference see Rule XIII Court of Appeals *post*.

* § 14. [14.] (Am'd 1849, 1851.) *Judgment. Rehearing.*

The concurrence of five judges is necessary to pronounce a judgment. If five do not concur, the case must be reheard.

* *Amended—See Appendix.*

But no more than two rehearings shall be had; and if on the second rehearing five judges do not concur, the judgment shall be affirmed.

a. This section does no more than restore the common law, as it had been previously understood and acted on in this State. (*Mason* v. *Jones*, 3 Coms. 375; 3 Code R. 164.)

b. An affirmance upon an equal division of the court, merely determines the particular case, and leaves the question involved in it open for consideration in any future case in which they may arise (*Mores* v. *Goold*, 1 Kernan, 281; *The People* v. *Mayor of New York*, 25 Wend. 252); and where the court are equally divided, a rehearing cannot, in the absence of statutory authority, be allowed. (*Ib. Martin* v. *Hunter's Lessee*, 1 Wheat. 355.)

c. Where judgment is pronounced in open court holden by eight judges, without any dissent at the time, neither party can go behind such public act, and attack the judgment on the ground of what may have taken place among the judges in their private consultations. (*Mason* v. *Jones*, 3 Coms. 375; *Oakley* v. *Aspinwall*, *ib.* 547.)

d. A judgment of affirmance should in the absence of dissent, be held an affirmance, not only of the judgment, but of the precise proposition decided by the court below. (*Green* v. *Clark*, 13 Barb. 57.)

§ 15. *Sheriff to provide rooms.*

If, at a term of the court of appeals, proper and convenient rooms, both for the consultation of the judges and the holding of the court, with furniture, attendants, fuel, lights, and stationery suitable and sufficient for the transaction of its business, be not provided for it in the place where by law the court may be held, the court may order the sheriff of the county to make such provision, and the expense incurred by him in carrying the order into effect shall be a county charge.

16. (Am'd 1851.) *Court, where held. Adjournment.*

The court of appeals may be held in other buildings than those designated by law as places for holding courts, and at a different place, in the same city, from that at which it is appointed to be held. Any one or more of the judges may adjourn the court, with the like effect as if all were present.

TITLE III.

Of the Supreme Court, Circuit Courts, and Courts of Oyer and Terminer.*

SECTION 17. Existing statutory provisions, as to terms, &c., repealed
18. General terms.
19. Judgment, how given.
20. Special terms, &c.
21. Circuit and oyer and terminer together.
22. Times and places of holding courts.
23. Extraordinary terms, &c.
24. Courts, where held.
25. Publication of appointment.
26. Inability of judge.
27. Business out of court. Transfer of business.
28. Rooms, &c., how furnished.

§ 17. [15.] (Am'd 1849.) *Terms.*

All statutes, now in force, providing for the designation of the times and places of holding the general and special terms

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* *Jurisdiction of the Supreme Court.*

a. The supreme court has all the powers of the supreme court and the former court of chancery. *Onderdonk* v. *Mott*, 34 Barb. 106; *Myers* v. *Rasback*, 4 How. 83; *Myers* v. *Borland*, *id.* and see *ante* p. 22 *e*, and the constitution, art. vi. sec. 3–6; 2 R. S. 259, s. 1; *ib.* 234, s. 60; Laws 1847, p. 323, s. 16; Laws 1848, p. 282; Laws 1849, p. 27; *ib.* p. 117; *ib.* p. 150; Laws 1850, p. 20; *ib.* p. 9; Laws 1851, p. 308; Laws 1852, p. 591; Laws 1853, p. 526.

b. The supreme court has jurisdiction of an action in the nature of a suit in equity where the amount in dispute is less than $100. s. 37 art. 2, tit. 2. ch. 1, part 3 of the Revised Statutes, which required the court of chancery to dismiss every suit where the matter in dispute was less than $100 is repealed. (Laws 1862, p. 859, s. 39; Laws 1863, p. 664, s. 2, and see *Mallory* v. *Norton*, 21 Barb. 424; *Brasman* v. *Johnson*, 26 How. 27 and *Sarsfield* v. *Vaughner*, 15 Abb. 65; 38 Barb. 444, rev's'g S. C. 14 Abb. 297; and *Shepard* v. *Walker*, 7 How. 46; *Cobine* v. *St. John*, 12 How. 387; 576; *Marsh* v. *Benson*, 19 How. 415; 11 Abb. 241 and note; *Durham* v. *Willard*, 19 How. 425. In *Sarsfield* v. *Vaughier*, (*supra*) the value of the property in dispute was less than $50.

c. The supreme court may decree the cancellation of a void mortgage which is a cloud on property out of the State. (*Williams* v. *Ayrault*, 31 Barb. 364.) It may determine the validity of any actual or alleged devise or will of real estate (Laws 1853, p. 526), and may vacate the entry of satisfaction of a final decree of the court of chancery, entered on its records prior to 1846, on the return of an execution satisfied, and order a new execution to be issued. (*Suydam* v. *Holden*, Ct. of Appeals, Oct. 1853.) It has power to authorize the leasing or sale and conveyance of the real estate of benevolent, charitable, scientific, missionary societies or orphan asylums, (Laws 1861, p. 84, ch. 58). It has the power to exercise such an efficient control over every proceeding in an action pending in it, as effectually to protect every person interested in the result from injustice and fraud, and it will not allow itself to be made the instrument of wrong. (*Lowber* v. *Mayor of N. Y.*, 26 Barb. 262.)

An action upon an award may be brought in the supreme court, although

of the supreme court, and the circuit courts, and courts of oyer and terminer, and of the judges who shall hold the same, are repealed from and after the first day of July, 1848; and

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the submission provides for judgment in the county court. (*Burnside* v. *Whitney*, 21 N. Y. 148.)

a. An application to sell the real estate of a religious corporation may be made to the supreme court. (*Wyatt* v. *Benson*, 23 Barb. 327; 4 Abb. 182. See Code s. 30, subd. 9, and see supreme court rule regulating the application, in Appendix.)

b. The statutory powers of the supreme court may be exercised by the court at either a general or special term, unless there be some statute specially restricting the court. (*Tracy* v. *Talmage*, 1 Abb. 463.) Its jurisdiction in the matters of street openings in the city of New York, is exercised as a court, and not as a tribunal of inferior jurisdiction. (*In re Canal street*, 2 Kernan, 406.)

c. The supreme court cannot by certiorari arrest a special proceeding instituted before a judge of another court, prior to any final determination of the matter. (*Devlin* v. *Pratt*, 11 Abb. 398.)

d. The whole power of the court to order the sale of the lands of infants is derived from the statute. (*Onderdonk* v. *Mott*, 34 Barb. 106.)

Transfer of causes to:

e. As to the transfer of causes to the supreme court from the New York Superior Court and Court of Common Pleas, see section 33, *post*; from the Superior Court of Buffalo, see Laws 1857, vol. 1, p. 755; and from county courts see section 30, subd. 13 *post*; and in actions or proceedings in the City Court of Brooklyn, or before the City Judge of Brooklyn, in which the said City Judge shall have acted as attorney or counsel, or shall be interested, or in which he would be excluded as a juror by reason of consanguinity or affinity to either party, may be transferred to the supreme court and tried in the county of Kings on the judge making a certificate stating the facts, and filing said certificate with the county clerk of Kings county. (Laws 1861, ch. 86)

CIRCUITS:

f By Laws of 1847 (p. 326, s. 22), these courts have the same powers, and exercise the same jurisdiction, as that possessed and exercised by the circuit courts then existing, so far as they were consistent with that act; and all laws relating to the former circuit courts were made applicable to the present circuit courts, so far as the same were consistent with that act. Hardly any step, except to try or refer, can be taken at the circuit in a cause pending in the supreme court (*Mann* v. *Taylor*, 1 Code R. N. S. 388); and except to grant a new trial on the judge's minutes. See *Moffat* v. *Ford*, 14 Barb. 577.

OYER AND TERMINER:

g. The oyer and terminer in the several counties is a permanent and continuous court. Its successive sessions are terms of the same and not distinct tribunals. The oyer and terminer has no power to order a new trial upon the merits, after a conviction for felony. (*The People* v. *Appo*, 20 N. Y. 531; affirming S. C. 18 How. 350, and see *The People* v. *Dutchess Oyer and Terminer*, 2 Barb. 282.)

REMOVAL OF CAUSE FROM STATE COURT INTO U. S. CIRCUIT COURT.

h. In what cases: A cause may be removed from a state court into a U. S. circuit court where (1) the parties plaintiff and defendant are *citizens* each of a different state, and (2) where the sum or value in dispute exceeds $500. The manner of removal is by filing, at the time of entering an appearance in the State court, a petition and bond on behalf of the petitioner to enter process at the next term of the circuit court (1 U. S. Stat. at large, 78; and see Act of Congress of March 3, 1863; and *Jones* v. *Seward*, 26 How. 33; 40 Barb. 563, reversed 26 How. 433; and *Wood* v. *Matthews*, 2 Blatchford C. C. Rep. 370).

the order of the supreme court adopted July 14, 1847, prescribing the times and places of holding the general and special terms of the court, and the circuit courts, and courts of

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The value in dispute is determined by the amount *originally* claimed in the suit—and the defendant's right to removal cannot be taken away by allowing the plaintiff to amend by reducing his claim to less than $500 (*Disbrow* v *Driggs*, 8 Abb. 306 note, and cases there cited).

If *some*, only, of the defendants reside out of the State, no removal can be had (*Fairchild* v. *Durand*, 8 Abb. 305; *Prentis* v. *Brennan*, 2 Blatchford 162), and where three aliens and one citizen of New York united in a suit against a Connecticut corporation, it was held there could be no removal (*Denniston* v. *N. Y. & N. Haven R. R. Co.*, 2 Abb. 278; 415; 1 Hilton, 62; and see *Leonard* v. *Jamison*, 2 Edw. Ch. 136).

The court will not order the removal of an action by an assignee of a promissory note brought to recover damages for not properly presenting and protesting said note (*Anderson* v. *Manufacturer's Bank*, 14 Abb. 436), nor an action to enjoin a party from prosecuting an action (*Rogers* v. *Rogers*, 1 Paige, 183).

An outstanding injunction does not prevent the removal (*Byam* v. *Stevens*, 4 Edw. Ch. 119).

A foreign insurance company created by the laws of another state, but doing business in this state, in compliance with our laws, on being sued by a citizen of this state, cannot remove the cause on the ground of its being a citizen of another state (*Stevens* v. *Phœnix Ins. Co.*, 24 How. 517).

In an action in which a corporation is a party, if some of the corporators are citizens of the same state with the adverse party, the cause cannot be removed (*North River Steamboat Co.* v. *Hoffman*, 5 Johns. Ch. 300.)

A proceeding to charge joint debtors under section 375 of the Code, cannot be removed (*Fairchild* v. *Durand*, 8 Abb. 305).

When there are two circuit courts within the state, the court below may remove the cause to either (*Suydam* v. *Smith*, 1 Denio, 263; *Norton* v. *Hayes*, 4 Denio, 245).

a. The petition.—The statute does not state what the petition shall contain. It should, however, contain a statement of the facts necessary to authorize a removal. It must state the petitioner is a citizen of another state. To say he is a resident is not sufficient (*Corp* v. *Vermilye*, 3 Johns. 145). If the statement of a material fact is accidentally omitted, the omission may be supplied by amendment (*Field* v. *Blair*, 1 Code Rep. N. S. 362). The petition need not be signed by the petitioner personally. The signature of the attorney is sufficient (*Vandevoort* v. *Palmer*, 4 Duer, 677).

b. The bond.—The bond need not be executed by the petitioner. Execution by the sureties is sufficient (*Vandevoort* v. *Palmer*, 4 Duer, 677). The bond should be several, as well as joint (*Roberts* v. *Cannington*, 2 Hall, 649). A bond in a penalty of $1000, held sufficient (*Blanchard* v. *Dwight*, 12 Wend, 192). In that case $14,000 was claimed, but defendant had not been arrested. In *Jones* v. *Seward*, 26 How. 436, the court say: "I think the court should not approve any sureties unless the amount of the bond is equal to the sum in which the defendant has been held to bail.

c. Appearance.—Filing notice of appearance with the clerk is an *appearance entered* (*Field* v. *Blair*, 1 Code Rep. N. S. 292); so is a motion to discharge from arrest (*Dart* v. *Arnis*, 19 How. 429), or resisting a motion for an injunction (*Cooley* v. *Lawrence*, 5 Duer, 605; 12 How. 176); but giving bail on arrest is not (*Durand* v. *Hollins*, 3 Duer, 686); nor is a mere notice of appearance or retainer (*Field* v. *Blair*, 1 Code Rep. N. S. 292; *Norton* v. *Hayes*, 4 Denio, 245). There must be some act done and entered in court (*id.*). One defendant may appear and defend alone to enable him to remove the cause (*Livingston* v. *Gibbons*, 4 Johns. Ch. 94; *Norton* v. *Hayes*, 4 Denio, 245).

oyer and terminer, during the residue of the year 1847, and for the years 1848 and 1849, and assigning the business and duties thereof to the several judges of the court, is, from and after the first day of July, 1848, abrogated, and the provisions of this title are substituted in place thereof.

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a. Motion for order.—The application for the order is usually on notice, or order to show cause (*Disbrow* v. *Driggs*, 8 Abb. 306 n.), but where an order issued *ex parte*, the court refused to vacate it on appeal. (See *Illius* v. *N. Y. & N. H. R. R. Co.*, 3 Kernan, 597.) On the motion the plaintiff may, by affidavits, contradict any fact stated in the petition, or state new facts (*Denniston* v. *N. Y. & N. H. R. R. Co.*, 2 Abb. 278; 415; *Disbrow* v. *Driggs*, 8 Abb. 306 n.).

b. Form of order to show cause, and for removal.—See *Carpenter* v. *N. Y. & N. H. R. R. Co.*, 11 How. 485, 486. No order for removal, however, seems necessary (*id.*). Where an injunction has issued, the order may provide that it shall not operate to dissolve the injunction (*Liddle* v. *Thatcher*, 12 How. 294).

c. On a defendant complying with the statute requirement, the state court has no discretion in the matter, but the cause is removed, and any subsequent proceeding in the state court would be void for want of jurisdiction (see *Livermore* v. *Jenks*, 11 How. 479, and cases there cited; and see *Hill* v. *Henderson*, 6 Sme. and M. 351). Except that any attachment which has been issued is by the statute to continue in force until the final judgment in the circuit court. The court has jurisdiction of any proceeding in relation to the attachment (*Carpenter* v. *N. Y. & N. H. R. R. Co.*, 11 How. 481).

d. Filing petition.—The petition to remove must be filed at the time of, *and not after*, entering an appearance. If no appearance has been entered, and the plaintiff has taken no step towards entering judgment, the defendant may remove the cause, although the time to answer has expired (*Carpenter* v. *N. Y. & N. H. R. R. Co.*, 11 How. 481; *Redmond* v. *Russell*, 12 Johns. 153; *Roberts* v. *Cannington*, 2 Hall, 649).

e. Proceedings after order for removal.—After the order is made, the defendant is to perfect the proceedings by appearing in the circuit court before the next term of that court, and entering special bail where an order of arrest had issued in the state court, and filing copies of the process (*Martin* v. *Kanouse*, 1 Blatchf. C. C. R. 149), and the plaintiff must file a new declaration in the circuit court (*Clarke* v. *Protection Ins. Co.*, *id.* 150). After removal, all proceedings must be according to the rules of the court into which the cause is removed; the code has no application to such causes (*Suydam* v. *Ewing*, 1 Code Rep. N. S. 294).

f. It seems a State court cannot entertain a motion to vacate an order of removal to the U. S. courts after the cause has been transmitted to the circuit court. The appropriate place for such a motion, which, in effect, is to remand the cause to the State court, is in the forum where the cause is pending. So held by Davies, J., in *Disbrow* v. *Driggs*; and see *Jones* v. *Seward*, 26 How. 436.

g. On the removal of a cause, certified copies of the process and papers by which the suit was commenced in the State court, should be sent to and entered in the United States court (*Martin* v. *Kanouse*, 1 Blatch. C. C. Rep. 149). On the entry of such copies the plaintiff must file a new declaration in the United States Court (*Clarke* v. *Protection Ins. Co.*, 1 Blatch. C. C. Rep. 150). Can the United States court send the cause back to the State Court? (*Van Zandt* v. *Maxwell*, 2 Blatch. C. C. Rep. 421.)

h. There can be no review in the court of appeals of an order at chambers not appealed from in the court below, denying a motion to remove a cause into the United States circuit court (*Kanouse* v. *Martin*, 6 How. 240; *Illius* v. *N. Haven R. R. Co.*, 3 Kernan, 597).

§ 18. [16.] (Am'd 1849.) *General terms.*

At least four general terms of the supreme court shall be held annually in each judicial district, and as many more as the judges in such districts shall appoint, at such times and places as a majority of the judges of such district shall appoint.

a. General terms of the supreme court held in the city of Albany, may be held at the capitol, or the city hall. (Laws 1849, ch. 82, p. 117.)

The general term is an appellate court, and stands in the same relation to the special term as an appellate court does to courts of original jurisdiction. (*Yates* v. *The People*, 6 Johns. 334; *Harris* v. *Clark*, 10 How. 415.)

b. Although there are general terms and special terms of the supreme court, there is but one supreme court (*Ayres* v. *Covill*, 9 How. 578; *Corning* v. *Powers*, *ib.* 54; *Gracie* v. *Freeland*, 1 Coms. 228; *Mason* v. *Jones*, 1 Code Rep. N. S. 338), and the special term has jurisdiction to set aside an order made at general term on a default or on the ground of any irregularity in making the order. "It is only when the relief sought affects the adjudication at the general term, that it is necessary to apply to the general term for relief. Where the motion is upon the ground of irregularity in obtaining the judgment or order at general term, and the *point* was not before the court, or if the judgment or order was regular and the party seeks relief by excusing his default, I see no reason why the application should not be at special term. It is different where the motion necessarily requires a reconsideration of the adjudication at the general term." (Hand, J., in *Ayres* v. *Covill*, supra.) On an appeal to the general from the special term, the special term has no authority to entertain or decide a motion to dismiss the appeal. Such a motion can only be heard at a general term. (*Harris* v. *Clark*, 10 How. 415.)

See further, note to section 20, *infra*.

§ 19. [17.] *Judgment, how given.*

The concurrence of a majority of the judges holding a general term, shall be necessary to pronounce a judgment. If a majority do not concur, the case shall be reheard.

c. A judge of the supreme court who has not heard the argument of a cause, is competent to sit with two others who heard it, for the purpose of constituting a court, and the decision of a cause made by a court thus constituted—the judge who did not hear the argument taking no part in the decision—is valid. As it was the duty of the three judges who heard the argument to consult together in relation to the decision, it is to be presumed that they did so, and that the decision subsequently announced is the result of such consultation. (*Corning* v. *Slosson*, 16 N. Y., 294.)

§ 20. [18.] (Am'd 1849.) *Special terms, &c.*

There shall be at least two terms of the circuit court and court of oyer and terminer held annually in each of the counties of this State, and as many more terms thereof, and as many special terms, as the judges of each judicial district shall appoint therein; but at least one special term shall be held annually in each of said counties. Fulton and Hamilton shall be considered one county for the purposes of this section.

a. The constitution (art. vi. sect. 6), prescribes by what justices the general and special terms shall be held, but "it leaves their powers to be prescribed by the legislature." (*Griffin* v. *Griffith*, 6 How. 428.)

b. The distinction between the power of the court at special and general terms was discussed in the case of *Garcie* v. *Freeland*, 1 Coms. 228, and again in *Mason* v. *Jones*, 1 Code Rep. N. S. 388. The special term is the supreme court as well as the general term; and, unless the law or the constitution points out a limit, it has the same powers. The special term now hears every question, except on appeal, that could come before the general term—questions as to the opening of streets, as to granting mandamus or certiorari; and has even quashed a certiorari allowed *ex parte* at the general term, and its decision was not appealed from. An application to amend a judgment at general term, for irregularity merely, may be made at special term (*De Agreda* v. *Mantel*, 1 Abb. 133; *Corning* v. *Powers*, 9 How. 54); but the special term cannot, on motion, set aside as erroneous a judgment entered on report of a referee. (*Dana* v. *Howe*, 3 Kernan, 308.)

c. There is but one supreme court, which acts and decides; whether it acts through the special term or the general term, its powers are the same. None of the ancient powers of the general term are taken from it; and it can therefore make an original order in any matter (as for re-taxation of costs) in which it might formerly have made such order. The code specifies the manner in which appeals should be brought before the general term, but does not attempt to limit its powers. (*Anon.* 10 How. 353.)

See note to section 18, *ante*.

§ 21. [19.] (Am'd 1849.) *Circuit and oyer and terminer together.*

Circuit courts, and courts of oyer and terminer, shall be held at the same places, and commenced on the same day.

§ 22. [23.] (Am'd 1849.) *Times and places of holding court.*

The governor shall, on or before the first day of May, 1848, by appointment in writing, designate the times and places of holding the general and special terms, circuit courts, and courts of oyer and terminer, and the judges by whom they shall be held; which appointment shall take effect on the first day of July thereafter, and shall continue until the thirty-first day of December, 1849. The judges of the supreme court of each district, shall, in like manner, at least one month before the expiration of that time, appoint the times and places of holding those courts for two years, commencing on the first day of January, 1850, and so on, for every two succeeding years, in their respective districts.

§ 23. [24.] *Extraordinary terms, &c.*

The governor may also appoint extraordinary general and special terms, circuit courts, and courts of oyer and terminer, whenever, in his judgment, the public good shall require it.

a. Whenever, from any cause, any general or special term of the supreme court, or any circuit court, or court of oyer and terminer, duly appointed, shall be in danger of failing, it shall be the duty of the governor to designate some justice or justices of said supreme court, who shall hold said courts respectively (Laws of 1850, p. 9); and whenever an action in the supreme court cannot be brought to argument and decision in the district where the same is pending, by reason of the justices of such district, or any of them, having been employed as counsel, or being interested therein, or of kin to the parties or any of them, the court may, upon special motion, order such action to be brought to argument in any adjoining district to be specified in such order; and then such cause shall be heard and decided in such district. (Laws of 1850, p. 20.)

See section 459, *post*.

§ 24. [25.] (Am'd 1849, 1851, 1862.) *Terms, where held. Adjournments.*

The places appointed within the several counties for holding the general and special terms, circuit courts, and courts of oyer and terminer, shall be those designated by statute for holding county or circuit courts. If a room for holding the court in such place shall not be provided by the supervisors, it may be held in any room provided for that purpose by the sheriff, as prescribed by section twenty-eight.

General and special terms of the supreme or county courts, and circuit courts and courts of oyer and terminer, may be adjourned to be held on any future day, by an entry to be made in the minutes of the court; and juries may be drawn and summoned for an adjourned circuit or county court, or an adjourned court of oyer and terminer, and causes may be noticed for trial at an adjourned circuit or county court, in the same manner as if such courts were held by original appointment.

And special terms may be adjourned to be held at a future day at the chambers of any justice of said court residing within the district, by an entry in the same manner, and then adjourned from time to time, as the justice holding the same shall order and direct.

See notes to sections 18 and 20.

§ 25. [26.] *Publication of appointment.*

Every appointment so made shall be immediately transmitted to the secretary of state, who shall cause it to be published in the newspaper, printed at Albany, in which legal notices are required to be inserted, at least once in each week, for three weeks before the holding of any court in pursuance thereof. The expense of the publication shall be paid out of the treasury of the State.

§ 26. [28.] *Inability of judge.*

In case of the inability, for any cause, of a judge assigned for that purpose, to hold a special term or circuit court, or sit at a general term, or preside at a court of oyer and terminer, any other judge may do so.

a. The justice appointed to preside at a general term in the absence of the presiding justice, may preside during the whole term, and not merely during the absence of the presiding justice (*The People* v. *Hicks*, 15 Barb. 153); and a justice of the supreme court, while a judge of the court of appeals, by virtue of his selection from the class of justices having the shortest time to serve, has authority to preside in a court of oyer and terminer, or to discharge any of the ordinary duties of a justice of the supreme court (*McCarron* v. *The People*, 3 Kernan, 74).

See note to § 25.

§ 27. [30.] (Am'd 1849.) *Business out of court. Proceedings in first district.*

[1] The judges shall, at all reasonable times, when not engaged in holding court, transact such other business as may be done out of court.

[2] Every proceeding commenced before one of the judges in the first judicial district, may be continued before another, with the same effect as if commenced before him.

b. POWERS OF JUDGE AT CHAMBERS.—Unless a distinction is made in a statute between the powers of a judge and those of the court, the judge has the same powers as the court (Parke, B., *Smeeton* v. *Collier*, 1 Exch. R. 459); but if the distinction is made by the statute, then a judge cannot exercise any power which is conferred on the court. (*Clarke* v. *East India Co.*, 2 Bail Court Rep. 320.) A judge of the supreme court, like any other officer, when acting out of court is an officer of limited jurisdiction. He may do just what the legislature has authorized him to do, and whatever he does more than this is done without jurisdiction. (*Bangs* v. *Selden*, 13 How. 376; and see *Reg.* v. *Sewell*, 6 Law Times, 191.) The justices of the supreme court, although elected in districts, possess co-ordinate powers throughout the State (Const. art. vi. s. 6), and have the powers vested in vice-chancellors and judges of the supreme court prior to July, 1847. (Laws of 1849, p. 27; and see *Garcie* v. *Sheldon*, 3 Barb. 232; *Aymer* v. *Chacé*, 1 Code R. N. S. 333.)

A judge at chambers, on an application under section 247, may make either an *absolute* or a conditional order, precisely as at special term. (*Witherspoon* v. *Van Dolar*, 15 How. 266.)

In the first judicial district a motion to open a judgment and let defendants in to defend, may be made to a justice out of court (*Lowber* v. *Mayor of N. Y.*, 5 Abb. 325), and so may a motion to appoint a guardian *ad litem* for a defendant in a partition suit. (*Disbrow* v. *Folger*, 5 Abb. 53.) And generally in the first district, all motions, except for new trials, may be made at chambers; and this includes a motion for an allowance. An order made at chambers in the first district is always made during a term of the court, as a special term is always held during the hours of attending at chambers. (*Main* v. *Pope*, 16 How. 271.)

A judge at chambers may punish for contempt (*Re Smethurst*, 3 Code R. 55; 2 Sand. 724; *Shepherd* v. *Dean*, 13 How. 173; *Wicker* v. *Dresser*, 14 *id.* 465; see, however, 13 *id.* 331).

Except in the cases prescribed by statute, the former distinction between chamber and term duties of a judge are retained. (*Mann* v. *Tyler*, 1 Code R. N. S. 383; *Clark* v. *Judson*, 2 Barb. 93.) The court is not always open as a

court of equity, except to enable the justices thereof to make such orders as the chancellor formerly made out of term. (*Re Bookhout*, 21 Barb. 348.)

Power of a justice of the supreme court upon a statute writ of habeas corpus returnable before him at chambers. (See *The People* v. *Wilcox*, 22 Barb. 179.)

a. WHAT A JUDGE AT CHAMBERS CANNOT DO.—A judge at chambers cannot review the *ex parte* order of another judge (*Cayuga Bank* v. *Warfield*, 13 How. 439), nor

Allow a common law writ of certiorari (*Gardener* v. *Commissioners of Warren*, 10 How. 181), nor

Entertain a motion for discharge of a debtor from imprisonment (*Re Walker*, 2 Duer, 655; Mather's case, 14 Abb. 45), nor

Review collaterally the decisions of a court of competent jurisdiction, as to discharge from a commitment for contempt (*The People* v. *Orser*, 12 How. 550), nor

Entertain a motion in arrest of judgment (*Duel* v. *Agan*, 1 Code R. 134), nor

For a new trial (*Lusk* v. *Lusk*, 3 Code R. 113; *Graham* v. *Milliman*, 4 How. 435), nor

Lessen the time for a notice of motion (*Merrit* v. *Slocum*, 6 How. 350), nor

Extend the time to make a case *after* the ten days have expired (*Doty* v. *Brown*, 3 How. 375; 2 Code R. 3), nor

Adjust costs (*Nellis* v. *De Forest*, 6 How. 413; *Van Schaick* v. *Winne*, 8 *id.* 6), except in the cases provided for in section 311 post, nor

Grant a judgment, except under section 247 (*Aymar* v. *Chace*, 12 Barb. 301), nor

Except in the first district (*Main* v. *Pope*, 16 How. 271), entertain a motion for an allowance (*Mann* v. *Tyler*, 6 How. 236; 1 Code R. N. S. 382; Rule 52), nor

Entertain proceedings for appointment of a guardian to sell real estate of infants (*Re Bookhout*, 21 Barb. 348),

Nor can he make an absolute, indefinite, and continuing order, either to set aside or stay proceedings; at most he has only power to stay the proceedings for a time, as until the next ensuing term, or until an order to show cause is applied for or disposed of. (*Genesee Bank* v. *Spencer*, 15 How. 14.) This rule applies to proceedings supplementary to execution. (*Id.*)

See section 324 post.

b. The true interpretation of the second part of this section is: A proceeding commenced in the first judicial district by any judge competent to institute it therein, may be continued in such district before any other judge competent to have commenced it. (*Dresser* v. *Van Pelt*, 15 How. 19.) See similar provisions for proceedings in the superior court and court of common pleas, note to s. 33, *post*, and see s. 401, subd. 6.

c. The act (1849, ch. 121, s. 4) conferring on the Recorder of Troy the powers of a justice of the supreme court at chambers held to be unconstitutional. (*Griffin* v. *Griffith*, 6 How. 428.)

§ 28. [31.] *Rooms, &c.*

The supervisors of the several counties shall provide the courts appointed to be held therein with room, attendants, fuel, lights, and stationery, suitable and sufficient for the transaction of their business. If the supervisors neglect, the court may order the sheriff to do so; and the expense incurred by him in carrying the order into effect, when certified by the court, shall be a county charge.

d. This section applies to the court of common pleas for the city and county of New York, and the superior court (s. 51, *post*) and marine court of the said city (Laws 1853, p. 992, Laws 1861, p. 65), and to the district courts of New York city. (Laws 1857, ch. 344.)

TITLE IV.

*Of the County Courts.**

Section 29. Repeal of existing statutes.
30. Jurisdiction.
31. General terms.
32. Jurors.

§ 29. [32.] *Repeal of existing statutes.*

All statutes now in force, conferring or defining the jurisdiction of the county courts, so far as they conflict with this act, are repealed; and those courts shall have no other jurisdiction than that provided in the next section. But the repeal contained in this section shall not affect any proceedings now pending in those courts.

§ 30. [33.] (Am'd 1849, 1851, 1852, 1860.) *Jurisdiction: Transfer of action to Supreme Court.*

The county court has jurisdiction in the following special cases, but has no original civil jurisdiction except in such cases:

1. Civil actions in which the relief demanded is the recovery of a sum of money not exceeding five hundred dollars, or the recovery of the possession of personal property not exceeding in value five hundred dollars, and in which all the defendants are residents of the county in which the action is brought at the time of its commencement, subject to the right of the supreme court, upon special motion, for good cause shown to remove any such action to the supreme court before trial.

2. The exclusive power to review, in the first instance, a judgment rendered in a civil action by a justice's court in the county, or by a justice's court in cities, and to affirm, reverse, or modify such judgment.

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* *a.* County judges are not allowed any fees for services except for such as may be performed by justices of the peace, or commissioners of deeds; and no greater fees for such services than those allowed to said justices and commissioners. Surrogates' fees not affected. (Laws 1857, vol. 2, p. 197.)

3. The foreclosure or satisfaction of a mortgage, and the sale of mortgaged premises situated within the county, and the collection of any deficiency on the mortgage, remaining unpaid after the sale of the mortgaged premises.

4. The partition of real property situated within the county.

5. The admeasurement of dower in land situated within the county.

6. The sale, mortgage, or other disposition, of the real property situated within the county, of an infant, or person of unsound mind.

7. To compel the specific performance by an infant heir, or other person, of a contract made by a party who shall have died before the performance thereof.

8. The care and custody of the person and estate of a lunatic or person of unsound mind, or an habitual drunkard, residing within the county.

9. The mortgage or sale of the real property situated within the county, of a religious corporation, and the disposition of the proceeds thereof.

10. To exercise the power and authority heretofore vested in such courts of common pleas, over judgments rendered by justices of the peace, transcripts of which have been filed in the offices of the county clerks in such counties.

11. To exercise all the powers and jurisdiction conferred by statute upon the late courts of common pleas of the county, or the judges, or any judge thereof, respecting ferries; fisheries; turnpike roads; wrecks; physicians, habitual drunkards; imprisoned, insolvent, absent, concealed, or non-resident debtors; jail liberties; the removal of occupants from State lands; the laying out of railroads through Indian lands; and upon appeal from the determination of commissioners of highways; and all other powers and jurisdiction conferred by statute, which has not been repealed, on the late court of common pleas of the county, or on the county court since the late courts of common pleas were abolished, except in the trial and determination of civil actions; and to prescribe the manner of exercising such jurisdiction when the provisions of any statute are inconsistent with the organization of the county court.

12. To remit fines and forfeited recognizances, in the same cases and like manner as such power was given by law to

courts of common pleas. But the first subdivision of this section shall not apply to the county courts of the counties of Kings and Erie.

13. To grant new trials, or affirm, modify, or reverse judgments in actions tried in such court upon exceptions, or case made, subject to an appeal to the supreme court.

But in any action or proceeding pending in the county court, in which the county judge is for any cause incapable of acting, it shall be his duty to make a certificate of such fact, and file the same in the office of the clerk of such county court, and thereupon jurisdiction of such action or proceeding shall be vested in the supreme court, and such further proceedings shall be had therein, according to the practice of such court, as might have been had in the county court, if such cause or matter had remained therein; but all such matters shall be heard or tried in the first instance at a special term or circuit court, held in a county where such action or proceeding is situated.

a. By the constitution (art. vi., sec. 14,) the legislature is empowered to confer equity jurisdiction in special cases upon the county judge; and in another part of the same section, it is provided that "county courts shall have such jurisdiction, in cases arising in justices' courts, and in special cases, as the legislature may prescribe, but shall have no *original* civil jurisdiction except in such cases." In *Kundolf* v. *Thalheimer* (2 Kernan, 593), it was decided that the county courts have no jurisdiction of an action for an assault, although the damages sought to be recovered do not exceed $500, and, although all the defendants reside in the county where the action is brought, at the time of its commencement; that such an action is not a "*special case*," within the meaning of that term in the constitution, and therefore the provision purporting to confer jurisdiction therein upon the county court is void. And it was suggested that the county courts have no jurisdiction in any of the ordinary common-law actions. That suggestion has not found favor. *Kundolf* v. *Thalheimer*, although not overruled, is authority only for the exact point decided. The county court has jurisdiction of actions to foreclose mortgages (*Benson* v. *Cromwell*, 6 Abb. 43; *Arnold* v. *Rees*, 17 How. 35; 7 Abb. 328; 18 N. Y. 57, overruling *Hall* v. *Nelson*, 23 Barb. 88); and to partition lands within the county (*Doubleday* v. *Heath*, 16 N. Y. 80).

JURISDICTION OF COUNTY COURTS.

b. County courts have also jurisdiction of appeals from the decision of a justice's court, in summary proceedings to recover the possession of land (Laws 1849, p. 292); and their appellate jurisdiction has been held to extend to *a judgment* in a justice's court in proceedings under the mechanics' lien law. (*The People* v. *Rensselaer County Judge*, 13 How. 398). These courts have the same jurisdiction in their respective counties in relation to the liberties of jails, as was vested in courts of common pleas by the revised statutes, part 3, art. iii. tit. 6. cap. 7. (Laws 1851, p. 22.) They have also jurisdiction in proceedings for the naturalization of aliens. (*The People* v. *Pease*, 30 Barb. 589.) To entertain an application to change the location of a toll gate. (*McAlister* v. *Albion Plank R'd Co.*, 11 Barb. 610,) or proceedings to acquire land for the Lockport & Niagara Falls Railroad. (*Mosier* v. *Hilton*, 15 Barb. 657.)

c. County courts have no jurisdiction to appoint a receiver of a religious cor-

poration, but only the special jurisdiction formerly vested in the chancellor, to direct the application by the corporation itself, of the proceeds of a sale of real estate. (*Wheaton* v. *Gates*, 18 N. Y. 396.)

a. Note to subd. 2.—There is no appeal to the county court from the verdict of a jury given upon the laying out of a private road. (*The People* v. *Robinson*, 17 How. 534; 29 Barb. 77.)

b. Appeal lies to Steuben county court from judgments rendered by the Police Justice of the village of Corning. (Laws 1860, ch. 72.)

c. The county court on appeal may reverse in part, and affirm in part, a judgment of a justices' court, for entire damages, when it clearly appears there are two or more independant causes of action. (*Staats* v. *Hudson River R. R.*, 23 How. 463.)

d. Note to subd. 8.—This subdivision confers jurisdiction on county courts respecting habitual drunkards in all cases. (*Davis* v. *Spencer*, 24 N. Y. 386, overruling; *Re Smith*, 16 How. 567.)

e. Note to subd. 13.—"Whenever a cause or matter shall be pending in any county court, in which the judge of such court shall have been attorney, or counsel, or shall be interested; or in which he would be excluded from being a juror, by reason of consanguinity or affinity to either of the parties; or in the decision of which he shall have taken part when sitting as a judge in any other court,—it shall be his duty to make a certificate stating such fact, and file the same in the office of the clerk of such county court; and thereupon jurisdiction of such cause or matter shall be vested in the supreme court, in which such proceedings shall be had therein, according to the practice of such court, as might have ben had in such county court if such cause or matter had remained therein." (Laws 1847, c. 470, s. 31.) Perhaps the 13th subdivision, *supra*, abrogates the law of 1847. Where the appeal from a justice's court to the county court is transferred to the supreme coust by reason of the incapacity of the county judge to hear same, it must be heard in the first instance at a special term of the supreme court. (*Sheldon* v. *Albro*, 8 How. 305; *Davis* v. *Stone*, 16 *id.* 508.) The appeal is to be heard on the original papers; and no copy need be furnished for the use of the court (*Willis* v. *Peck*, 16 *id.* 541); the appeal is to be heard in the county court of the county from which it was transferred, and in no other county. (*Id.*) From the decision at special term an appeal may be made to the general term. (*Davis* v. *Stone*, supra.) And where appeal is heard by the supreme court because of the incompetency of the county judge to hear same, the successful party is entitled only to the same costs as he would have been entitled to if the appeal had been decided by the county judge. (*Taylor* v. *Seely*, 3 Code R. 84; 4 How. 314; *O'Callaghan* v. *Carroll*, 16 How. 327; *Davis* v. *Stone*, id. 538.)

f. By subdivision 2, of sec. 33, of this code, "any action or proceeding pending in any mayor's or recorder's court in which the judge is for any cause incapable of acting, may, by such court, be transferred to the county court."

See note to section 60, *post*.

§ 31. [34.] (Am'd 1849, 1851.) *When open. Terms.*

The county court is always open for the transaction of any business for which no notice is required to be given to an opposing party. At least two terms in each county for the trial of issues of law or fact, and as many more as the county judge shall appoint, shall be held in each year at the places in the counties respectively designated by statute for holding county or circuit courts, on such days as the county judge shall from

time to time appoint, and may continue as long as the court deem necessary.

Notice of such appointment shall be published in the State paper at least four weeks before any such term, and also in a newspaper, if any, printed in the county; so many of such terms as the county judge shall designate for that purpose, in such notice, may be held for the trial of issues of law, and hearing and decision of motions, and other proceedings at which no jury shall be required to attend.

§ 32. [36, 37, 38.] (Am'd 1849.) *Jurors.*

Jurors for the county courts and courts of sessions shall be drawn from the jury-box of the county, and summoned in the same manner as for the trial of issues at a circuit court.

See laws 1861, p. 14, ch. 8.

TITLE V.

Of the Superior Court and Court of Common Pleas, in the city of New York, and the Mayors' and Recorders' Courts in other cities.*

SECTION 33. Jurisdiction.
34. Common Pleas for New York to review certain judgments.
35. General and special terms.
36. By whom held.
37. Judgments, where given.
38. Concurrence of two judges necessary.
39. Criers.
40. Superior Court, of whom to consist.
41. } Obsolete.
42.
43.
44.
45.
46. Terms of Superior Court.
47. Suits may be transferred.
48. Jurisdiction of transferred suits.
49. (Repealed.)
50. Appeal.
51. Section applied.

§ 33. [39.] (Am'd 1849, 1852.) *Jurisdiction.*

The jurisdiction of the superior court of the city of New York, of the court of common pleas for the city and county of

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a. * The superior court was established by a law passed in 1828. (Laws 1828, p. 141.) By sect. 13 the said court shall have no power to send any process into any other county than the city and county of New York, except in the cases thereinafter specified. [The excepted cases are subpœnas] § 14. Writs of subpœna issuing out of the said court shall be obligatory upon any witness duly served therewith within this State, in like manner as if such writs had been issued out of the supreme court; and obedience to such subpœna may be enforced by attachment.

§ 23. The chief justice and each of the associate justices of the said court may exercise all the powers and authority incident to their offices at chambers touching any suit, judgment, or proceeding in the said court; and it shall be the duty of at least one of them to attend daily, at all seasonable hours, in the office to be provided for them by the said mayor, aldermen, and commonalty, for the dispatch of chamber business; and the said justices, and each of them, shall moreover be and they are hereby authorized to perform all the duties which the justices of the supreme court out of term are authorized to do and perform by any statute of this State.

§ 6. Either of the judges of the said court may hold the same for the trial of causes and for the hearing of non-enumerated motions, &c.; and by sec. 2 of Laws of 1830, p. 18, all the powers relative to the hearing of non-enumerated motions which by said sixth section are vested in a single judge may be exercised by such judge at chambers.

New York, of the mayors' courts of cities, and of the recorders' courts of cities, shall extend to the following actions:

1. To the actions enumerated in sections 123 and 124, when the cause of action shall have arisen, or the subject of the action shall be situated, within those cities respectively;

2. To all other actions where all the defendants reside, or are personally served with the summons, within those cities respectively, or where one or more of several defendants, jointly liable on contract, reside, or are personally served with the summons, within those cities respectively; except in the case of mayors' and recorders' courts of cities, which courts shall only have jurisdiction where all the defendants reside within the cities in which such courts are respectively situated. The supreme court may remove into that court any action brought under this subdivision and pending in the superior court or court of common pleas for the city and county of New York, and may change the place of trial therein, as if such action had been commenced in the supreme court; such order for removal and for change of place of trial to be made in the supreme court upon motion, and on filing a certified copy of such order in the office of the clerk of the superior court, or

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Act of 1830, s 4. Orders out of court relating to any suit pending in the said common pleas after any default entered, or any issue of fact shall have been joined in the same, shall be granted by the first judge *only* of said court, (except for the examination of witnesses when the said court shall be actually sitting), unless he shall be absent from the city of New York, or incapacitated to attend thereto by sickness.

§ 9. The same power is hereby given to the first judge of said court at chambers relative to suits and proceedings in such court, as is given by any law of this State to the justices of the supreme court at chambers.

Laws of 1821, § 1. The first judge of said court [of Common Pleas] may perform all the duties, and exercise all the powers which may be done and performed by the recorder, "or by the several commissioners appointed by virtue of the act entitled, an act to appoint commissioners to perform certain duties of judges of the supreme court," or any subsequent act, &c.

Laws of 1840, ch. 276, § 2. When any proceeding shall be commenced by or before any judge of the said court by virtue of any statute of this State, the same may be continued by or before any other judge of said court.

§ 3. When there shall be a motion or proceeding in the said court, in which it shall be necessary for either party to have the deposition of any witness, who may be within the jurisdiction of said court, and who shall have refused to make his deposition voluntarily, the court may issue a summons requiring such witness to attend before a judge thereof to make his said deposition; and obedience to such summons may be enforced, as in case of a subpœna issued by said court.

§ 4. All the provisions of this act shall apply to the court of common pleas of the city of New York, in like manner and to the same extent as they do to the superior court of said city.

of the court of common pleas, such cause shall be deemed to be removed into the supreme court, which shall proceed therein as if the same had originally been commenced there; and the clerk with whom such order is filed, must forthwith deliver to the clerk of the county in which, by such order, the trial is ordered to be had, to be filed in his office, all process, pleadings, and proceedings relating to such cause. And any action or proceeding pending in any mayor's or recorder's court, in which the judge is for any cause incapable of acting, may by such court be transferred to the county court of the county; and thereupon the papers therein on file in the mayor's or recorder's court shall be transmitted to the county court; which shall thenceforth have jurisdiction of such action or proceeding.

3. To actions against corporations created under the laws of this State, and transacting their general business, or keeping an office for the transaction of business, within those cities respectively, or established by law therein, or created by or under the laws of any other State, government, or country, for the recovery of any debt, or damages, whether liquidated or not, arising upon contract made, executed, or delivered within the State, or upon any cause of action arising therein.

a. Note to subd. 1.—JURISDICTION OF SUPERIOR COURT AND COMMON PLEAS. The common law jurisdiction of the New York Superior Court and Common Pleas, except in its territorial limitation, is co-equal with that of the Supreme Court; any action triable in the latter is triable in the former, provided the defendant, or one of the defendants, resides, or is served with process, within the city of New York, or where the cause of action arose, or the subject of the action is within that city. (*McIvor* v. *McCabe*, 16 Abb. 319; *Porter* v. *Lord*, 13 How. 254; 2 Abb. 43; 4 Duer, 682; *Bates* v. *Reynolds*, 7 Bosw. 685; *McKenzie* v. *Hackstaff*, 2 E. D. Smith, 75.) They have no jurisdiction to compel a conveyance of land out of the city of New York. (*Ring* v. *McCoun*, 10 N. Y. 268.) Their jurisdiction includes partition of lands in the city of New York, or the determination of any estate or right in such lands without reference to the residence of the parties. (*Id.*; *Varian* v. *Stevens*, 2 Duer, 635; *Nichols* v. *Romaine*, 9 How. 512.) These courts have general equity jurisdiction, and may entertain an action to compel the specific performance of a contract by a religious corporation for the sale of its real estate. (*Bowen* v. *Irish Presbyt. Cong.*, 6 Bosw. 246.) These courts have jurisdiction of all action against the corporation of the city of New York upon any cause of action whatever. (*Harlem R. R. Co.* v. *Metro. Police Commr's*, 1 Hilton, 562; and see *ante*, p. 23 *b*); and have jurisdiction of all actions against foreign corporations, where the cause of action upon which the suit is brought arises within the city of New York; and in such case a voluntary appearance by the defendant (even without any service of summons) gives the court jurisdiction of the person (*Watson* v. *The Cabot Bank*, 5 Sand. 423, affirmed in the court of appeals; so said, 4 Duer, 606; see *Harriott* v. *New Jersey R. R. Co.*, 2 Hilton, 262; 8 Abb. 284; and note to section 427 post); and perhaps concurrent jurisdiction with the U. S. courts in admiralty over a question of salvage (*Cash*-

mere v. *Crowell*, 1 Sand. 715; *Cashmere* v. *De Wolf*, 2 *id.* 379; see, however, *Frith* v. *Crowell*, 5 Barb. 209; *Baker* v. *Hoag*, 3 Selden, 563). They have not jurisdiction to appoint a receiver to wind up the affairs of a foreign corporation (*Day* v. *U. S. Car Spring Co.*, 2 Duer, 608), nor to issue a commission of lunacy (*Re Brown*, 1 Abb. 108; 4 Duer, 613), nor to compel the attendance of witnesses to be examined under a commission from a court of a foreign country (*Re Jay*, 5 Sand. 674), nor of proceedings for the dissolution of a corporation. (*Kattenstroth* v. *Astor Bank*, 2 Duer, 632; *Brake* v. *The Pythagoras Asso.*, 4 Duer, 658; 11 How. 44.) Perhaps subd. 3 "only relates to actions to recover a debt or damages, or such equitable relief as one natural person may claim of another" (*id.*), and the equitable powers of these courts can only be exercised in those actions and proceedings which their jurisdiction as defined by the code properly embraces. (*The People* v. *Porter*, 1 Duer, 709.) An action commenced in either of these courts by individual corporators of New York city against the Mayor, Aldermen, and Commonalty, asking for an injunction restraining the defendants from granting the right to construct a railroad in said city, is within the jurisdiction of that court, both as to parties and subject-matter, and the court may grant the injunction sought (*The People* v. *Sturtevant*, 5 Selden, 263); and the superior court has jurisdiction of an action for divorce by reason of adultery committed within this State, when the parties to the action were inhabitants of this State, and resided in it when the offense was committed, and continued to reside in it up to the time of suit brought, the defendant then residing in the city of New York. (*Forrest* v. *Forrest*, 6 Duer, 102; 25 N. Y. 501.)

See sections 139 and 427, *post*.

a. The courts will not sanction any attempt by fraud or misrepresentation to bring a party within the jurisdiction (*Carpenter* v. *Spooner*, 2 Sand. 717; 2 Code R. 140; 3 *id.* 23; *Goupil* v. *Simonson*, 3 Abb. 474); thus where by a false statement, made for the purpose, a defendant was induced to come within the city of New York, and was there served with a summons in an action in the superior court, the service was set aside. (*Id.*)

b. These courts have the same powers to compel discovery by the parties to a suit pending therein, which are conferred by the revised statutes on the supreme court (*Gould* v. *M'Carthy*, 1 Kernan, 575; see note to section 388, *post*); and the justices of the superior court may issue attachments against absconding, concealed, or non-resident debtors. (*Renard* v. *Hargous*, 3 Kernan, 259.)

c. In an action in the common pleas, the defendant a (non-resident) was served with the summons out of the jurisdiction of the court, and he without objection or reservation gave notice of appearance, and then moved to set aside the proceedings for want of jurisdiction of his person; the court held that the defendant, by appearing voluntarily and without objection, had conferred jurisdiction. (*Smith* v. *Dipeer*, 2 Code R. 70.)

d. The common pleas possess all the power and jurisdiction of county courts throughout the state. (*Wood* v. *Kelly*, 2 Hilton, 334,) and on appeals from the marine and justice's courts, all the powers and jurisdiction formerly exercised by the superior court of New York. (*Wood* v. *Kelly*, 2 Hilton, 334.) It has power to commit for the non-payment of a personal tax. (*Kahn's case*, 11 Abb. 147,) and each of the associate judges of this court, possesses the power by the Revised Statutes conferred on the first judge of that court, to compel delivery of books, &c., belonging to a public office. (*Devlin* v. *Platt*, 11 Abb. 398.)

e. The common pleas has jurisdiction of judgments on recognizances docketed with the county clerk under laws of 1844 (Laws 1845, p. 250; Laws 1861, ch. 333); and to remit fines and forfeit recognizances in the same cases, and in like manner as such power was heretofore given by law to courts of common pleas; and to correct and discharge the dockets of liens and of judgments entered upon recognizances; and to exercise in the city and county of New York all the powers and jurisdiction now or hereafter conferred upon or vested in the said court, or the county courts in their counties, and the powers and jurisdiction which were vested in the court of common pleas for the city

and county of New York before the enactment of the code. (Laws 1854, p. 464. See *The People* v. *Lott*, 21 Barb. 130.)

a. A judgment entered with the county clerk upon a forfeited recognizance, becomes a lien on real estate from the time of docketting (*The People* v. *Lott*, 21 Barb. 130), and is subject to the jurisdiction and control of the New York common pleas to the same extent as if it had been docketted in it. (*The People* v. *Petry*, 2 Hilton, 523; *The People* v. *Lott*, 21 Barb. 130.) In addition, the court has the discretionary power to remit the forfeiture in whole or in part, or to discharge the recognizance upon such terms as appear just and reasonable. (*The People* v. *Petry*, 2 Hilton, 523.) In the exercise of this discretion, the court will look into the proceedings at the time the forfeiture was declared, to ascertain whether the party was fairly entitled to a postponement of the trial, but, *semble*, that will not be done until he has submitted himself to trial and judgment upon the indictment against him. (*Id.*)

b. Upon application for a remission of a forfeiture upon a recognizance, the application will be denied unless it appear that the bail in no wise connived at the escape of his principal, and that reasonable diligence has been used to apprehend and surrender him. (*Id.*)

c. For a history of the New York court of common pleas, an account of its judicial organization and jurisdiction, the reader is referred to an elaborate article by the Honorable Charles P. Daly, first judge of the court, in 1. E. D. Smith's Reports.

d. Removal of causes.—The making an order for the removal of an action from the superior into the supreme court, is a matter within the discretion of the court, and the removal will not be ordered unless, upon the facts shown, the court can see good cause for directing it (*Campbell* v. *Butler*, 4 Abb. 55); but the removal is ordered in all cases where sufficient cause for removal is shown. (*Carpenter* v. *Spooner*, 3 Code R. 23; 2 Sand. 717.) On a motion to remove an action, the papers should be entitled in the court in which the action is then pending, and out of which the removal is sought. (*Miller* v. *Dows*, 2 How. 98.)

e. The provision of law (Laws 1844, ch. 32,) declaring that no *habeas corpus* or certiorari shall be allowed removing a proceeding before judgment or final decision from the court of common pleas, applies not only to proceedings *in court*, but also to all such proceedings as by statute are authorized to be instituted before any judge of the court (*Devlin* v. *Platt*, 11 Abb. 398), and, therefore, a proceeding before a judge of that court to compel delivery of books, &c., of a public office, cannot, before a final determination thereof, be removed into the supreme court by certiorari. (*Id.*) A certiorari to remove such proceeding while still pending is a nullity, and may be disregarded. (*Id.*)

§ 34. [40.] (Am'd 1849.) *Common pleas to review certain judgments.*

The court of common pleas for the city and county of New York, shall also have power to review the judgments of the marine court of the city of New York, and of the justices' courts in that city.

See section 427 and note, and section 352. (*Hawkins* v. *Mayor of N. Y.*, 5 Abb. 344.)

§ 35. [41.] *Terms.*

The superior court of the city of New York, and the court of common pleas for the city and county of New York shall.

within twenty days, appoint general and special terms of those courts, respectively, and prescribe the duration thereof; and they may, from time to time, respectively alter such appointments; and hereafter no fees shall be paid for any service of a judge of either of those courts.

§ 36. [42.] *By whom held.*

A general term shall be held by at least two of the judges of those courts respectively, and a special term by a single judge.

§ 37. [43.] *Judgments, where given.*

Judgments upon appeal shall be given at the general term; all others, at the special term.

§ 38. [44.] *Judgment, how pronounced.*

The concurrence of two judges shall be necessary to pronounce a judgment at the general term. If two do not concur the appeal shall be reheard.

§ 39. *Crier.*

A crier shall be appointed by the superior court of the city of New York, and by the court of common pleas for the city and county of New York, respectively, to hold his office during the pleasure of the court. He shall receive a salary, to be fixed by the supervisors of the city and county of New York, and paid out of the county treasury.

§ 40. *Superior Court.*

The superior court of the city of New York, shall, from the first day of May, 1849, consist of six justices.

[Sections 41 to 45 inclusive, obsolete.]

§ 46. *Terms.*

A general term of the superior court may be held by any two of the six justices thereof, and a special term by any one of them; and general and special terms, one or more of them, may be held at the same time.

§ 47. [As am'd Laws 1851, p. 8.] *Certain suits may be transferred.*

All civil suits at issue at the time of the passage of this act, that from and after the first of May, 1849, shall be placed upon the calendar of the supreme court, at any general or special term thereof to be held in the city of New York, and which shall be in readiness for hearing on questions of law only, or are equity cases, may by an order of that court, or of the judge holding such special term, be transferred to the said superior court of the city of New York, and to be heard at the general terms thereof.

a. The phrase "equity cases" means suits in equity commenced prior to July, 1848, and then pending in the supreme court. (*Giles* v. *Lyon*, 1 Code Rep. N. S. 257; 4 Coms. 600.)

§ 48. *Jurisdiction of transferred suits.*

The said superior court shall have jurisdiction of every suit so transferred to it, and may exercise the same powers in respect to every such suit, and any proceedings therein, as the supreme court might have exercised, if the suit had remained in that court.

§ 49. [This section was repealed, Laws 1851, p. 8.]

§ 50. *Appeal.*

Appeals from the judgments of the superior court in such suits, may be taken to the court of appeals, in the same manner as from the judgments of the superior court in actions originally commenced therein.

§ 51. *Section applied.*

The provisions of section twenty-eight of this act, shall apply to the said superior court.

TITLE VI.

Of the Courts of Justices of the Peace.

SECTION 52. Repeal of existing provisions.
53. Jurisdiction.
54. No jurisdiction in certain cases.
55. Answer of title.
56. Undertaking.
57. Suit discontinued.
58. If undertaking not given.
59. The same.
60. New action.
61. Costs.
62. Answer of title as to one cause of action.
63. Docketing judgments.
64. Rules.

§ 52. [45.] (Am'd 1849.) *Repeal of existing provisions.*

The provisions contained in sections two, three, and four, of the article of the revised statutes entitled, "Of the jurisdiction of justices' courts," as amended by sections one and two of the act concerning justices' courts, passed May 14, 1840, and the provisions contained in sections 59 to 66 of the same [fourth] article, both inclusive, are repealed, and the provisions of this title substituted in place thereof. But this repeal shall not affect any action heretofore commenced in a court of a justice of the peace.

* § 53. [46.] (Am'd 1849, 1851, 1860, 1861, 1862.) *Jurisdiction.*

Justices of the peace shall have civil jurisdiction in the following actions, and no others.

1. In actions arising on contracts for the recovery of money only, if the sum claimed does not exceed two hundred dollars.

2. An action for damages for injury to rights pertaining to the person, or to personal or real property, if the damages claimed do not exceed two hundred dollars.

* *Amended—See Appendix.*

3. An action for a penalty not exceeding two hundred dollars.

4. An action commenced by attachment of property, as now provided by statute, if the debt or damages claimed do not exceed two hundred dollars.

5. An action upon bond conditioned for the payment of money, not exceeding two hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due. Where the payments are to be made by installments, an action may be brought for each installment as it becomes due.

6. An action upon a surety bond taken by them; though the penalty or amount claimed exceed two hundred dollars.

7. An action upon a judgment rendered in a court of justice of the peace, or by a justice or other inferior court in a city where such action is not prohibited by section 71.

8. To take and enter judgment on the confession of a defendant, where the amount confessed shall not exceed five hundred dollars, in the manner prescribed by article 8, title 4, chapter 2, of part 3, of the Revised Statutes.

9. An action for damages for fraud in the sale, purchase, or exchange of personal property, if the damages claimed do not exceed two hundred dollars.

10. An action to recover the possession of personal property claimed, the value of which as stated in the affidavit of the plaintiff, his agent or attorney, shall not exceed the sum of one hundred dollars.

The plaintiff in such action, at the time of issuing the summons, but not afterwards, may claim the immediate delivery of such property as hereinafter provided.

Before any process shall be issued in an action to recover the possession of personal property, the plaintiff, his agent or attorney, shall make proof by affidavit, showing:

1. That the plaintiff is the owner, or entitled to immediate possession, of the property claimed, particularly describing the same.

2. That such property is wrongfully withheld or detained by the defendant.

3. The cause of such detention or withholding thereof, ac-

cording to the best knowledge, information, and belief of the person making the affidavit.

4. That said personal property has not been taken for any tax, fine, or assessment, pursuant to statute, or seized by virtue of an execution or attachment against the property of said plaintiff; or if so seized, that it is exempt from such seizure by statute.

5. The actual value of said personal property.

On receipt of such affidavit, and an undertaking, in writing, executed by one or more sufficient sureties, to be approved by the Justice of the Peace before whom such action is commenced, to the effect that they are bound in double the value of such property as stated in said affidavit for the prosecution of said action, and for the return of said property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against said plaintiff, the Justice shall endorse upon said affidavit a direction to any constable of the county in which said Justice shall reside, requiring said constable to take the property described therein from the defendant, and keep the same, to be disposed of according to law; and the said Justice shall at the same time issue a summons directed to the defendant, and requiring him to appear before said Justice at a time and place to be therein specified, and not more than twelve days from the date thereof, to answer the complaint of said plaintiff; and the said summons shall contain a notice to the defendant that in case he shall fail to appear at the time and place therein mentioned, the plaintiff will have judgment for the possession of the property described in said affidavit, with the costs and disbursements of said action.

The constable to whom said affidavit, endorsement, and summons shall be delivered, shall forthwith take the property described in said affidavit, if he can find the same, and shall keep the same in his custody. He shall thereupon, without delay, serve upon said defendant a copy of such affidavit, notice and summons, by delivering the same to him personally, if he can be found in said county; if not found, to the agent of the defendant in whose possession said property shall be found; if neither can be found, by leaving such copies at the last or usual place of abode of the defendant, with some person of suitable

age and discretion. And shall forthwith make a return of his proceedings thereon, and the manner of serving the same, to the justice who issued the said summons.

The defendant may at any time after such service, and at least two days before the return day of said summons, serve upon plaintiff or upon the constable who made such service, a notice in writing that he excepts to the sureties in said bond or undertaking; and if he fail to do so, all objection thereto shall be waived. If such notice be served, the sureties shall justify, or the plaintiff give new sureties on the return day of said summons, who shall then appear and justify, or said justice shall order said property delivered to defendant, and shall also render judgment for defendant's costs and disbursements.

At any time before the return day of said summons, the said defendant may, if he has not excepted to plaintiff's sureties, require the return of said property to him, upon giving to the plaintiff, and filing same with the justice, a written undertaking, with one or more sureties, who shall justify before said justice on the return day of said summons, to the effect that they are bound in double the value of said property, as stated in plaintiff's affidavit, for the delivery thereof to said plaintiff if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against said defendant; and if such return be not required before the return day of said summons, the property shall be delivered to said plaintiff.

The qualification of sureties and their justification under this act, shall be the same as provided in sections one hundred and ninety-four and one hundred and ninety-five of the Code, in respect to bail on arrest in the Supreme Court.

Sections two hundred and fourteen, two hundred and fifteen, and two hundred and sixteen of the Code, shall apply to proceedings and actions brought under this act, substituting the word constable for the word sheriff whenever it occurs in either of said sections.

The actions so commenced shall be tried in all respects as other actions are tried in justices' courts.*

In all actions for the recovery of the possession of personal property, as herein provided, if the property shall not have been delivered to plaintiff, or the defendant by answer shall

* Amendment inserted here.—*See Appendix.*

claim a return thereof, the justice or jury shall assess the value thereof, and the injury sustained by the prevailing party by reason of the taking or detention thereof, and the justice shall render judgment accordingly, with costs and disbursements.

If it shall appear by the return of a constable that he has taken the property described in the plaintiff's affidavit, and that defendant cannot be found, and has no last place of abode in said county, or that no agent of defendant could be found on whom service could be made, the justice may proceed with the cause in the same manner as though there had been a personal service.

For the endorsement on said affidavit, the justice shall receive an additional fee of twenty-five cents, which shall be included in the costs of the suit.

§ 54. [47.] *No jurisdiction in certain cases.*

But no justice of the peace shall have cognizance of a civil action—

1. In which the people of this State are a party, excepting for penalties not exceeding one hundred dollars:

2. Nor where the title to real property shall come in question, as provided by sections 55 to 62, both inclusive:

3. Nor of a civil action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction:

4. Nor of a matter of account where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars:

5. Nor of an action against an executor or administrator as such.

a. **Jurisdiction of Justices of the Peace.**—A JUSTICE OF THE PEACE HAS JURISDICTION OF THE FOLLOWING ACTIONS, *namely: Actions*—

By seamen against *shipping agents* for advance pay, the act of 1819 applies only to actions against the *owner*, master or commander of a ship. (*Loftus* v. *Clark*, 1 Hilt. 310.)

By district school teachers for wages. (*Reynolds* v. *Mynard*, 1 How. Ap. Cas. 620.)

Against a justice for wilfully refusing to issue an execution,) *Van Vleck* v. *Burroughs*, 6 Barb. 341) or for wrongfully refusing to approve an appeal bond. (*Tompkins* v. *Sands*, 8 Wend. 462.)

For trespass to lands in another county than that where the justice resides. (*Graves* v. *McKeon*, 2 Denio 639, aff'd, 1 How. Ap. Cas. 345.)

For enticing away a wife. (*Chase* v. *Hale*, 8 Johns. 461.)

Against a sheriff for an escape, (*Jansen* v. *Stoughtenburgh*, 9 Johns. 369,) or for not returning an execution, where the damage does not exceed ($200). (*Loughran* v. *Orser*, 15 How. 281.)

For penalties under a corporation by-law. (*Walker* v. *Cruickshanks*, 2 Hill, 296.)

Upon judgments. (*McGuire* v. *Gallagher*, 2 Sand. 402; 1 Code R. 127,) and justice's judgments exceeding $100. (*Humphrey* v. *Persons*, 23 Barb. 313.)

On a bond, (*Boomer* v. *Laine*, 10 Wend. 525,) but query an executor's bond, (*O'Neil* v. *Martin*, 1. E. D. Smith, 404; *Mahoney* v. *Gunter*, 10 Abb. 431.)

On a promise to discontinue a suit. (*Jarrington* v. *Bullard*, 40 Barb. 513.)

For injury to personal property, (*Bull* v. *Colton*, 22 Barb. 94,) where it does not amount to an assault on the person, (*Rich* v. *Hogeboom*, 4 Denio, 453.)

If the plaintiff state his demand at more than two hundred dollars, but claim damages only to *two* hundred, the justice has jurisdiction. So, the plaintiff may sue on a demand exceeding *two* hundred dollars, and reduce it to the justice's jurisdiction by voluntary credits or deductions. (*Tuttle* v. *Maston*, 1 Johns. Cas. 25; 12 Johns. 425; *Bennett* v. *Ingersoll*, 24 Wend. 113,) except an action within subd. 2 of sect. 53. (*Bellinger* v. *Ford*, 14 Barb. 250.) The plaintiff is not obliged, when he commences his suit, to reduce his demand to $200, for that might give the defendant, if he has a set-off, an undue advantage. The parties may present and prove their demands as they are, and if a balance is found exceeding the justice's jurisdiction, the excess may be remitted, and judgment taken for the residue. (Justice's Manual, 3d ed. 13.)

One indivisible contract cannot be made the foundation of several suits, so as to recover part in one suit, and part in another. See in note to section 140, *post*, Splitting cause of action.) This rule, however, is only applicable to hostile suits (*Cornell* v. *Cook*, 7 Cow. 310); for the parties may, by consent, divide a large demand into any number of smaller ones, and the defendant may confess separate judgments for each. (*Id.*)

An action cannot be brought upon a judgment rendered in one of the district courts of the city of New York, *between the same parties*, without leave of the court first obtained. (*Thompson* v. *Sutphen*, 2 E. D. Smith, 527; *Mills* v. *Winslow*, id. 18; 3 Code R. 44; overruling *Maguire* v. *Gallagher*, 2 Sand. 402.)

Although a justice has no jurisdiction of a suit against a foreign corporation, such corporation may confer jurisdiction by appearing and answering without objecting to the jurisdiction. (*Paulding* v. *Hudson Manf. Co.*, 3 Code R. 223; 2 E. D. Smith, 38.)

Executors and administrators may sue, *but cannot* be sued, in a justice's court; and if they sue, the defendant may plead a set-off if he have one, and if he prevail may have judgment against such plaintiffs in their representative character, which will be evidence of a debt established, to be paid in the course of administration. (2 R. S. 236, s. 53.)

Where the complaint is so drawn that the defendant can set up a title in his answer, and on giving the requisite security, oust the justice of his jurisdiction, but he omits to set up title, the justice retains his jurisdiction, and the defendant will be precluded from drawing it in question on the trial. (*Adams* v. *Rivers*, 11 Barb. 390. See *Bellows* v. *Sackett* 15 Barb. 97; *Fredonia Plank R'd. Co.* v. *Wart*, 27 Barb. 214, and see note to sect. 59 *post*.)

Towns which corner together, but do not touch otherwise, are "adjoining towns" within the statute relating to justice's jurisdiction. (*Holmes* v. *Carley*, 32 Barb. 440.)

A justice may take a confession of judgment *any where* in his county. (*Pollock* v. *Aldrich*, 17 How. 109; *Stone* v. *Williams*, 40 Barb. 322.) It must not be for a sum exceeding $500, (*Daniels* v. *Hinckston*, 5 How. 322; *Grinwold* v. *Sheldon*, 1 Code R. N. S. 261,) but an entire demand may be divided and several judgments composed, (*Cornell* v. *Cook*, 7 Cow. 309.) A justice cannot

take the confession of judgment by one who is his son-in-law. (*Chapin* v. *Churchill*, 12 How. 367.) Omitting to answer affidavit to confession renders it void as against creditors, but binding on the defendant. (*Stone* v. *Williams*, 40 Barb. 322.) A judgment may be confessed on the trial without the formalities prescribed by the Revised Statutes. (*Gates* v. *Ward*, 17 Barb. 424.)

a. A JUSTICE OF THE PEACE HAS NOT JURISDICTION OF THE FOLLOWING ACTIONS, *namely: Actions*—

To charge the separate estate of married women. (*Coon* v. *Brook*, 21 Barb. 546.)

For injury to the property amounting to an assault on the person. (*Rich* v. *Hogeboom*, 4 Denio, 453, and see *Bull* v. *Colton*, 22 Barb. 94.)

For converting personal property where the complaint *claims* more than ($200), (*Bellinger* v. *Ford*, 14 Barb. 250,) although the amount claimed was inserted by mistake, (*id.*) if the claim had been $200 *and over*, it would not have ousted the justice of jurisdiction. (*Rockwell* v. *Perine*, 5 Barb. 573.)

Against a justice for a false return. (*Worden* v. *Brown*, 14 How. 327.)

For damages for fraud in the sale of real estate. (*White* v. *Seaver*, 25 Barb. 236.)

Where the contested demands exceed $400. (*Stilwell* v. *Staples*, 3 Abb. 365.) If the accounts have been settled, the balance is the only subsistent account; and unless this balance and the subsequent accounts, exceed four hundred dollars, the justice has jurisdiction. (Code, sec. 54, subd. 4; 2 Cow. 431.)

b. The matters of account must be open and unliquidated (2 Cow. 413); thus, if the plaintiff should prove a claim of $300, and the defendant payment on account of $250, the justice must give judgment for the balance. (*Ib.*) But if instead, the defendant had proved a set-off to the amount of $250, the justice must have dismissed the complaint. (10 Wend. 555, 557.)

c. A claim for a balance of $86 for work and labor, the aggregate of which work and labor amounted to $400, reduced by payments to the sum first named, does not create a case of mutual accounts. Payments on account are not in any proper sense items of that account in favor of a defendant. The account, although reduced by payments, is on one side only. (*Ward* v. *Ingraham*, 1 E. D. Smith, 538.) It is otherwise when the defence seeks to set off items arising in a course of mutual dealing, which themselves constitute an affirmative claim in the defendant's favor, and which have not been specifically appropriated as payments in reduction of the plaintiff's claim. (*Ib.*)

d. Where the plaintiff in an action arising on contract, and for the recovery of money only, proves contested demands which with those established by the defendant exceed $400 in amount, a case arises in which a justice of the peace has no jurisdiction; and demands contested by the pleadings, but admitted on the trial are "*proved*," within the meaning of that word as used in this subdivision. The admission at the trial dispenses with other evidence, and is itself the proof on which the justice acts. A plaintiff is not required to commence an action in a justice's court and prove demands which, with those proved by the defendant, shall exceed $400, and then be dismissed, as a necessary preliminary to suing in a court of record. (*Stilwell* v. *Staples*, 3 Abb. 365; 5 Duer, 691.)

e. Where the purchaser of an unfinished house, by the consent of the seller retained $500 of the consideration money, to be applied to the completion of the building, and in an action by the seller brought in the court of common pleas among other things to recover a part of that sum as purchase-money due, it appeared that it had been so expended pursuant to the agreement under which it was reserved,—held that such expenditure was to be deemed to all intents a payment, and that the facts did not show a case of mutual accounts within the meaning of this subdivision. (*Brady* v. *Durbrow*, 2 E. D. Smith, 78.)

In a case of mutual accounts where the claims of both parties, each against the other, amount together to more than $400, one of the parties cannot sue the other in a justice's court, but must bring his action in a court of record. (*Id.*)

In order to oust a justice of jurisdiction on the ground that the total of the accounts on both sides exceed $400, the fact must be proved by legal evidence, and the evidence must legitimately tend to establish such fact. (*Parker* v. *Eaton*, 25 Barb. 122.) Where the amount of the accounts still subsisting is a question of fact, and the evidence is conflicting, the determination of the justice on that point is as conclusive as on any other question of fact where his jurisdiction is not affected by his finding; and if under such circumstances the justice decides that the accounts of the parties as proved exceed $400, and that he is therefore ousted of his jurisdiction, the county court has no right to reverse his judgment on appeal. (*Id.*)

c. In an action in which the plaintiff demanded judgment for $336 and interest, the defence was payment and a counter-claim of $200; on the trial before a referee he found the plaintiff's claim to be $260 92, and that the defendant had made payments on account to the amount of $95 85, and had a counter-claim to the amount of $136 43,—held the accounts between the parties did not exceed $400. (*Crim* v. *Cronkhite*, 15 How. 280.)

On its being proved that the amounts exceed $400, the justice is required to enter a judgment of discontinuance, with costs. (10 Wend. 559. See § 344, sub. 3 *post*.) The decision of the justice that the accounts proved exceed $400, cannot be reviewed. (*Parker* v. *Eaton*, 25 Barb. 122.)

The statute declaring that no judge of any court can sit as such in any cause in which he is a party, extends to justices of the peace. (*Baldwin* v. *McArthur*, 17 Barb. 415, and see *Chapin* v. *Churchill*, 12 How. 367; *Re Hopper*, 5 Paige, 489.) So does the law of 1847, ch. 280, s. 81, forbidding a judge to act in any cause in which he has been counsel. (*Carrington* v. *Andrews*, 12 Abb. 348. Co'y Co't.) But the statute forbidding a partner of or clerk to a judge practising before him, does not apply. (*Fox* v. *Jackson*, 8 Barb. 355.) The provision suspending the jurisdiction of a justice on his becoming an innholder, or tavern-keeper, applies to his civil jurisdiction. (*Rice* v. *Milks*, 7 Barb. 387.) A justice cannot sit in a cause to which a corporation is a party, if he be related to a stockholder in such corporation. The defendant may prove the existence of such relationship, although there is no plea to the jurisdiction of the justice; or he may answer setting up the fact to be proved, in order to deprive the justice of jurisdiction. (*Place* v. *Butternuts Woolen Man. Co.*, 28 Barb. 508.)

Long Summons.—A justice of the peace has civil jurisdiction, by *long summons*, of all persons residing within the town, or adjoining the town of the justice's residence, and within his county, or where the plaintiff resides in the same town as the justice or an adjoining county. (*Cooper* v. *Ball*, 14 How. 295.) There is no jurisdiction by long summons of a non-resident. (*Willins* v. *Wheeler*, 8 Abb. 116.) Joint debtors may be sued by long summons, if one be a resident. (*Burghart* v. *Rice*, 2 Denio, 95.) But this rule does not apply to the case of an action against the maker and the indorser of a promissory note; they are not joint debtors. (*Harriott* v. *Van Cott*, 5 Hill, 285; *Kelsey* v. *Bradbury*, 21 Barb. 531.) No provision is made by statute for process by warrant, or attachment, or short summons against a corporation. A railroad corporation may, therefore, be sued by a long summons (*Johnson* v. *Cayuga & Sus. R. R. Co.*, 11 Barb. 621), and may insist on being sued by long summons in a county through which their road passes. They are, in law, residents of such county (*Belden* v. *N. Y. & Harlem R. R. Co.*, 15 How. 17), unless the plaintiff is a non-resident. (*Wilde* v. *N. Y. & Harlem R. R. Co.*, 1 Hilton, 302.)

A non-resident has his option to sue by long or by short summons. (*Kelly* v. *Kelly*, 2 E. D. Smith, 250; and see *Ackerman* v. *Finch*, 15 Wend. 652.)

Form of the Summons.—The form of the summons in these courts is not governed by the code (*Williams* v. *Price*, 2 Sand. 229.) The summons should state a cause of action (*Ellis* v. *Merrit*, 2 Code R. 68; *Cooper* v. *Chamberlain*, *ib.*

142; *Bray* v. *Andreas*, 1 E. D. Smith, 387; *Hogan* v. *Baker*, 2 *id.* 22; contra, see *Cornell* v. *Bennett*, 11 Barb. 657; *Smith* v. *Joyce*, 12 *ib.* 21); but where the defendant was summoned to answer the plaintiff's "complaint for money due" (*Silkman* v. *Boiger*, 4 E. D. Smith, 236), or to answer the complaint of J. W. B. for $100 damages in the action on contract, it was held sufficient (*Bray* v. *Andreas*, 1 *id.* 387); and where the summons was "to answer the complaint for professional services" (*Bissell* v. *Dean*, 3 *id.* 172) and also where the summons required the defendant to answer in "civil action for damage and false representation in the sale of a horse," on appeal it was held sufficient. The particular plea need not be stated. (*Delancey* v. *Nagle*, 16 Barb. 97; *Humphrey* v. *Persons*, 23 Barb. 313.) The summons omitting to state the plea, or the nature of plaintiff's claim, is no cause for reversing the judgment. (*Cornell* v. *Bennett*, 11 Barb. 657.)

a. A summons stating a cause of action for more than $100, was formerly held to be a nullity (*Yager* v. *Hannah*, 6 Hill, 631); but now although a summons issued by a justice claims damages exceeding $200, the defendant is bound to appear in the action, inasmuch as justices of the peace have jurisdiction of some actions wherein judgments are claimed for sums over $200 (*Humphrey* v. *Persons*, 23 Barb. 313); and claiming $200 *and over* would not render the summons a nullity (*Rockwell* v. *Perine*, 5 Barb. 573). A justice acquires no jurisdiction where the defendant, being a non-resident, is sued by a summons, returnable more than four days after its date, or served less than two days before the return day (*Robinson* v. *West*, 11 Barb. 309).

b. In an action to recover penalties for the violation of the excise law, it is a sufficient endorsement of the summons if it state that such summons is issued "according to the provisions of tit. 9, p. 1, ch. 20 of the statute of excise and the regulation of taverns and groceries." (*Perry* v. *Tynen*, 22 Barb. 137; and see, as to indorsement, *Andrews* v. *Harrington*, 19 *id.* 343; *Marselis* v. *Seaman*, 21 *id.* 319; *Avery* v. *Slack*, 17 Wend. 85; *Board of Excise of Saratoga* v. *Doherty*, 16 How. 46.)

Semble, plaintiff, may fill up process as the clerk of the justice. (*The People* v. *Smith*, 20 Johns. 63; see, contra, *Borrodale* v. *Leek*, 9 Barb. 611.)

c. **Short Summons.**—A short summons against a non-resident, allowed by § 33 of the non-imprisonment act issues of course, without security, although the plaintiff is also a non-resident (*Ackerman* v. *Finch*, 15 Wend. 652; but see *Allen* v. *Stone*, 9 Barb. 60). A non-resident of the county must be proceeded against by short summons or attachment (*Thompson* v. *Sayre*, 1 Denio, 175). An action may be commenced against a resident corporation by short summons *if* the plaintiff is a non-resident *and* furnishes the requisite bond and affidavit (*Wilde* v. *N. Y. and Harlem R. R. Co.*, 1 Hilton, 302); but only on these conditions (*Belden* v. *N. Y. and Harlem R. R. Co.*, 15 How. 17).

To authorize the issuance of a short summons the facts which warrant it must be shown affirmatively (*Allen* v. *Stone*, 9 Barb. 60; *Sperry* v. *Major*, 1 E. D. Smith, 361). As to what is sufficient proof see *Waters* v. *Whittemore*, 13 Barb. 634.

An action to recover back illegal fees exacted by a non-resident defendant as an attorney cannot be commenced by short summons (*Waters* v. *Whittemore*, 22 Barb. 593).

d. **Attachment.**—To authorize the issuance of an attachment an affidavit must be presented, and a bond with surety given (*Bennett* v. *Brown*, 4 Coms. 254; *Davis* v. *Marshall*, 14 Barb. 96). The affidavit is sufficient, if it shows the defendant is a non-resident, that plaintiff has a debt against him of a specified amount, arising on contract (*Van Kirk* v. *Wilds*, 11 *Barb.* 520), or for a tort (*Pope* v. *Hart*, 35 Barb. 630.) An oral statement of a witness under oath, written down by the justice, although not signed by the witness, is a sufficient affidavit (*Millius* v. *Shafer*, 3 Denio, 60); but an oral statement not reduced to writing is not sufficient (*Comfort* v. *Gillespie*, 13 Wend. 404). The justice may take into consideration an affidavit made by another plaintiff to procure an attachment against the same defendant (*Colver* v. *Van Valen*, 6 How. 102). An

affidavit stating facts indicating an intent to defraud is insufficient; it must state a belief of a fraudulent intent (*id. Miller* v. *Brinkerhoff*, 4 Denio, 118; *Pope* v. *Hart*, 35 Barb. 630; *Colvor* v. *Van Valen*, 6 How. 102); and the facts must also be stated (*Smith* v. *Luce*, 14 Wend. 237; *Connell* v. *Lascells*, 20 *id.* 77; *Stewart* v. *Brown*, 16 Barb. 367; *Frost* v. *Willard*, 9 Barb. 440; *Camp* v. *Tibbetts*, 2 E. D. Smith, 20; 3 Code R. 45). The facts must be sworn to positively, not on belief (*Johnson* v. *Moss*, 20 Wend. 145; *Fulton* v. *Heaton*, 1 Barb. 552). An affidavit in which the facts are stated on the belief only of the deponent is fatally defective (*Dewey* v. *Greene*, 4 Denio, 93; *Mott* v. *Lawrence*, 9 Abb. 196). The objection, if made in due time, is not waived by the defendant pleading after his objection is overruled (*Avery* v. *Slack*, 17 Wend. 85; *Shannon* v. *Comstock*, 21 *id.* 457; *Wheeler* v. *Lampman*, 14 Johns. R. 481); but pleading without previously objecting is a waiver (*id. Swartwout* v. *Roddis*, 5 Hill, 118). This principle is confined to cases where the objection is to process to bring the party into court; for other objections improperly overruled, are sometimes waived by afterwards going on with the suit (3 Hill, 180, 499; 5 *id.* 428). If the affidavit contains some evidence for the justice to act on, the proceeding will not be reversed for insufficiency of proof (*Rosenfield* v. *Howard*, 15 Barb. 546); and cannot be questioned in a collateral proceeding (*Kissock* v. *Grant*, 34 *id.* 144). An affidavit that defendant kept concealed to avoid service of *a warrant*, not showing the kind of warrant, held insufficient (*Lynde* v. *Montgomery*, 15 Wend. 461.) Proof that defendant has removed property, or made a mortgage, without showing an intent to defraud, is not sufficient. (*Connell* v. *Lascells*, 20 Wend. 77; *Rosenfield* v. *Howard*, 15 Barb. 546; *Mott* v. *Lawrence*, 9 Abb. 196; 17 How. 559.)

Security must be given in the form of a Bond.—(*Homer* v. *Brinckerhoff*, 1 Denio, 184; *Bennett* v. *Brown*, 4 Coms. 254; *Davis* v. *Marshall*, 14 Barb. 96,) by plaintiff or some one on his behalf with surety. (*Millius* v. *Shafer*, 3 Denio, 60.) It must truly describe the action. (*Comfort* v. *Gillespie*, 13 Wend. 404.) The condition of the bond extends to the final result of the proceedings. (*Ball* v. *Gardner*, 21 Wend. 290; see *Fenno* v. *Dickenson*, 4 Denio, 84) and all damages sustained by the attachment. (*Groat* v. *Gillespie*, 25 Wend. 388; *Winsor* v. *Orcutt*, 11 Paige, 578; and see *Earl* v. *Spooner*, 3 Denio 246; *Bennett* v. *Brown*, 31 Barb. 158.)

An attachment on the ground that defendant has left the county with intent to defraud his creditors must be returnable not less than six nor more than twelve days from date. (*Johnson* v. *Moss*, 20 Wend. 145.)

A non-resident sued by long attachment may waive the irregularity, and take his remedy on the bond. (*Bowne* v. *Mellor*, 6 Hill, 496.) A long attachment, regular on its face, protects the officer. (*Webber* v. *Gay*, 24 Wend. 485.)

An attachment actually levied has priority over an execution in the Sheriff's hands, but on which no levy has been made (*Ray* v. *Harcourt*, 19 Wend. 495; *Dubois* v. *Harcourt*, 20 *id.* 41); but to preserve priority, plaintiff must proceed with due diligence (*Van Loan* v. *Kline*, 10 Johns. 129; *Sterling* v. *Welcome*, 20 Wend. 238), and suffer its removal out of the county (*id.*)

On a claim by a third party to goods attached, the bond for their delivery must be for double the value of the goods attached. (*Kamena* v. *Wanner*, 6 Abb. 193.)

On plaintiff's recovering judgment, if an appeal is duly taken, the attached property must be released. (*Keyser* v. *Waterbury*, 7 Barb. 650; 3 Code R. 233; and see *Moore* v. *Somerindyke*, 1 Hilton, 199.)

Where an attachment issues on the ground that defendant has *departed* with intent to defraud, &c., judgment should be entered without a summons. (*Stewart* v. *Brown*, 16 Barb. 367.)

A return of a levy, without stating that a copy of the attachment was served, is not sufficient. (*Willard* v. *Sperry*, 16 Johns. 121.) A return of levy on property, without saying *of the defendant*, or a return of delivery of a copy without saying *a certified copy*, held sufficient. (*Johnson* v. *Moss*, 20 Wend. 145; *Van Kirk* v. *Wilds*, 11 Barb. 520.)

The attachment must be served personally, if defendant can be found; if not served personally, a summons must issue. (*Taylor* v. *Harker*, 1 E. D. Smith, 391.) A return that defendant could not be found in the county, is equivalent to a return that no personal service has been made. (*Rosenfield* v. *Howard*, 15 Barb. 546.)

On an attachment against joint debtors, a return showing service on one only, does not authorize the justice to proceed. (*McDoel* v. *Cook*, 2 Coms. 110; see *Flogg* v. *Child*, 13 Barb. 246.)

Warrant.—A warrant is the only process by which a person can commence an action for a tort before a justice of the peace of the county in which he resides against a non-resident of such county; and in all cases on application for a warrant, except where the action shall have been commenced by summons, the applicant shall, by affidavit, state the facts and circumstances within his knowledge, showing the grounds of his application. (*Pope* v. *Hart*, 35 Barb. 630; 23 How. 215.) An affidavit which stated positively that the applicant was a resident of the county, and that the defendant was a resident, and also that, as *he verily believed*, he had a good cause of action against the defendant for fraud and deceit in the sale by him of a certain pair of horses to plaintiff, was held sufficient. (*Id.*) The applicant for a warrant may prove the facts necessary to its issuance. (*Terry* v. *Fargo*, 10 Johns. 114; *Bissell* v. *Hill*, 3 Wend. 389.) The requisite security may be by a deposit of money (*Wheelock* v. *Brinkerhoff*, 13 Johns. 481); but a note to the justice, requesting him to let plaintiff have a warrant, and that the writer would be "answerable for the costs," is not a sufficient security. (*Money* v. *Tobias*, 12 Johns. 422.) The security extends to costs on appeal. (*Traver* v. *Nichols*, 7 Wend. 434.) Omitting to state the facts which entitle the party to a warrant is a jurisdictional defect. (*Loder* v. *Phelps*, 13 Wend. 46; *Money* v. *Tobias*, 12 Johns. 422.) A warrant in favor of two plaintiffs, partners, cannot issue on an affidavit that one is a non-resident. (*Linnell* v. *Sutherland*, 11 Wend. 568.) The defendant must be brought before the justice. (*Colvin* v. *Luther*, 9 Cow. 61.) Security taken for his appearance is void. (*Millard* v. *Canfield*, 5 Wend. 61.) Bail cannot surrender their principal. (*Tuttle* v. *Kip*, 19 Johns. 194; *Whitney* v. *Spencer*, 4 Cow., 39.) The justice should quash the warrant on its being shown that the defendant had been a resident thirty days before warrant issued. (*Shannon* v. *Comstock*, 21 Wend. 457.)

Service of Summons.—Where the plaintiff is a constable he may himself serve the summons. (*Tuttle* v. *Hunt*, 2 Cow. 436; *Putnam* v. *Mann*, 3 Wend. 202.) Service on the 2d for the 8th day of the month is in time. (*Columbia Turnpike Road Co.* v. *Hayward*, 10 Wend. 422.)

The service should not be on Saturday on persons who keep that day holy. (Laws 1847, ch. 349; *Marks* v. *Wilson*, 11 Abb. 88.)

Return of Service.—The return should state the *time and manner* of service, and the statute requirement in this respect should be strictly complied with. (*Wheeler* v. *Lampman*, 14 Johns. 481; *Legg* v. *Stillman*, 2 Cow. 418; *Stewart* v. *Smith*, 17 Wend. 517; *Putnam* v. *Mann*, 3 id. 202.) A return of "personally served," or of "served by copy," held sufficient as to *manner* of service. (*Legg* v. *Stillman*, 2 Cow. 418; *Tuttle* v. *Hunt*, *id.* 436; *Hughes* v. *Mulvey*, 1 Sand. 92; *B'd of Excise of Saratoga* v. *Doherty*, 16 How. 46;) but where the return was "served by copy," without stating whether the service was a *personal* service by copy, or *by leaving* a copy, was held not sufficient. (*Foster* v. *Hazen*, 12 Barb. 547.) Where the action is for a penalty the return need not show that the statutory endorsement on the summons was also served. (*B'd of Excise of Saratoga* v. *Doherty*, 16 How. 46.) Where the defendant is a corporation the return should show how the service was made. (*Sherwood* v. *Saratoga & W. R. R. Co.* 15 Barb. 650.) The justice is to decide whether the return shows a service sufficient to give him jurisdiction. If the return shows sufficient personal service the justice has jurisdiction, and if the service was not in fact sufficient the judgment may be reversed on appeal, but neither the return nor the judgment can be questioned collaterally. (*N. Y. & Erie R. R. Co.* v.

Purdy, 18 Barb. 574; *Fitch* v. *Devlin*, 15 *id.* 47.) In an action against a railroad company, the constable returned that he served the summons personally on A B, freight agent of defendants, at, &c., no person having been designated by them upon whom process might be served, and that no officer of the company resided within the county on whom process could be served, held that defendant might show on appeal that the service was unauthorized, as there was a director resident in the county. (*Wheeler* v. *N. Y. & Harlem R. R. Co.*, 24 Barb. 414.) The return is prima facie evidence of the facts therein stated. (*id.*)

The justice may allow the constable to amend his return to a summons. (*Perry* v. *Tynan*, 22 Barb. 137.)

A return of personal service indorsed on the summons by the justice, at the request of the constable, but not subscribed by the constable, is sufficient, and confers jurisdiction on the justice. (*Reno* v. *Pinder*, 20 N. Y. 298 rev'g s. c. 24 Barb. 423.)

An entry in the docket, "Sept. 1. Sums 2 pers. by S. B. Ward, Cons. 11 plt. appears," was held no evidence of the service. (*Manning* v. *Johnson*, 7 Barb. 457.)

On summons against two or more jointly-liable, a return of service on one defendant only gives jurisdiction to proceed in form against all the defendants. (*Fogg* v. *Child*, 13 Barb. 246.) On attachment it is otherwise. (*McDoel* v. *Cook*, 2 Coms. 110.)

Appearance.—The parties may now appear in person or by attorney, formerly it was otherwise, (*Smith* v. *Goodrich*, 5 Johns. 353,) but attorneys-at-law, as such are not recognized in justices' courts. (*Hugh* v. *Mulvey*, 1 Sandf. 92; *Cohen* v. *Dupont*, *id.* 260; see, however, Laws 1862, ch. 484.) The same person cannot appear as attorney for both parties. (*Sherwood* v. *Saratoga R. R. Co.*, 15 Barb. 650.) And the constable who served the process cannot advocate the cause; he *might* appear on the return day, and present plaintiff's demand, but could not prove the cause of action. (*Ford* v. *Smith*, 11 Wend. 73; *Kittle* v. *Baker*, *id.* 354.) The wife of one of the parties was allowed to appear for him. (*Hughes* v. *Mulvey*, 1 Sandf. 92.) The attorney must be duly authorized to appear, and an authority "to collect" is sufficient authority to appear. (*McMinn* v. *Richtmeyer*, 3 Hill, 236.) The attorney must prove his authority to appear (*Fanning* v. *Trowbridge*, 5 Hill, 428,) and if the authority is in writing, its execution must be duly proved; (*Timmerman* v. *Morrison*, 14 Johns. 369,) if insisted upon. (See *Hirshfield* v. *Landman*, 3 E. D. Smith, 208; *Bush* v. *Miller*, 13 Barb. 481.) Omitting to object on the trial to the authority of the party to appear, is an *admission* of his authority. (*Ackerman* v. *Finch*, 15 Wend. 652; and see *Treadwell* v. *Bruder*, 3 E. D. Smith, 596.) The justice cannot act on his own knowledge of the authority; there must be proof before him. (*Beaver* v. *Van Every*, 2 Cow. 429; *Lester* v. *Crary*, 1 Denio, 81; *Wilcox* v. *Clement*, 4 *id.* 60.) As to what is sufficient proof of authority to appear, see *Warren* v. *Helmer*, 8 How. 419; *Andrews* v. *Harrington*, 19 Barb. 343; *Underhill* v. *Taylor*, 2 Barb. 348; *Armstrong* v. *Craig*, 18 Barb. 387; *Bunker* v. *Latson*, 1 E. D. Smith, 410; *Burch* v. *Westfall*, 5 N. Y. Leg. Obs. 178.

Effect of Appearance.—All defects in the summons and service thereof, are cured by appearance and answer without objection (*Heilner* v. *Burras*, 3 Code R. 17; *Cushingham* v. *Phillips*, 1 E. D. Smith, 417; *Andrews* v. *Thorp*, ib. 615; *Bray* v. *Andreas*, ib. 387; *Hogan* v. *Baker*, 2 ib. 22,) and an appearance of a defendant in person or by attorney, on the return of an attachment, gives the justice jurisdiction to proceed without issuing a summons. (*Conway* v. *Hitchins*, 9 Barb. 378.)

Where a summons is issued by a justice not residing in the same town with either of the parties, nor in an adjoining town, the defendant is not in order to avail himself of his objection to the jurisdiction, bound to appear and object. If he does not appear a judgment rendered will be voidable, on an appeal and assignment of error in fact, (*Tiffany* v. *Gilbert*, 4 Barb. 320,) and the same rule applies to a non-resident defendant sued by a long summons. (*Willins* v. *Wheeler*, 28 Barb. 669, and see *Buck* v. *Waterbury*, 13 Barb. 116; *Fitch* v. *Devlin*, 15 *id.* 47.)

a. **Proceeding to call and try Action.**—The provision requiring the justice to wait one hour after the hour appointed applies to the return day. (*Allen* v. *Stone*, 9 Barb. 60,) an adjourned hearing, (*Sherwood* v. *Saratoga & W. R. R. Co.* 15 Barb. 650,) and where the trial is necessarily held open to a future day. (*Clark* v. *Garrison*, 3 Barb. 372.)

b. After the justice had called through his list of causes, a defendant who was in waiting asked his cause to be called, and was informed by the justice that there was no such cause; whereupon he left the court; and it was held that the justice could not afterwards, and in the defendant's absence proceed with the cause. (*Marling* v. *Grote*, 3 Abb. 109.)

c. **Discontinuance of Action by Non-Appearance.**—The action may be discontinued by the non-attendance of the justice or the plaintiff on the return day, or any adjournment day within one hour after the hour appointed (*Lynsky* v. *Pendegrast*, 2 E. D. Smith, 43; *Sprague* v. *Shed*, 9 Johns. 140; *Green* v. *Angel*, 13 *id.* 469.) The discontinuance may be waived by consent (*Stoddard* v. *Holmes*, 1 Cow. 245); and where the justice did not arrive before the expiration of the hour, but soon afterwards, and after defendant had left, but he caused his arrival and desire to proceed with his trial to be made known to defendant, and the defendant attended; objected to the trial proceeding, and refused to take part therein, yet the justice proceeded, on appeal it was held regular. (*Everett* v. *Lisk*, 1 Code Rep. 70; and see *Cornell* v. *Bennett*, 11 Barb. 657; *Myer* v *Fisher*, 15 Johns. 504; *Barber* v. *Parker*, 11 Wend. 51; *Wilde* v. *Dunn*, 11 Johns. 459; *Baldwin* v. *Carter*, 15 *id.* 496; *Wilcox* v. *Clement*, 4 Denio, 160.) The justice may postpone calling the case under special circumstances. (*Hunt* v. *Wickwire*, 10 Wend. 102; *Chamberlain* v. *Lovet*, 12 Johns. 217; *Pickert* v. *Dexter*, 12 Wend. 150.)

d. **Defendant appearing pending the trial.**—Defendant appearing before the plaintiff's case is closed, should be permitted to make a defence (*Sweet* v. *Coon*, 15 Johns. 86; *Pickert* v. *Dexter*, 12 Wend. 150; *Allen* v. *Stone*, 9 Barb. 60; *Mead* v. *Darragh*, 1 Hilton, 395; *Atwood* v. *Austin*, 16 Johns. 180; *Colvin* v. *Corwin*, 15 *id.* 557), unless where he does not appear on the return day, and the cause is adjourned. (*Snell* v. *Loucks*, 11 Johns. 69; see 19 Johns. 390; 8 Cow. 87; 1 Wend. 143; 12 *id.* 150; 15 *id.* 557; 4 Den. 576.)

e. **Defendant cannot be admitted to defend after the cause has been submitted** (*The People* v. *Lynde*, 8 Cow. 138; *Montford* v. *Hughes*, 3 E. D. Smith, 591), nor after judgment. (*Alburtis* v. *McCready*, 2 E. D. Smith, 39; *Sperry* v. *Major*, 1 *id.* 361; *Appleby* v. *Strang*, 1 Ab. 143.)

f. **Adjournments.**—The justice has power on the return day of his own motion to adjourn not exceeding eight days (*Thompson* v. *Sayre*, 1 Denio, 175; *Fanning* v. *Trowbridge*, 5 Hill, 428; *Nellis* v. *McCarn*, 35 Barb. 115), and where the eighth day is Sunday, the adjournment may be to the following Monday. (*Speidell* v. *Fash*, 1 Cow. 234.) Although a justice may adjourn on his own motion, yet where he does not do that, but adjourns on defendant's application and against the wishes of plaintiff and without requiring oath or bail, the action is discontinued. (*Peck* v. *Andrews*, 32 Barb. 445.) The adjournment must be to a day certain. (*Wilcox* v. *Clement*, 1 Denio, 160.) An irregular adjournment, or for longer than is authorized is cause for reversal of judgment (*Kimball* v. *Mack*, 10 Wend. 297; *Palmer* v. *Green*, 1 Johns. Cas. 101; *Colden* v. *Dopkin*, 3 Cai. 171; *Gamage* v. *Law*, 2 Johns. 192; *Dunham* v. *Heyden*, 7 *id.* 381; *Proudfit* v. *Henman*, 8 *id.* 391; *McCarthy* v. *McPherson*, 11 *id.* 407; *Payne* v. *Wheeler*, 15 *id.* 492; *Redfield* v. *Florence*, 2 E. D. Smith, 339; *Wight* v. *McClave*, 3 *id.* 316; *Aberhall* v. *Roach*, *id.* 345; *McCollum* v. *McClave*, 1 Hilton, 140; 3 Abb. 106); but a party asking or consenting to an irregular adjournment cannot allege it for error (*Peck* v. *McAlpine*, 3 Cai. 166; *Mason* v. *Campbell*, 1 Hilton, 291; *Redfield* v. *Florence*, 2 E. D. Smith, 339); and consent may be inferred from neglecting to object (*id.*; *Kilmore* v. *Suydam*, 7 Johns. 529; *Fiero* v. *Reynolds*, 20 Barb. 275); and the parties may consent to adjourn, and further, that on the adjourned day the justice may again adjourn. (*Richardson* v. *Brown*, 1 Cow 255.) But a second adjournment, on a written consent,

but in the absence of both parties, was held irregular (*Weeks* v. *Lyon*, 18 Barb. 530; see *Redfield* v. *Florence*, 2 E. D. Smith, 340); and where a cause was adjourned to the 15th, and on the 10th one went before the justice and swore he was authorized by both parties to ask a further adjournment, and on this a further adjournment was had, held that a judgment on such adjourned day, defendant not appearing, was erroneous. (*Deland* v. *Richardson*, 4 Denio, 95; and see *Rawson* v. *Grow*, 4 E. D. Smith, 18.)

a. In general a justice has a discretion as to granting an adjournment, and only a clear abuse of that discretion will be error. (*Onderdonk* v. *Ranlett*, 3 Hill, 323; *Irroy* v. *Nathan*, 4 E. D. Smith, 68; and see *Rose* v. *Gleason*, 8 Johns. 409; *Rawson* v. *Grow*, 4 E. D. Smith, 18.) The discretion is limited to the periods within which power to direct them is given by law; and an unauthorized adjournment amounts to a discontinuance. (*Proudfit* v. *Hurmans*, 8 Johns. 391; *Hogan* v. *Baker*, 2 E. D. Smith, 22.) Denying an application for an adjournment made orally without oath, held no ground for reversing the judgment (*Edwards* v. *Drew*, 2 E. D. Smith, 55); but refusing an adjournment to which a party shows himself entitled, or imposing improper terms as a condition of the adjournment, is error. (*Easton* v. *Coe*, 2 Johns. 383; *Sebring* v. *Wheedon*, 8 *id.* 458; *Hemstract* v. *Youngs*, 9 *id.* 364; *Beekman* v. *Wright*, 11 *id.* 442; *Annin* v. *Chase*, 13 *id.* 462; *Cross* v. *Moulton*, 15 *id.* 469.) The justice may refuse an adjournment to procure a witness, if the other party will admit the facts expected to be proved by such witness. (*Brill* v. *Lord*, 14 Johns. 341.

b. Where a justice adjourned a cause with the provision that if the defendant filed security he should have a further adjournment, and the defendant filed the security, but failed to appear on the adjournment day,—held that the justice did right in proceeding to judgment in the absence of defendant (*Muber* v. *Held*, 3 Abb. 110).

c. Where the justice, upon the plaintiff opposing an adjournment, denied the defendant's application to adjourn, and afterwards, without proceeding to trial, departed from his office (it does not appear at what hour), stating that it was uncertain at what time he should return—the defendant having left the court, the justice returned about three in the afternoon, resumed his court, and suffered the plaintiff to proceed with his case in the defendant's absence; on appeal it was held that the justice thus absenting himself, worked a discontinuance of the action (*Lynsky* v. *Pendergrast*, 2 E. D. Smith, 43).

d. When the defendant appeared and answered, and demanded a jury trial, and the cause was adjourned to procure a jury, and on the adjournment day he neglected to appear, held that the justice did right in proceeding to hear the cause without a jury and in the absence of the defendant (*Kilpatrick* v. *Carr*, 3 Abb. 117).

e. A party who has had one adjournment after issue joined cannot, on tendering security, have a second adjournment without showing special cause (*Powers* v. *Lockwood*, 9 Johns. 133; *St. John* v. *Benedict*, 12 *id.* 418; *Farrington* v. *Payne*, 15 *id.* 432). And the special cause must be shown by affidavit (*Edwards* v. *Drew*, 2 E. D. Smith, 55). The attorney may make the affidavit (*Seers* v. *Grandy*, 1 Johns. 514). To entitle a party to a second adjournment on the ground of the absence of a witness the affidavit must state and show due diligence to obtain the attendance of such witness. It is not enough to allege that the witness was not within reach of process on the day of making the affidavit (*Christman* v. *Paul*, 16 How. 17). The affidavit should also state a reasonable expectation of being able to procure the attendance of the witness on the adjournment day (*Onderdonk* v. *Ranlett*, 3 Hill, 323); and that the party cannot safely proceed to trial in the absence of such witness (*Lynsky* v. *Pendegrast*, 2 E. D. Smith, 43).

f. An adjournment on the ground of absence of witnesses, or to examine a witness on commission cannot be demanded as a right after the jury is impanelled (*Fink* v. *Hall*, 8 Johns. 437; *Purmelee* v. *Thompson*, 7 Hill, 77; *Matthews* v. *Feistell*, 2 E. D. Smith, 90); and in *Aberhall* v. *Roach*, 11 How. 95, it

was held that an adjournment for ten days after a trial had commenced, without the consent and in the face of an objection by the defendant, to enable the plaintiff to obtain the attendance of a witness, rendered the subsequent proceedings and judgment erroneous. Upon showing that a witness subpœnaed does not attend, and on giving security, a defendant is entitled to a second adjournment, and the court cannot impose any terms (*Beekman* v. *Wright*, 11 Johns. 442; *Annin* v. *Chase*, 13 *id.* 462; see *Belshaw* v. *Colie*, 1 E. D. Smith, 213). Dangerous sickness of defendant's child held sufficient to entitle him to an adjournment (*Rose* v. *Stuyvesant*, 8 Johns. 426). Not so the engagement of counsel in another court (*Ranney* v. *Gwynne*, 3 E. D. Smith, 59).

a. **Security on Adjournment.**—The security on an adjournment must be in writing (*McNutt* v. *Johnson*, 7 Johns. 18; *Stewart* v. *McGuin*, 1 Cow. 99). There is no prescribed form, and if it exceeds the requirement of the statute the surety is bound by it (*id.*; *Fonday* v. *Cuyler*, 1 Wend. 464).

b. An erroneous adjournment does not make the judgment a nullity; it is good until reversed (*Hurd* v. *Shipman*, 6 Barb. 621).

c. **Adjourning Court.**—After a trial has commenced, the justice may continue his court from one day to the next if the exigencies of the case require it (*Day* v. *Wilbur*, 2 Cai. 134); but semble, not merely to allow either party to produce further proof (*Green* v. *Angel*, 13 Johns. 469); and generally, after a trial is commenced, the justice cannot adjourn, unless by consent of parties, or because it is impossible to finish the trial within a reasonable time (*Edwards* v. *Drew*, 2 E. D. Smith, 55; *Aberhall* v. *Roach*, 11 How. 95; *Wight* v. *McClave*, 3 E. D. Smith, 316; *Story* v. *Bishop*, 4 *id.* 423; *Gibberton* v. *Ginochio*, 1 Hilton, 218; *Redfield* v. *Florence*, 2 E. D. Smith, 340; *Fairbanks* v. *Corlies*, 1 Abb. 152). The justice inspecting the note sued on held not to be a commencement of the trial (*Olney* v. *Bacon*, 1 Johns. 142).

d. Where a cause is erroneously held over, the error is cured by the parties afterwards going to trial on the merits (*Seymour* v. *Bradfield*, 35 Barb. 49).

§ 55. [48.] *Answer of Title.*

In every action brought in a court of justice of the peace, where the title to real property shall come in question, the defendant may, either with or without other matter of defence, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. The justice shall thereupon countersign the same, and deliver it to the plaintiff.

See Cowen's Treatise on Justices' Courts, vol. 1, pp. 463 to 469, and vol. 2, pp. 272, 273, as to when it may be said that title comes in question.

e. An issue on a license to do an act on real estate which would otherwise be a trespass, does not present for trial "a claim of title to real property." (*Lawrence* v. *Barnum*, 4 Sand. 637; *Muller* v. *Bayard*, 15 Abb. 450; *Utter* v. *Gifford*, 25 How. 289.) To set up a license to do an act on real estate, is a very different thing from a claim of title (see 18 Wend. 569); and in an action for taking away rock from plaintiff's land, where the defendant by his answer admitted the plaintiff's title, and he alleged that he entered pursuant to a contract by which he was to remove the rock, and was to have the rock as part of his compensation, it was held that a claim of title to real property did not arise. (*O'Reilly* v. *Davies*, 4 Sand. 722.)

f. Title embraces the right to the possession, and everything but the bare,

naked possession. (*Ehle* v. *Quackenboss*, 6 Hill, 437.) But the question of actual possession is not a question of title. (*Fredonia Plank Road Co.* v. *Wait*, 27 Barb. 214; *Rathbone* v. *McConnell*, 20 Barb. 311.)

a. Where a plaintiff, in his complaint, averred the ownership and possession of a piece of land, and alleged an entry thereon by the defendant, with teams, &c., and the ploughing up and destroying the trees growing thereon, and the defendant in his answer, alleged that he entered and took the trees, &c., by virtue of an agreement made between the plaintiff and the defendant for the sale of the premises by the defendant to the plaintiff,—it was held that the title came in question (*Powell* v. *Rust*, 1 Code Rep. N. S. 172); but an answer setting up an entry and claim to land under an executory contract for sale, was held not to constitute a claim of title. (*Dolittle* v. *Eddy*, 7 Barb. 75.)

b. Where title to real estate is not pleaded, the justice is not ousted of his jurisdiction because it may be necessary to prove title in order to sustain the action, unless such title is disputed by the defendant. (*Bellows* v. *Sackett*, 15 Barb. 97; *Fredonia Plank Road Co.* v. *Wait*, 27 Barb. 214; *Adams* v. *Rivers*, 11 Barb. 390.)

c. In an action for obstructing a right of way, the defendant answered a general denial. On the trial, the defendant proved the plaintiff had the right of way, subject to certain restrictions; held, the title to real estate was not in question. (*Hastings* v. *Glens*, 1 E. D. Smith, 402.)

d. The question of title to land is, in all cases, a question of ownership. The question of title does not arise in an action to recover damages for the breach of an agrement to convey lands, when the only issue made by the pleadings is whether an inchoate right of dower in the wife of defendant was a subsisting incumbrance. (*Smith* v. *Riggs*, 2 Duer, 622.)

e. In an action for killing plaintiff's cows. the answer set up that the Harlem Railroad Company, being possessed of a tract of land in the centre of the Fourth avenue, granted the defendants permission to run their cars over a railway laid down on said tract, and that the cows, being unlawfully upon said tract, were killed by the engine of the defendants, while lawfully running upsaid tract. Held that title not in question. (*Longhurst* v. *New York and New Haven R. R. Co.* in the N. Y. Com. Pleas, General Term, July 1853, Daly and Woodruff, JJ.)

f. Where a party is charged with a liability arising out of his being owner of land, and he disclaims being the owner of that land, this raises a question of title. (*Regina* v. *Hardon*, 22 Law Jour. Rep., N. S., Q. B., 299; 18 Eng. Law and Eq. R. 406.)

g. Where the complaint alleged that the defendants unlawfully took and carried away a quantity of firewood, the property of, and in the possession of, the plaintiffs, and converted the same to their own use, the defendants answered, that such firewood was grown and cut upon the Tonawanda Reservation, in the county of Genesee; that such reservation is Indian lands, and is owned and occupied by the Seneca nation of Indians, and that they reside thereon; that the defendants are Seneca Indians, and occupy and reside on the said reservation, and are member of the said nation; and that in their own right as such Indians, they took, carried away, and converted said wood, as they lawfully might do. Held that the answer set up title to lands by the defendants. (*Smith* v. *Mitten*, 13 How. 325.)

h. Where the plaintiff claimed a *presumptive* right of way through the defendant's premises to reach premises in the rear, and in passing through the defendant's premises met with an accident occasioned, as alleged, by the defendant's negligence; the defendant, however, charging that the plaintiff had no right of way, and was a trespasser,—it was doubted whether or not title came in question. (*Roulston* v. *Clark*, 3 E. D. Smith, 367.)

i. In an action for damages from the bite of a dog, an allegation that the plaintiff when injured, was in a place where he had no right to be, does not put in issue a claim of title. (*Pierret* v. *Moller*, 3 E. D. Smith, 574.)

a. Where in an action by the assignee of a lessor of a lease in fee, against an assignee of the lease, to recover rent, the complaint alleged that the plaintiff became the owner of the rent, and became seized in fee of the estate in the demised premises, and the defendant denied all allegations of the complaint,—held that title came in question. (*Main* v. *Cooper*, 26 Barb. 468; 25 N. Y., 180.)

b. Where the action was in substance the former action of waste, and the complaint alleged a forfeiture and prayed a recovery of possession; held that title appeared in question on the face of the complaint. (*Sneyder* v. *Beyer*, 8 E. D. Smith. 235.)

c. In an action for falsely representing himself to have title, and thereby obtaining money and goods, a plea of the general issue was held to raise a question of title. (*Brooks* v. *Delrymple*, 1 Manning's Mich. R. 145.)

d. The title to land does not come in question in a suit to recover a tax paid by mistake by the plaintiff on a lot of the defendant's, the defendant's title to the lot being disputed on the trial. (*Nixon* v. *Jenkins*, 1 Hilton, 318.)

See note to section 304, *post.*

§ 56. [49.] (Am'd 1851, 1858.) *Undertaking to be given.*

At the time of answering, the defendant shall deliver to the justice a written undertaking, executed by at at least one sufficient surety, and approved by the justice, to the effect that if the plaintiff shall, within twenty days thereafter, deposit with the justice a summons and complaint in an action in the supreme court for the same cause, the defendant will, within twenty days after such deposit, give an admission in writing of the service thereof.

Where the defendant was arrested in the action before the justice, the undertaking shall further provide, that he will, at all times, render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable not exceeding one hundred dollars.

e. Where a defendant omitted, within the prescribed time, to admit service of a summons and complaint deposited by the plaintiff with a justice of the peace in pursuance of this section, and upon the plaintiff's bringing an action upon the undertaking deposited with the justice, the defendant moved in the supreme court for leave to admit service of the summons and complaint, and to stay the plaintiff's proceedings on the undertaking,—held, that the court had no power to grant such relief. There was no action pending until the service of the summons. (*Davis* v. *Jones*, 3 Code Rep. 63; 4 How. 340.)

f. It seems that it is not necessary for the plaintiff to give a notice to the defendant of the deposit of the summons and complaint with the justice, but the defendant is bound to ascertain for himself the fact of the same having been deposited, at the peril of losing his right to answer. (*Ib.*)

g. Where a defendant fails to comply literally with the terms of his undertaking filed under this (56th) section, omitting to give the written admission

of service of the summons and complaint, but puts in his answer in the supreme court, and the plaintiff accepts it without such admission, held a substantial performance of the undertaking, and the waiver does not affect the identity of the suits before the justice and in the supreme court. (*Wiggins* v. *Tallmadge*, 7 How. 404.)

a. It does not seem necessary, or proper, that the defendant should join in the undertaking; nor does it seem necessary that the undertaking should be under seal; or state any consideration; but it should state the place of residence of the surety, and be acknowledged by him. The surety must justify to the amount of $200. (*Thompson* v. *Blanchard*, 3 Coms. 335; and see 17 How. 394; 10 Abb. 454.)

b. The undertaking when approved, should, it is presumed, remain in the custody of the justice. Perhaps, in case of two actions and two undertakings with the same surety in each, such surety would have to justify to the amount of $400. (*Anon.* 4 How. 414.)

See note to section 60.

§ 57. [50.] (Am'd 1851, 1858.) *Action discontinued. Costs.*

Upon the delivery of the undertaking to the justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the supreme court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the justice may be recovered of the plaintiff.

§ 58. [51.] *If undertaking not given.*

If the undertaking be not delivered to the justice, he shall have jurisdiction of the cause, and shall proceed therein; and the defendant shall be precluded, in his defence, from drawing the title in question.

§ 59. [52.] (Am'd 1849.) *The same.*

If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the justice shall dismiss the action, and render judgment against the plaintiff for the costs.

c. The law was the same before the code. (Willard, J. *M'Namara* v. *Bilby*, 4 How. 44, and see note to section 55.)

d. Where it appears on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title is disputed, the parties, by consenting that the justice shall adjucate on the disputed title, do not confer

jurisdiction. (*Stryker* v. *Mott*, 6 Wend. 465; and see *Powell* v. *Rust*, 1 Code Rep. N. S. 172.) To entitle a defendant to a dismissal, he must call the justice's atttention specifically to the objection. (*Brown* v. *Schofield*, 8 Barb. 239.)

§ 60. [53.] (Am'd 1851, 1858.) *Another action may be brought.*

When a suit before a justice shall be discontinued by the delivery of an answer and undertaking, as provided in sections 55, 56, and 57, the plaintiff may prosecute an action for the same cause in the supreme court, and shall complain for the same cause of action only on which he relied before the justice; and the answer of the defendant shall set up the same defence only which he made before the justice.

a. On a new action being brought the complaint and answer must be as before the justice, without any further or additional pleading (*M'Namara* v. *Bitely*, 4 How. 44); and the defendant cannot amend his answer in the supreme court *of course*, in matters of substance. (*Cusson* v. *Whalon*, 1 Code Rep. N. S. 27; *Wendell* v. *Mitchell*, 5 How. 424.)

b. If the plaintiff complains for a different cause of action, or the defendant sets up a different defence from that used before the justice, the remedy of the adverse party is by motion to strike out the pleading, and require it to be conformed to that in the court below. (*Brotherson* v. *Wright*, 15 Wend. 240; *Tuthill* v. *Clark*, 11 *ib.* 642.) But while the plaintiff is restricted to the same *cause* of action, the restriction does not extend to matters of *form*; and his complaint in the supreme court may be in a form adapted to that court, although it may differ from the form of his complaint before the justice. The test is, does it state the same *cause of action?* (*People* v. *Albany Com. Pleas*, 19 Wend. 123.) A similar rules applies to the answer, and if it state the same *ground of defence* a mere difference in form between it and the answer before the justice will not invalidate it. The defendant may abandon part of his defence before the justice, when he comes to answer in the supreme court, and yet the defence be the *same*. (*Wiggins* v. *Tallmadge* 7 How. 404.)

c. The suit for the same cause in the supreme court, is an action originally commenced in a court of a justice of the peace. (*Brown* v. *Brown*, 6 How. 320; *Pugsley* v. *Kesselburgh*, 7 *ib.* 402; 10 N. Y. 420; *Wiggins* v. *Tallmadge*, 7 How. 404.)

d. An affidavit in support of a motion to dismiss an appeal to the court of appeals from a judgment of the supreme court, because the suit was originally commenced in a court of a justice of the peace, must show the justice was ousted of jurisdiction by the filing an undertaking required by section 56, as well as by the plea of title (*Lalliette* v. *Van Keuren*, 7 How. 409). The record need not show the identity of the action in the supreme court with that before the justice. The identity may be shown by affidavit (*Pugsley* v. *Kesselburgh*, 10 N. Y. 420). See § 11, *ante*.

e. In an action prosecuted before a justice of the peace, where a plea of title was interposed, and proceedings had for continuing the prosecution in the county court, it was not necessary in order to give the county court jurisdiction that it should appear that the defendant was a resident of the county when the action was commenced (*Clyde Plank Road Co.* v. *Baker* or *Parker*, 12 How. 371; 22 Barb. 323).

§ 61. [54.] (Am'd 1851, 1858.) *Costs.*

If the judgment in the supreme court be for the plaintiff, he shall recover costs; if it be for the defendant, he shall recover costs, except that upon a verdict he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial.

See section 304, post.
As to the mode of entering judgment, see section 274 of this code.

§ 62. [55.] (Am'd 1849, 1851, 1858, 1860.) *Answer of title as to part. Transfer of cases to supreme court.*

If, in an action before a justice, the plaintiff have several causes of action, to one of which the defence of title to real property shall be interposed, and as to such cause the defendant shall answer and deliver an undertaking, as provided in sections fifty-five and fifty-six, the justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action therefor in the supreme court. As to the other causes of action, the justice may continue his proceedings.

All actions pending in any County Court, on the seventh day of May, eighteen hundred and fifty-eight, in all cases in which a plea of title was interposed in actions originally commenced in a Justice's Court, are transferred to and vested in the Supreme Court, with full power and jurisdiction to proceed therein, as if commenced in said Supreme Court, by reason of a plea of title having been interposed in a Justice's Court in like cases.

§ 63. [56.] (Am'd 1849.) *Docketing justices' judgments.*

A justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket; and from that time, the judgment shall be a judgment of the county court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered; except that it shall be a lien only from the time

of filing and docketing the transcript. But no such judgment for a less sum than twenty-five dollars, exclusive of costs, hereafter docketed, shall be a lien upon, or enforced against, real property.

See note to section 68, *post*.

* § 64. [57.] (Am'd 1849, 1851, 1852, 1860.) *Rules.*

The following rules shall be observed in the courts of justices of the peace:

1.

The pleadings in these courts are:

1. The complaint by the plaintiff;
2. The answer by the defendant.

2.

The pleadings may be oral or in writing; if oral, the substance of them shall be entered by the justice in his docket; if in writing, they shall be filed by him, and a reference to them shall be made in the docket.

3.

The complaint shall state, in a plain and direct manner, the facts constituting the cause of action.

4.

* The answer may contain a denial of the complaint, or of any part thereof, and also notice in a plain and direct manner of any facts constituting a defence.

5.

Pleadings are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended.

6.

Either party may demur to a pleading of his adversary, or any part thereof, when it is not sufficiently explicit to enable

**Amended—See Appendix.*

him to understand it, or it contains no cause of action or defence although it be taken as true.

7.

If the court deem the objection well founded, it shall order the pleading to be amended; and if the party refuse to amend, the defective pleading shall be disregarded.

8.

In case a defendant does not appear and answer, the plaintiff cannot recover without proving his case.

9.

In an action or defence founded upon an account, or an instrument for the payment of money only, it shall be sufficient for a party to deliver the account or instrument to the court, and to state that there is due to him thereon from the adverse party a specified sum, which he claims to recover or set off.

10.

A variance between the proof on the trial and the allegations in a pleading, shall be disregarded as immaterial, unless the court shall be satisfied that the adverse party has been misled to his prejudice thereby.

11.

The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, when by such amendment substantial justice will be promoted. If the amendment be made after the joining of the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party.

12.

Execution may be issued on a judgment, heretofore or hereafter rendered in a justice's court, at any time within five

years after the rendition thereof, and shall be returnable sixty days from the date of the same.

13.

If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect, and be executed in the same manner, as other executions and judgments of the county court, except as provided in section 63.

14.

The court may, at the joining of issue, require either party, at the request of the other, at that or some other specified time, to exhibit his account on demand, or state the nature thereof as far forth as may be in his power, and in case of his default, preclude him from giving evidence of such parts thereof as shall not have been so exhibited or stated.

15.

The provisions of this act, respecting forms of action, parties to actions, the rules of evidence, the times of commencing actions, and the service of process upon corporations, shall apply to these courts.

The defendant may, on the return of process, and before answering, make an offer in writing to allow judgment to be taken against him for an amount, to be stated in such offer, with costs. The plaintiff shall thereupon, and before any other proceedings shall be had in the action, determine whether he will accept or reject such offer. If he accept the offer, and give notice thereof in writing, the justice shall file the offer and the acceptance thereof, and render judgment accordingly. If notice of acceptance be not given, and if the plaintiff fail to obtain judgment for a greater amount, exclusive of costs, than has been specified in the offer, he shall not recover costs, but shall pay to the defendant his costs accruing subsequent to the offer.

a. **The Complaint.**—The complaint need not correspond with the summons in every respect. Thus, where the summons described the action as "a civil action for damage and false representation in the sale of a horse," and the complaint was for a breach of warranty in the sale of a horse, the court said, "the complaint was in a civil action, and that was enough." (*Delancey*

v. *Nagle*, 16 Barb. 97.) The complaint should give a plain statement of the cause of action; a complaint for "one quarter's rent of" premises, describing them and stating the amount claimed, is sufficient. (*Hubbell* v. *Clark*, 1 Hilton, 67). So in an action on a premium note, an averment in the complaint, after setting out the note, that "the company did in the years 1850–1855, make assessments upon the said notes and required the defendants to pay a certain portion thereof, which assessment the defendants have neglected and refused to pay," was held a sufficient averment of the making the assessment and of a demand and refusal, in order to constitute a cause of action. If the defendant wished more particular information, he should have applied to have the pleading amended (*St. Lawrence Mut. Ins. Co.* v. *Page*, 1 Hilton, 430). Where the complaint was "for money had and received, damages $41," the court, on appeal, held it insufficient, and that the claim should have been stated according to the facts; but inasmuch as the cause had been tried on the merits, an amendment was ordered (*Cushingham* v. *Phillips*, 1 E. D. Smith, 418). A complaint on a sealed instrument, need not state the sealing, it is sufficient if the instrument is referred to so as to be identified (*Smith* v. *Kerr*, 3 Coms. 144; *Mosher* v. *Lawrence*, 4 Denio, 419). A complaint for taking property, not alleging it to have been plaintiff's property held sufficient (*Willard* v. *Bridge*, 4 Barb. 361; *Copley* v. *Rose*, 2 Coms. 115). A plaintiff may present his cause of action in as many aspects as he can, if they are not inconsistent with each other, and all exhibit causes of action which may be joined (*Wentworth* v. *Buhler*, 3 E. D. Smith, 305); and there is no particular mode in which separate causes of action are to be separated and distinguished from each other. Any mode which apprises the defendant of what is intended, is sufficient (*Hall* v. *M'Kechnie*, 22 Barb. 244); and where a complaint is both in contract and in tort, and is not demurred to, the plaintiff may recover in either form (*Willard* v. *Bridge*, 4 Barb. 361; see *Mayor of N. Y.* v. *Mason*, 1 Abb. 344; *Burdick* v. *M'Ambly*, 9 How. 117).

a. If the complaint is not sufficiently explicit, the defendant should demur; a justice has no authority to strike out a pleading in whole or in part (*Mayor of N. Y.* v. *Mason*, 1 Abb. 344).

b. Where the complaint claimed damages "one hundred dollars *and over*," but judgment was taken for less than $100 held no error, the words *and over* being surplusage (*Rockwell* v. *Perine*, 5 Barb. 573).

c. **The Demurrer.**—A demurrer is the only proper mode of objecting to a pleading in a justice's court (*Mayor of N. Y.* v. *Mason*, 1 Abb. 334; 4 E. D. Smith, 142). The demurrer need not specify the grounds of demurrer (*Stern* v. *Drinker*, 2 E. D. Smith, 401). Objections to the complaint not taken by demurrer are waived (*Willard* v. *Bridge*, 4 Barb. 361), and after an issue of fact it is too late to raise any objection which might have been raised by demurrer (*Hilliard* v. *Austin*, 17 Barb. 141; *Hall* v. *McKechnie*, 22 Barb. 244; and 1 E. D. Smith, 615; 412; 10 How. 276; 5 Sand. 210). But where it appears on the face of the complaint that it is defective for non-joinder of another as plaintiff, the objection for that cause is not waived by not demurring, and may be taken on the trial (*Rice* v. *Hollenbeck*, 19 Barb. 664; contra *Tripp* v. *Riley*, 15 *id.* 333).

d. The language of subdivision 7 "is imperative, and must apply to and control every case in which the defective pleading is susceptible of amendment (*Turck* v. *Richmond*, 13 Barb. 533). The right to amend is peremptory, and not discretionary (*Hilliard* v. *Austin*, 17 Barb. 141; *Stern* v. *Drinker*, 2 E. D. Smith, 402; *Smith* v. *Mitten*, 13 How. 326);" and the allowance of the demurrer *must* always be with leave to amend (*id.*; *Glasse* v. *Keulson*, 3 Abb. 100). If the party refuse to amend, the defective pleading may be disregarded (*id.*). Where the defendant on the decision of a demurrer against him puts in an answer, he thereby waives the demurrer; and the appellate court cannot review the decision of the justice in overruling the demurrer (*Irvine* v. *Forbes*, 11 Barb. 587; *Harper* v. *Leal*, 10 How. 276).

Sections 143 and 148 of the Code do not apply to proceedings in justices' courts (*Cornell* v. *Smith*, 2 Sand. 290; 3 Code Rep. 201).

a. **The Answer.**—"The notice authorized by subdivision 4 is not annexed to the answer, but is contained in it; no demurrer is allowed to it." (*Jewett* v. *Jewett*, 6 How. 190.)

b. An answer denying any knowledge or information of the matters alleged in the complaint, is not permissible. (*Dennison* v. *Carnahan*, 1 E. D. Smith, 144.)

c. By an answer on the merits, the defendant waives all objections which would go only in abatement of the action; and this notwithstanding he may have previously taken the objection, either in the form of a motion to dismiss the complaint, or by a demurrer, which has been overruled. (*Andrews* v. *Thorp*, 1 E. D. Smith, 615; *Monteith* v. *Cash*, ib. 412; *Harper* v. *Leal*, 10 How. 276; *Hilliard* v. *Austin*, 17 Barb. 141; *Hall* v. *McKechnie*, 22 Barb. 244; and see *Gardner* v. *Clark*, 6 *ib.* 449; *Bridge* v. *Payson*, 5 Sand. 210; and note to § 148, *post.*)

d. If a defendant unite in one answer matter in abatement and matter in bar, the court may disregard the former and try the case upon the merits. (*Monteith* v. *Cash*, 1 E. D. Smith, 412; *Andrews* v. *Thorp*, ib. 615; see, however, *post*, note to § 150.)

e. Can a defendant file a supplemental answer? (*Russell* v. *Ruckman*, 3 E. D. Smith, 419; *Price* v. *Peters*, 15 Abb. 197; *Ressequie* v. *Brownson*, 4 Barb. 541.)

f. It is sufficient, unless objected to as indefinite, for the defendant to plead a general denial and give notice that he will prove on the trial that the plaintiff is largely indebted to him for board and washing, and for money paid, and that he will claim a judgment for $100 (*Bell* v. *Davis*, 8 Barb. 210).

g. Where a defendant has interposed a defence, nothing short of his *express* consent will be a waiver of it (*Penfield* v. *Jacobs*, 21 Barb. 335).

h. The allegation of new matter in the answer is deemed controverted by the plaintiff, and it is competent for him to countervail it by evidence either in direct denial or of new matter by way of avoidance; therefore, where the defence was infancy, the plaintiff may, without replying or amending his complaint, prove the making of a new promise by the defendant after he attained majority (*Hodges* v. *Hunt*, 22 Barb. 150).

i. Can a defendant recover on a counter claim? See *Stewart* v. *Bocks*, 3 Abb. 118, and § 150, *post.*

j. **Verification.**—The provision for verifying pleadings is not applicable to oral pleadings (*Williams* v. *Price*, 2 Sand. 229). But an answer of title must be in writing (See section 55).

k. **Construction.**—Great latitude is allowed in pleadings in courts of justices of the peace; and the courts construe them liberally (*Ross* v. *Hamilton*, 3 Barb. 609; *Willard* v. *Bridge*, 4 Barb. 361; *Ressequie* v. *Brownson*, id. 543; *Smith* v. *Mitten*, 13 How. 326).

l. **Amendments.**—Justices' courts possess in general the same power as to amendments as courts of record (*Fulton* v. *Heaton*, 1 Barb. 552; *Agreda* v. *Faulberg*, 3 E. D. Smith, 178); but it is not the duty of the justice, nor proper for him, to volunteer to make amendments not moved for by either party (*Loyd* v. *Fox*, 1 E. D. Smith, 102). Section 173 is inapplicable to justices' courts (*Gates* v. *Ward*, 17 Barb. 427; *Webster* v. *Hopkins*, 11 How. 148); and the complaint cannot be amended by adding a plaintiff or defendant (*id.*) but it may by adding a new cause of action (*Babcock* v. *Lipe*, 1 Denio, 139); or by reducing the amount of damages claimed (*Wooley* v. *Wilber*, 4 Denio, 570).

m. Where an answer is defective the justice should allow it to be amended (*Smith* v. *Mitten*, 13 How. 325); and an additional defence may be interposed (*Colvin* v. *Corwin*, 15 Wend. 557,) but not on the trial (*Tattersall* v. *Hass*, 1 Hilton, 56).

n. Where, on the return day of a summons, the justice on the plaintiff's motion amended the summons by striking out the name of one of the plain-

tiffs named therein, issue was joined and the cause adjourned. On the adjournment day a motion was made on the part of the plaintiff, to have the name of the plaintiff which had been previously struck out, restored. The motion was allowed, and the plaintiff obtained judgment. The supreme court on appeal reversed the judgment, on the ground that the justice ought not to have allowed the restoration of the name of the plaintiff previously stricken out (*Gates* v. *Ward*, supra).

a. A justice may authorize a constable to amend his return. (*Perry* v. *Tynen*, 22 Barb. 137.)

b. On a complaint on a special contract the plaintiff may, in the absence of all objection, give evidence, and recover on a *quantum meruit*; and if any objection is raised at the trial, the justice may amend (*Irvine* v. *Wortendyke*, 2 E. D. Smith, 374). In an action for false imprisonment, it was held to be improper for the justice to allow an amendment of the complaint by adding a count for malicious prosecution, after the plaintiff had rested his case and failed to sustain his action in the original form (*Waldheim* v. *Sichel*, 1 Hilton, 45).

c. An application to amend is addressed to the discretion of the court, and though a justice has power to allow amendments, error will not lie from a decision refusing an application to amend (*White* v. *Stevenson*, 4 Denio, 193). If the application be denied on the ground that the justice had no power to grant the motion, still the judgment will not be reversed unless it distinctly appear that the amendment would have been granted but for the supposed want of power (*id.*; and see *Sammis* v. *Brice*, *id.* 576); or that injustice will result (*Tattersall* v. *Hass*, 1 Hilton, 56).

d. **Variance.**—A recovery may be had upon a *quantum meruit* for work and labor proved to have been performed, although the complaint is upon a special contract only which is not put in evidence, provided the case is submitted without objection and decided apparently with the whole merits before the court (*Irvine* v. *Wortendyke*, 2 E. D. Smith, 374). And a plaintiff may recover on a complaint simply for work and labor, although it appears on the trial that a special contract existed, and that the work was done under it (*Harris* v. *Story*, id. 363); thus, where complaint alleged a sum due for labor rendered at a specified time, the answer was a general denial; on the trial the proofs disclosed the existence of a written contract between the parties, which was offered in evidence by the defendant, and excluded as inadmissable under the pleadings,—it was held that it ought to have been received. (*Id.*) After taking time to decide, and the objection not being taken by the defendant, the justice cannot give judgment for a variance (*Shall* v. *Lathrop*, 3 Hill, 237.)

e. **Plaintiff must prove his Case.**—Notwithstanding that the defendant does not appear, the plaintiff to entitle him to a judgment must give *prima-facie* evidence of his right to recover, which must in case of appeal, appear by the return (*Alburtis* v. *M'Cready*, 2 E. D. Smith, 39; *Howard* v. *Brown*, id. 247; *Ely* v. *O'Leary*, id. 355; *Perkins* v. *Stebbins*, 29 Barb. 523; *Raymond* v. *Traffarn*, 12 Abb. 52. And if on an appeal from a judgment taken in the absence of the defendant, it appear that the evidence was not *prima facie* sufficient to support the judgment, the appellate court will reverse it. (*Howard* v. *Brown*, 2 E. D. Smith, 247.) Thus in an action to recover for services in watching a ship, the defendant did not appear in the court below, and the plaintiff merely proved the rendition of the service and its value, but gave no proof of his employment by the defendant, or that defendant derived any benefit from the service rendered—the plaintiff had judgment. The court on appeal reversed the judgment on the sole ground that the plaintiff had not made out a *prima facie* case against the defendant. (*Id.*) Although the plaintiff cannot recover without proving his case, he need not disprove any defence that must be specifically pleaded to be made available to the defendant. All that the plaintiff is obliged to prove in such a case is, enough to entitle him to recover if the allegations in the complaint were denied generally by the answer (*Humphrey* v. *Persons*, 23 Barb. 314). Thus if the action is to recover for a cause of action apparently barred by the statute to limitation, the plaintiff need not show that the statute is not, in fact, a bar to his recovery. (*Id.*) But where the defendant did

not deny plaintiff's claim but merely alleged a set off, which was not proved, held that plaintiff was entitled to judgment without proving his claim. (*Gregory* v. *Trainer*, 1 Abb. 209; 4 E. D. Smith, 58.) Demands contested on the pleadings, but admitted on the trial are "proved." (*Stilwell* v. *Staples*, 3 Abb. 365.)

a. The justice may suspend the trial of a cause in progress before him, in order, in the absence of the defendant, to hear the plaintiff's evidence and render judgment (*Beach* v. *M'Cann*, 4 Abb. 18); but where he is induced to do this by statements which are untrue, that defendant is not intending to appear, the judgment rendered by him in favor of the plaintiff will be reversed. (*Id.*)

b. **Plaintiff not appearing after defence of counter claim.**—Where, after a defendant had set up a counter-claim, and had commenced his proofs, the cause was adjourned by consent, and on the adjournment day the plaintiff failed to appear, the justice proceeded with the trial, and rendered judgment for the defendant for his counter-claim,—it was held that the justice erred, and that he ought merely to have dismissed the action (*Norris* v. *Bleakley*, 3 Abb. 107).

c. **Waiver of jury.**—A party who has demanded a jury may waive it (*Hosford* v. *Carter*, 10 Abb. 452). A jury may be waived by non-appearance on the adjournment day, or by failure to pay jury fees in due season (*Kilpatrick* v. *Carr*, 3 Abb. 117); and by consent a cause may be tried by a jury of less than six jurors (*Carman* v. *Newell*, 1 Denio, 25).

d. Where after a trial by a jury had been commenced and adjourned, and on the adjournment day one of the jurors could not attend by reason of sickness, the defendant refused to proceed to try before the remaining five jurors, to have a talesman called, to have a new venire returnable immediately, or to take an adjournment on terms,—held the justice did right to proceed at the plaintiff's instance with the trial without a jury (*Babcock* v. *Hill*, 35 Barb. 52).

e. If a venire is not returned at the time appointed, another should be issued, and the justice cannot proceed to try without a jury unless the jury is waived (*Blanchard* v. *Richley*, 7 Johns. 198; *Sebring* v. *Wheedon*, 8 *id.* 460). Suppressing venire by party demanding it, held a waiver of a jury (*Coon* v. *Snyder*, 19 Johns. 384).

f. **Appearance on the trial.**—An attorney at law or any other person who is deputized by a justice of the peace to serve and does serve the summons in the action, is prohibited from acting as counsel on the trial, by the statute which forbids a constable who serves the original or jury process, from acting as counsel at the trial (*Knight* v. *Odell*, 18 How. 279).

g. **Discontinuance because justice a necessary witness.**—On a party making an affidavit that the justice is [1] a material and *necessary* witness for him, [2] the facts he expects to prove by the justice, and [3] on the justice being satisfied that he is a material witness, the action is to be discontinued (*Hopkins* v. *Cabrey*, 24 Wend. 264; *B'd of Excise of Saratoga* v. *Doherty*, 19 How. 46; *Young* v. *Scott*, 3 Hill, 32). The justice is not a necessary witness when the facts can be proved otherwise than by calling him (*Murtha* v. *Walters*, 2 Sand. 517) or if the opposite party will admit the facts sought to be proved by the justice (*Van De Veer* v. *Stanton*, 1 Cow. 84). With these exceptions, on its being shown that the judge is a material and necessary witness, he cannot refuse to dismiss the cause, on the ground "that he knows nothing material between the parties, and has no recollection of the facts the defendant alleges he expects to prove by him" (*Hopkins* v. *Cabrey*, 24 Wend. 264) or on the ground that "he can give no evidence of any thing except what appears on his minutes." (*Brown* v. *Brown*, 2 E. D. Smith, 154).

h. **Objections to jury.**—Any irregularity in summoning the jury is ground for challenge to the array, and must be made in the first instance. If no objection be made until after the jury are impanneled and sworn, the objection comes too late, and the appellate court will not interfere unless in a case where injustice has been done (*Mayor of New York* v. *Mason*, 1 Abb. 352; 4 E. D. Smith, 142); and all objection to the qualification of a juror is waived unless the objection is taken on the trial (*Clark* v. *Vranken*, 20 Barb. 278).

a. A justice cannot, on his own motion, object to the panel and issue a new venire (*Cross* v. *Moulton*, 15 Johns. 469), but he may on his own motion exclude a drunken man from the jury (*Bullard* v. *Spoor*, 2 Cow. 430).

b. It is good cause of challenge to the array that the jury was summoned by a constable who appeared for either party (*Watkins* v. *Weaver*, 10 Johns. 107).

c. An alien is not qualified to serve as a juror (*Borst* v. *Beecker*, 6 Johns. 382); nor is a tenant of either party (*Hathaway* v. *Helmer*, 25 Barb. 29); nor one who has not the "property qualification" (*Fenwick* v. *Parker*, 8 Code R. 254). The fact of his qualification may be tried by examining the juror himself (*Ogden* v. *Parks*, 16 Johns. 180.)

d. **Examination of Witnesses.**—A justice has discretion in restricting a party from a frivolous or vexatious examination of a witness. (*Peck* v. *Richmond*, 2 E. D. Smith, 380); and as to the order of proof and rebutting testimony, and as to recalling a witness and re-opening case (*Burch* v. *Westfall*, 5 N. Y. Leg. Obs. 178; *Dunckle* v. *Kocker*, 11 Barb. 387; *Breidert* v. *Vincent*, 1 E. D. Smith, 542; *Harpell* v. *Curtis*, *id.* 78; *Heidenheimer* v. *Wilson*, 31 Barb. 636); and as to striking out improper answers of witnesses, (*Buck* v. *Waterbury*, 13 Barb. 116); and the justice is to judge whether a witness is competent to testify as an expert, but his judgment in this respect may be reviewed (*Wiggins* v. *Wallace*, 19 Barb. 388).

Whether a witness shall be recalled or not after the parties have closed their case rests in the discretion of the court (*Dunckle* v. *Kocker*, 11 Barb. 387.)

e. A justice has no power to open a case for further hearing after the day of trial is passed, and the cause has been submitted by the plaintiff, and the witnesses have departed (*Harden* v. *Woodside*, 2 E. D. Smith, 37; *Alburtis* v. *M'Cready*, *id.* 39); but where, after the parties had once rested, but before the case had been finally submitted, and while the parties and their witnesses were all present, additional evidence was admitted,—it was held that the admitting of such evidence rested in the discretion of the justice; and the court on appeal refused to reverse the judgment for such a departure from the usual course of proceeding, it not appearing that the opposing party was prejudiced thereby. (*Harpell* v. *Curtis*, 1 *id.* 78; *Prikert* v. *Dexter*, 12 Wend. 153.) After a motion for a nonsuit, the justice may refuse to admit any further evidence (*Reed* v. *Barber*, 3 Code Rep. 160); but if a defendant, after a motion for a nonsuit, himself supplies the evidence on the want of which his motion was founded, he cannot afterwards have a reversal upon the technical ground that such evidence was not before the court when the nonsuit was asked. (*Hyland* v. *Sherman*, 2 E. D. Smith, 235.)

f. Section 399 is applicable to justices' courts as a *rule of evidence.* (*Fulon* v. *Keese*, 8 How. 341; *Gates* v. *Ward*, 17 Barb. 427; *Collins* v. *Knapp*, 18 *id.* 532; *Pelham* v. *Bryant*, 10 How. 60; contra, *Warren* v. *Helmor*, 8 *id.* 419)

g. Where a witness was taken sick pending his examination, and the trial was in consequence adjourned—on the adjournment day the party who had called the witness did not produce him, nor excuse his non-appearance, held that the justice could not for that reason strike out his previous testimony. (*Clements* v. *Benjamin*, 12 Johns. 299.)

h. If a witness is produced and sworn before a justice, it is immaterial that a written statement prepared by him out of court is received as his testimony. (*Wesson* v. *Chamberlain*, 3 N. Y. 331.)

i. It is in the discretion of the justice to permit or refuse to permit leading questions to be put to witnesses, and for an exercise of his discretion in this respect, unless plainly an abuse, his judgment will not be reversed. (*Seymour* v. *Bradfield*, 35 Barb. 49.)

j. **Nonsuit.**—A justice may nonsuit the plaintiff (*Clements* v. *Benjamin*, 12 Johns. 299). But except where plaintiff does not appear to hear verdict (*Douglass* v. *Blackman*, 14 Barb. 381) not after the case has been submitted to the jury or after the cause has been submitted or the justice takes time to consider. (*Young* v. *Hubbell*, 3 Johns. 430; *Elwell* v. *McQueen*, 10 Wend. 520; *Shall* v. *Lathrop*, 3 Hill, 237; *Hess* v. *Beekman*, 11 Johns. 511; *Young* v. *Rum-*

mell, 5 Hill, 60; *Peters* v. *Dissey*, 3 E. D. Smith, 115); unless by stipulation of the parties (*Smith* v. *Compton*, 20 Barb. 262).

a. **Charging Jury.**—The justice may instruct the jury as to the law, or leave them to find a verdict without instructions. If he does not instruct them, they are judges of law and fact, if he wrongly instructs them it is ground for reversal. (*Trustees of Penn Yan* v. *Thorne*, 6 Hill, 326; *Chapman* v. *Fuller*, 7 Barb. 70; *Delancey* v. *Nagle*, 16 *id.* 96; *Stroud* v. *Butler*, 18 *id.* 327; *Pettit* v. *Ide*, 12 Abb. 44.)

b. **Deliberation of Jury.**—By consent the jury may retire without any one to attend them. *Tower* v. *Hewitt*, 11 Johns. 134.) But if any one is sworn to attend them he must be a constable (*Staley* v. *Barhite*, 2 Cal. 221); and this, too, whether the jury retire or are left in the court room to deliberate. (*Douglass* v. *Blackman*, 14 Barb. 381.) That the constable attending the jury acted as counsel for one of the parties, is not error, if the other party did not object. *Tallman* v. *Woodworth*, 2 Johns. 385.) Error in the oath administered to the person attending the jury held ground for reversal. (*Day* v. *Wilber*, 2 Cal. 134; *Herrick* v. *Bedford*, 3 *id.* 140).

c. After the jury have retired it is error for the justice, unless with the consent of the parties, to answer enquiries put by the jury (*Bunn* v. *Croul*, 10 Johns. 239; *Taylor* v. *Betsford*, 13 *id.* 487; *Moody* v. *Pomeroy*, 4 Denio, 115), or to give them his minutes (*Neil* v. *Abel*, 24 Wend. 185); or to enter the jury room, without answering any questions (*Benson* v. *Clark*, 1 Cow. 258; but see *Thayer* v. *Van Vleet*, 5 Johns. 111); consent to the justice entering the jury room is not implied by the parties failing to object. (*Moody* v. *Pomeroy*, 4 Denio, 115, citing 13 Johns. 487; 1 Hill, 61; 7 Johns. 200; 13 Wend. 274.) By consent of parties the justice after the jury have retired may re-examinne a witness before them (*Brown* v. *Cowell*, 12 Johns. 384; *Keeler* v. *Lockwood*, Hill and Den. Sup. 137); read testimony to them (*Hancock* v. *Salmon*, 8 Barb. 564; *Whitney* v. *Orim*, 1 Hill, 61); and a consent that justice may enter the jury room implies a consent to read testimony (id.): so where the jury desired to examine a witness further, the defendant objected, but the justice permitted the examination, and the defendant heard all that transpired, held no ground for reversal (*Rogers* v. *Moulthrop*, 13 Wend. 274); nor is it ground for reversal that the constable attending the jury, urged them to give the verdict as it was given. (*Baker* v. *Simmons*, 29 Barb. 198.) But furnishing the jury with the minutes of the testimony taken by the counsel of the prevailing party, is ground for reversal. (*Durfee* v. *Eveland*, 8 Barb. 46.) Circulating spirituous liquors among a jury, even with consent of parties, is ground for reversal (*Kellogg* v. *Wilder*, 15 Johns. 455; *Rose* v. *Smith*, 4 Cow. 17), but not if done during a suspension of the trial (*Dennison* v. *Collins*, 1 Cow. 111).

d. **Verdict.**—It is error to receive a verdict if no one is *present* on behalf of the plaintiff. He should be called when the jury are prepared to render their verdict, and if he does not appear a judgment of non-suit may be entered (*Douglass* v. *Blackman*, 14 Barb. 381). If the plaintiff is present, and is called when the jury render their verdict, no one appearing and answering for him will not vitiate the judgment (*McEachron* v. *Randles*, 34 Barb. 301); and judgment will not be reversed because the return omits to state that the plaintiff was called when the jury came into court to render their verdict (*Warring* v. *Loomis*, 4 Barb. 485). The verdict may be received on Sunday (*Houghtaling* v. *Osborn*, 15 Johns. 119). There cannot be a special verdict (*Wylie* v. *Hyde*, 13 Johns. 249). Verdict of "no cause of action" is a verdict for defendant (*Felter* v. *Mulliner*, 2 Johns. 181); and a verdict for defendant six cents damages and six cents costs is a verdict for defendant (*Goodenow* v. *Travis*, 3 Johns. 427). A verdict for plaintiff for $10 and interest from a day specified is sufficient; the justice may compute the interest (*Page* v. *Cady*, 1 Cow. 115). A verdict for "one mill" damages is a nullity (*Brown* v. *Smith*, 3 Cal. 81). The jury may reconsider their verdict before it is entered (*Blackley* v. *Sheldon*, 7 Johns. 32). The verdict, although no judgment is entered on it, is a bar to a second action (*Felter* v. *Mulliner*, 2 Johns. 181; *Young* v. *Overacker*, *id.* 191; *Hess* v. *Beck-*

man, 11 *id.* 457). The jury need not find for costs; they follow of course (*Brown* v. *Smith*, 3 Cai. 81; *Blake* v. *Millspaugh*, 1 Johns. 316).

a. **Verdict.**—Where the jury assess damages beyond the jurisdiction of the justice, or for an excessive amount, or where the party is not entitled to any, such damages, or the excess, may be remitted (*Burger* v. *Kortright*, 4 Johns. 414; *Clark* v. *Denure*, 3 Denio, 319; *Barber* v. *Rose*, 5 Hill, 76; *Fish* v. *Dodge*, 4 Denio, 311; *Putnam* v. *Shelop*, 12 Johns. 435); but judgment was reversed for excessive damages (*Haight* v. *Badgeley*, 15 Barb. 499).

b. On a conflict of evidence, the verdict of the jury is conclusive (*McDonald* v. *Edgerton*, 5 Barb. 560; *Dunckle* v. *Kocker*, 11 *id.* 387; *Rogers* v. *Ackerman*, 22 *id.* 134); but a verdict will be set aside that has no evidence to support it, or that is contrary to the uncontradicted testimony in the case (*Rathbone* v. *Stanton*, 6 Barb. 141; *Fish* v. *Skut*, 21 Barb. 333).

c. Where the jury do not agree, the parties may waive the provisions of law prescribing the time within which a venire for a second jury should be returnable (*Fiero* v. *Reynolds*, 20 Barb. 275).

d. **Judgment.**—Where the trial is before a jury, the justice should render judgment and determine the amount of costs, not later than the same day on which the verdict is rendered; otherwise he loses jurisdiction of the cause, and judgment afterwards rendered is void (*Sibley* v. *Howard*, 3 Denio, 72; *Hall* v. *Tuttle*, 6 Hill, 48; *Beattie* v. *Qua*, 15 Barb. 132); and where the trial is without a jury, the justice must render judgment within four days, or the action is discontinued (*Watson* v. *Davis*, 19 Wend. 371; *Young* v. *Rummell*, 5 Hill, 60; 7 *id.* 503; *Wiseman* v. *Panama R. R. Co.*, 1 Hilton, 300; and see *Heidenheimer* v. *Wilson*, 31 Barb. 636). If the fourth day is a Sunday, the judgment must be rendered on the third day (*Bissell* v. *Bissell*, 11 Barb. 96). The judgment must be declared by some official act; deciding in the mind is not sufficient (*Seaman* v. *Ward*, 1 Hilton, 52); but making a memorandum on the papers is sufficient (*Walrod* v. *Shuler*, 2 Coms. 134).

e. Judgment may be rendered on a Saturday against a seventh-day Baptist (*Mazon* v. *Annas*, 1 Denio, 204); and judgment may be rendered on the day of a general election in a cause tried and submitted on a previous day (*Rice* v. *Mead*, 22 How. 445); but judgment cannot be entered on a Sunday (*Houghtaling* v. *Osborn*, 15 Johns. 119).

f. A justice cannot decide a case on his own knowledge (*Burlingham* v. *Dayer*, 2 Johns, 189; *Rosekrans* v. *Van Antwerp*, 4 *id.* 228; *Blanchard* v. *Richley*, 7 *id.* 198; and see *Reed* v. *Gillet*, 12 *id.* 296; *Locke* v. *Smith*, 10 *id.* 250; *Wheeler* v. *Lampman*, 14 *id.* 481; *Green* v. *Angel*, 13 *id.* 469; *Sprague* v. *Shed*, 9 *id.* 140; *Cornell* v. *Moulton*, 3 Denio, 12; *McAllister* v. *Sexton*, 4 E. D. Smith, 41), nor be examined as a witness unless by consent (*Perry* v. *Weyman*, 1 Johns. 520; *Lawrence* v. *Houghton*, 5 *id.* 129; *Cobb* v. *Curtiss*, 8 *id.* 470). He cannot find the amount of damage on a mere estimate (*Ely* v. *O'Leary*, 2 E. D. Smith, 355; *Fox* v. *Decker*, 3 *id.* 150; and see *Prentiss* v. *Sprague*, 1 Hilton, 428).

g. The judgment should specify that it was made "on hearing the proofs and allegations" (*Stocking* v. *Driggs*, 2 Cai. 96); and if intelligible will not be vitiated by misspelling (*Jackson* v. *Browner*, 7 Wend. 388). Judgment in case of "wilful trespass" for three dollars, with "treble damages," making five dollars, held good (*Tifft* v. *Culver*, 3 Hill, 180). A judgment "for damages with costs $2.74," was affirmed on appeal (*Slaman* v. *Buckley*, 29 Barb. 289).

h. Section 136 of the Code held not to apply to justices' courts (*Perkins* v. *Richmond*, 17 How. 309). On a trial without a jury, the justice may, at the close of plaintiff's case, discharge one of several defendants, but should not enter judgment until the trial is finished (*Moon* v. *Eldred*, 3 Hill. 104; *Fenn* v. *Timpson*, 4 E. D. Smith, 276). On a suit commenced by warrant against two, if one only appears, judgment cannot be given against both (*Richards* v. *Walton*, 12 Johns. 434). Where in a suit by summons against two, one only appeared, and without authority confessed judgment against both, held binding on the other until reversed (*Ingalls* v. *Sprague*, 10 Wend. 672).

a. A judgment where the justice has jurisdiction cannot be attacked collaterally (*Wesson* v. *Chamberlain*, 3 Coms. 331; *Skinnion* v. *Kelly*, 18 N. Y. 355; *Bromley* v. *Smith*, 2 Hill, 517; *Groff* v. *Griswold*, 1 Denio, 433).

b. Although it be voidable for irregularities, it will uphold a judgment given upon it in a suit commenced thereon (*Humphrey* v. *Persons*, 23 Barb. 314).

c. The fact that a justice's judgment on which an action is brought, was recovered more than six years before suit commenced, is no cause for reversing a judgment given upon it, where the defendant did not appear in the latter suit, and plead the statute of limitations (*Humphrey* v. *Persons*, 23 Barb. 313).

d. A judgment once entered, the power of the justice ceases; he cannot open or alter his judgment, even though it be entered by inadvertence for a wrong amount (*Hardy* v. *Seelye*, 3 Abb. 103; *Scranton* v. *Levy*, 4 *id.* 21; *Camp* v. *Stewart*, 2 E. D. Smith, 89; *Sperry* v. *Major*, 1 *id.* 361; *The People* v. *Delaware Com. Pleas*, 18 Wend. 558; *McGuinty* v. *Herrick*, 5 Wend. 240). Relief from such a judgment can only be obtained by an appeal from the judgment (*Donnell* v. *Cornell*, 1 Code Rep. N. S. 288).

e. *Semble*, The judgment of a justice recovered since the code took effect, remains in force for twenty years (*Nichols* v. *Atwood*, 16 How. 475; and see § 68, *post*, and note).

f. A justice's judgment is a speciality (*James* v. *Henry*, 16 Johns. 233; *Witherwax* v. *Averell*, 6 Cow. 589). Parol evidence is inadmissible to contradict the docket of a justice (*Smith* v. *Compton*, 20 Barb. 262; *Niles* v. *Totman*, 3 *id.* 594).

g. The omission of a justice of the peace to certify, in his docket, that the amounts appearing by such books to be due on the judgments therein, have not been paid, to his knowledge; or to deposit such docket with the clerk of the town, on his removing therefrom, will not affect the validity of the judgments in the docket, or vary the effect of the same as evidence, the statutes requiring him to do so being merely directory (*Humphrey* v. *Persons*, 23 Barb. 313; *Carshore* v. *Huyck*, 6 Barb. 583).

h. Payment or tender of a judgment, the judgment creditor not forbidding, may be made to the justice (*Dexter* v. *Bryant*, 16 Barb. 337).

i. **Costs.**—(Laws 1860, p. 983; 1861, p. 16.)

Summons,	15	cents.
Warrant, attachment, or transcript of judgment,	25	"
Adjournment,	25	"
Subpœna, including all the names inserted therein,	25	"
Administering an oath,	5	"
Filing every paper necessary to be filed,	5	"
Swearing a jury,	25	"
Swearing a constable,	5	"
Trial of an issue of fact, in a case of appearance and answer,	50	"
Entering judgment,	25	"
Taking affidavit,	10	"
Drawing any bond,	25	"
Receiving and entering verdict of jury,	25	"
Venire,	25	"
Drawing affidavits, applications and notices, where required by law (per folio),	5	"
Execution,	25	"
For the renewal of the same,	25	"
For making a return to an appeal,	2	dol's.
A warrant for the apprehension of any person charged with any violation of the laws concerning the internal police of the state, or with being the father of a bastard,	25	cents
Indorsing any such warrant issued from another county,	25	"
A summons for any offence relating to the internal police of the state, or in case of any proceedings to recover the possession of land, or otherwise,	25	"

For drawing a record of conviction for contempts and other special cases,	50 cents.
An execution upon any such conviction,	25 "
A warrant of commitment for any cause,	25 "
For a precept to summon a jury in special cases,	35 "
Swearing such jury,	25 "
Hearing the matter concerning which a jury is summoned,	50 "
Receiving and entering their verdict,	25 "
For a view of premises alleged to be deserted,	50 "
Hearing an application for a commission to examine witnesses,	50 "
For every order for such commission, and attending, settling and certifying interrogatories,	50 "
For taking depositions of witnesses upon an order or commission issued by some court in this or a foreign state or territory (per folio),	5 "
For making the necessary return and certificates thereto,	50 "

a. Whenever a judgment shall be rendered in a court of a justice of the peace, in civil actions, it shall be with costs of the suit; but the whole amount of the items of such costs to be included in the entry of judgment, except charges for the attendance of witnesses from another county, shall not in any case exceed the sum of five dollars, unless such suit shall be adjourned more than once at the request and on motion of the party against whom judgment shall be finally rendered, and in such case the costs of such additional adjournment may be included in the entry of judgment (Laws 1860, p. 984, § 2).

b. In addition, the costs of a commission to examine a foreign witness may be taxed in the judgment (*Laws* 1841, p. 112).

c. **Execution.**—The execution is in all cases to be returnable in sixty days, the provision of the Revised Statutes regulating the time for returning executions from justices' courts being repealed (*Bander* v. *Burley*, 15 Barb. 604); but it is no sufficient objection to an execution that it calls for its return "*within sixty days*" (*Price* v. *Shipps*, 16 Barb. 585); it should be against personal property only (*Fisher* v. *Safford*, 1 E. D. Smith, 612). No time for the return need be inserted, and if inserted, may be treated as surplusage. The issuing and renewal of an execution probably ought to be considered the same thing; and neither can be done after five years from the entry of the judgment (*Morse* v. *Gould*, 1 Ker. 285). An execution issued more than five years after the judgment was rendered, is not merely irregular, but void (*Bates* v. *James*, 3 Duer, 45; *Morse* v. *Gould*, 1 Kernan, 285). May an alias execution issue after the expiration of five years?

d. After a transcript of a judgment has been filed in the office of the county clerk, the rules which govern the issuing execution upon it (except as specially provided) are those which apply to the common pleas (*Ginochio* v. *Figari*, 2 Abb. 185). An attorney-at-law may issue an execution in such a case (*Simpkins* v. *Page*, 1 Code R. 107).

e. "If any execution issued by a justice of the peace, or a judgment rendered by him, be not satisfied, it may from time to time be renewed by said justice, by an endorsement thereon to that effect, signed by him, and dated when the same shall be made. If any part of such execution has been satisfied, the endorsement of renewal shall express the sum due on the execution. Every such endorsement shall be deemed to renew the execution in full force in all respects for sixty days from the date thereof" (Laws of 1857, ch. 512, § 1), and all laws inconsistent therewith are repealed (*Id.* § 2).

f. An execution may be renewed without a return of no goods endorsed thereon (*Wickham* v. *Miller*, 12 Johns. 320); and this without any written return, and after the return day, and repeatedly (*Visger* v. *Ward*, 1 Wend. 551); and in *The People* v. *Hopson* (1 Denio, 574), it was held that this could be done after a sufficient levy upon property during the first life of the execution. In that case the execution ran out on the 5th of the month, was renewed on the

7th, and a new levy made upon the same day upon the same property. It was also repeated in that case, that a mere levy is not a satisfaction of a judgment (See *Chapman* v. *Fuller*, 7 Barb. 70).

a. An execution on a justice's judgment, issued after the death of plaintiff, by persons appearing to have no interest in the matter, is a nullity (*Bellinger* v. *Ford*, 14 Barb. 250).

b. A mandamus lies to compel the issuing an execution (*The People* v. *Clerk of Marine Court*, 3 Abb. 309).

c. A constable having returned an execution satisfied by sale, cannot afterwards annul that return by a supplementary indorsement on the execution (*Ross* v. *Hicks*, 11 Barb. 481).

d. Contempts.—A justice may punish for contempt for not attending as a juror (*Robbins* v. *Gorham*, 26 Barb. 586).

e. The application for an attachment against a witness for non-attendance may be based on an oral oath *without writing* (*Baker* v. *Williams*, 12 Barb. 527).

f. A justice of the peace may punish a defaulting witness or juror, after the suit in which the default occurred is terminated (*Robbins* v. *Gorham*, 25 N. Y. 586). Mode of proceeding. (See *id.*)

TITLE VII.

Of Justices' and other Inferior Courts in Cities.

CHAPTER I. Marine court in New York city.
II. Justices' courts in New York city.
III. Justices' courts in cities.
IV. General provisions.

CHAPTER I.

Marine Court of New York City.

CHAPTER II.

Justices' Courts in New York City.

The sections in this and the preceeding chapter of this title (§§. 65, 66), have been entirely abrogated by subsequent laws. The Law and Practice of the Marine and Justices' [District] Courts in the city of New York, are published in a small volume by the publisher of this work.

CHAPTER III.

The Justices' Courts of Cities.

§ 67. [60] *Jurisdiction.*

The justices' courts of cities shall have jurisdiction in the following cases, and no other:—

1. In actions similar to those in which justices of the peace have jurisdiction, as provided by sections 53 and 54.

2. In an action upon the charter or by-laws of the corporations of their respective cities, where the penalty or forfeiture shall not exceed one hundred dollars.

CHAPTER IV.

General Provisions.

§ 68. [61.] (Am'd 1849, 1851.) *Sections 55 and 64 applicable to this title.*

The provisions of sections 55 to 64, both inclusive, relating to forms of action, to pleadings, to the times of commencing actions, to the rules of evidence, to filing and docketing transcripts of judgments, to their effect and the mode of enforcing them, and to proceedings where title to real property shall come in question, shall apply to the courts embraced in this title; except that after the discontinuance of the actions in the inferior court, upon an answer of title, the new action may be brought either in the supreme court, or in any other court having jurisdiction thereof; and except, also, that in the city and county of New York, a judgment for twenty-five dollars or over, exclusive of costs, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien and be enforced in the same manner as, and be deemed, a judgment of the court of common pleas for the city and county of New York.

a. The justice is bound to give a transcript on demand to any party interested in the judgment, and on being paid for such transcript (Laws 1841, p. 114). If he refuses, a mandamus will lie to compel the delivery of the transcript (8 Cow. 133). The filing a transcript deprives the justice of any further control over the judgment (*Re Sholts*, 2 Cow. 506). The transcript may be made after the expiration of the justice's term of office (*Maynard* v. *Thompson*, 8 Wend. 393); and it need not show jurisdiction on its face (*Jackson* v. *Rowland*, 6 Wend. 666; *Jackson* v. *Jones*, 9 Cow. 182; 10 Cow. 233).

b. After a judgment in any county court of one county, if an execution be issued into another county before any transcript filed in that county, the court may order a transcript to be filed *nunc pro tunc* (*Roth* v. *Schloss*, 6 Barb. 380).

c. It is not necessary that a transcript from a justice of the peace of a judgment rendered by him, should show the proceeding to give him jurisdiction to render a valid judgment, in order to authorize it to be filed and docketed. It is, for that purpose, *prima-facie* evidence that the justice had jurisdiction to render the judgment (*Dickinson* v. *Smith*, 25 Barb. 102).

d. The statute of 1840, ch. 386, relating to the docketing of judgments, is directory. An error in the statement, of date, amount, &c., which would be amendable by the court in which the judgment was rendered, will not vitiate the lien of the judgment as against persons not actually misled or prejudiced thereby (*Sears* v. *Burnham*, 17 N. Y. 445).

e. The lien of a justices' judgment, of which a transcript was filed and docketed with the county clerk, pursuant to 2 R. S. 247, § 128, continued a lien against the defendant for twenty years, and against purchasers in good faith and subsequent incumbrancers for ten years (*Waltermire* v. *Westover*, 4 Kernan, 16). And so of judgments recovered since the code took effect (*Nichols* v. *Attwood*, 16 How. 475; *Young* v. *Reimer*, 4 Barb. 442; *Geller* v. *Hoyt*, 7 How. 265).

f. After filing transcripts of judgments of a justice's court, the county court has such a control over the judgments as to enable it to order set-off between them (*Hayden* v. *McDermott*, 9 Abb. 14; and see *Lyon* v. *Manly*, 18 How. 267; 10 Abb. 337; 32 Barb. 51), but cannot vacate the judgment on motion (*Martin* v. *Mayor of N. Y.*, 20 How. 86).

g. Filing transcripts for less than $25: see *Candee* v. *Gundelsheimer*, 17 How. 434; 8 Abb. 435; disapproved, *Vultee* v. *Whitehead*, 2 Hilton, 596; *Butts* v. *Dickinson*, 12 Abb. 60; Anon. 32 Barb. 201.

PART II.

OF CIVIL ACTIONS.*

TITLE I.

Form of Civil Actions.

SECTION 69. Distinction between actions at law and suits in equity, abolished.
70. Parties, how designated.
71. Actions on judgments.
72. Feigned issues abolished.

§ 69. [62.] (Am'd 1849.) *Distinction between actions at law and suits in equity, abolished.*

The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

a. The effect of this section has been much discussed. See note in the 3d. edition of this work where the decisions and dicta are collected. To these add *Reubens* v. *Joel*, 3 Ker. 493; *Scovill* v. *Griffith*, 2 Ker. 515; *Trull* v. *Granger*, 4 Seld. 119; *Ten Eyck* v. *Haughtalling*, 12 How. 529; *Phillips* v. *Gorham*, 17 N. Y. 270; *Voorhis* v. *Childs' Exor*, *id.* 354; *Cole* v. *Reynolds*, 18 N. Y. 74; *Goulet* v. *Asseler*, 22 N. Y. 228; *N. Y. Ice Co.* v. *N. West. Ins. Co.*, 23 N. Y. 357; 12 Abb. 414).

§ 70. [63.] (Am'd 1849.) *Parties how designated.*

In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

§ 71. [64.] *Actions on Judgments.*

No action shall be brought upon a judgment rendered in any court of this State, except a court of a justice of the peace,

* This title does not cover all the subjects which this part of the code embraces (*The People* v. *Sturtevant*, 9 How. 307).

between the same parties, without leave of the court for good cause shown, on notice to the adverse party; and no action on a judgment rendered by a justice of the peace, shall be brought in the same county within five years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county, or that the process was not personally served on the defendant, or on all the defendants, or in case of the death of some of the parties, or where the docket or record of such judgment is or shall have been lost or destroyed.

a. An action cannot be brought upon a judgment rendered in a district court, or the marine court of the city of New York, *between the same parties*, without leave of the court (*Thompson* v. *Stutphen*, 2 E. D. Smith, 527; *Mills* v. *Winslow*, *id.* 18; 3 Code R. 44). But an executor or administrator of a deceased judgment creditor (*Wheeler* v. *Dakin*, 12 How. 537), or a *bona-fide* assignee of a judgment may sue upon the judgment without leave (*Tuffts* v. *Braisted*, 1 Abb. 84; S. C., 4 Duer, 607; *Kopper* v. *Howe*, 2 Hilton, 69); and an action in the nature of a creditor's bill may be brought without the leave of the court first obtained (*Catlin* v. *Doughty*, 12 How. 457; *Quick* v. *Keeler*, 2 Sand. 231; 3 Code R. 205; *Dunham* v. *Nicholson*, 2 Sand. 636). Where a justice's judgment is docketed in the county court, no action can be brought thereon without leave of the county court (*Lyon* v. *Manley*, 32 Barb. 51; 10 Abb. 337; 18 How. 267). A defendant may, without leave of the court, by answer, and as a set-off or counter-claim, rely on a judgment in his favor against the plaintiff (*Wells* v. *Henshaw*, 3 Bosw. 625), especially if he be an assignee of the judgment (*Clark* v. *Story*, 29 Barb. 295).

b. In an action in a justice's court on a judgment, the complaint showed that the judgment had been docketed with the county clerk. The answer was that the action could not be maintained, because no action could be maintained on a judgment of the county court, held a sufficient statement of the objection that leave of the court was necessary (*Lyon* v. *Manley*, 10 Abb. 337; 32 Barb. 51; 18 How. 267).

c. No action can be maintained on a judgment for want of an answer obtained on a service of the summons by publication (*Force* v. *Gower*, 23 How. 294; *Kane* v. *Cook*, 8 Cal. 449; and see *Fiske* v. *Anderson*, 33 Barb. 71; 12 Abb. 8).

d. This section applies to judgments rendered before the code took effect (*Finch* v. *Carpenter*, 5 Abb. 225).

e. The proper remedy, where an action is brought upon a judgment without leave, in a case where leave is necessary, is by motion to set aside the summons and complaint. (*Id.*) On such a motion, leave to sue should not be granted *nunc pro tunc*, but the plaintiff should be left to a motion. (*Id.*) In that case, the order was that the motion to set aside the summons and complaint should be granted with costs, unless the plaintiff should, within twenty days, give notice of a motion for leave to bring the action *nunc pro tunc*; and if such notice was given, then all proceedings of both parties to be stayed until the decision of such motion.

f. As to actions on judgments against joint-stock companies or associations, it is provided (Laws 1853, p. 283) that after judgment obtained against any such joint-stock company or association, and execution thereon returned unsatisfied in whole or in part, suits may be brought against any or all of the shareholders or associates individually, as now provided by law; but no more than one suit shall be brought against said shareholders at any one time, nor until the same shall have been determined, and execution issued and returned unsatisfied in whole or in part. No death, removal, resignation of officers or

shareholders, or sale or transfer of stock, shall work a dissolution of any such joint-stock company or association, as against the parties so suing or being sued by such company, or as against any creditor or person having any demand against such company at the time of any such death, removal, resignation, sale, or transfer. The members of a joint stock company cannot be sued as such, until after suit against the company as prescribed by statute, and a judgment and an execution returned unsatisfied (*Robins* v. *Wells*, 26 Barb. 15; *Vanderbilt* v. *Garrison*, 8 Abb. 361).

§ 72. [65.] *Existing suits. Feigned issues abolished.*

Feigned issues are abolished; and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

a. An order for the trial of a question of fact by a jury must be made before the cause has been actually tried by the court (*O'Brien* v. *Bowes*, 10 Abb. 106). *Semble*, the motion for the order cannot be made after ten days after issue joined, but the court may, of its own motion, at any time before an actual trial has been had, order a trial by jury (*id.*, and Rule 33). And where an action properly triable by the court without a jury was regularly brought to trial and tried by the court, it was held that the court could not, after all the evidence was closed and the case submitted, order a trial of a question of fact by a jury. The judge must determine the whole case. (*Id.*)

b. In the cases mentioned in § 253, *post*, no issues can be framed pursuant to this section. This section has no application to an action for divorce from the marriage contract, on the ground of adultery, in which an issue of fact is raised by the pleadings; it has no more application to such an action than to an action for the recovery of money only (*Parker* v. *Parker*, 3 Abb. 478).

c. The former practice on feigned issues examined by Willard, Justice, *Snell* v. *Loucks* (12 Barb. 335).

TITLE II.

*Time of commencing civil actions.**

CHAPTER I. Actions generally.
II. For the recovery of real property.
III. Other than for the recovery of real property.
IV. General provisions.

CHAPTER I.

Time of commencing actions in general.

SECTION 73. Repeal of existing limitations.
74. Time for commencing actions, &c.

§ 73. [66.] (Am'd 1849.) *Repeal of existing limitations.*

The provisions contained in the chapter of the revised statutes, entitled "Of actions and the times of commencing them,"

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* *a.* In computing the time within which an action is to be commenced, the day on which the right of action accrued is to be excluded (*McGraw* v. *Walker*, 2 Hilton, 404).

b. There is no statutory limitation of the time within which a mandamus may be obtained (*The People* v. *Supervisors of W'Chester*, 12 Barb. 446).

c. As to the limitation contained in the "Act to provide for the incorporation of Insurance companies," see *Howard* v. *Franklin Ins. Co.*, 9 How. 45.

d. The right of action for non-acceptance of a bill of exchange, accrues from the non-acceptance (*Whitehead* v. *Walker*, 9 M. & W. 508).

e. The period which elapses between the death of a person, and the granting of letters testamentary on his estate, not, however, exceeding six months, and the period of six months after such letters are granted, are not part of the period of limitation (*Coddington* v. *Carnley*, 2 Hilton, 528).

f. In an action against surviving partners and the administrators of the deceased partner, the eighteen months which elapsed after the death of their intestate, is not as against the defendant, the administrators to be taken into account as part of the period of limitation (*Parker* v. *Jackson*, 16 Barb. 34).

g. For money received by a sheriff in an action to foreclose a mortgage or for partition, the cause of action begins to run when the sale is perfected (*Van Nest* v. *Lott*, 16 Abb. 130; *Van Tassel* v. *Van Tassel*, 31 Barb. 439).

h. The cause of action against a foreign factor for money received by him, does not accrue until a demand of payment or instructions to remit (*Walden* v. *Crafts*, 2 Abb. 301).

i. Where a note is made in a foreign state, by residents of such state, payable to residents of this state, the cause of action on such note does not accrue until the makers come into this state (*Carpenter* v. *Wells*, 21 Barb. 598).

j. A cause of action for extra work, accrues when said work was completed (*Peck* v. *U. S. and Liverpool Mail Ship Co.*, 5 Bosw., 226).

are repealed; and the provisions of this title are substituted in their stead. This title shall not extend to actions already commenced, or to cases where the right of action has already ac-

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a. The cause of action of one in possession of land under an erroneous deed which he has an equitable right to have corrected, does not accrue until an attempt is made to disturb his possession, founded on the error in the deed (*Bartlett* v. *Judd*, 23 Barb. 263).

b. The equitable right to an action against the estate of a deceased partner of a firm, where the surviving partner is solvent at the time of the death and then becomes insolvent, accrues at the time the survivor becomes insolvent, and the period of limitation is ten years (*Bloodgood* v. *Bruen*, 8 N. Y. 362).

c. Between pledgor and pledgee, a cause of action for an accounting and redemption of a pledge accrues, and the statute of limitations attaches at the time when the pledgor is entitled to redeem the pledge (*Roberts* v. *Sykes*, 8 Abb. 345; 30 Barb. 173).

d. In an action by a subsequent indorser against prior indorsers to recover the amount paid by him to take up the note, the cause of action accrues at the time of paying the money not when the note fell due (*Barker* v. *Cassidy*, 16 Barb. 177).

e. A promissory note given in the form of premium note as and for capital stock note in organizing a mutual insurance company is payable on demand, and the statute of limitations begins to run from its date (*Howland* v. *Edmonds*, 23 How. 152; 24 N. Y. 307; reversing, 33 Barb. 433; and see *Bell* v. *Yates*, 33 Barb. 627; *Howland* v. *Cuykendall*, 40 Barb. 320; *Colgate* v. *Buckingham*, 39 Barb. 177).

f. The cause of action by a surety against his principal for money paid for him, accrues when the payment is *actually* made (*Elwood* v. *Diefendorf*, 5 Barb. 398).

g. A cause of action cannot accrue until there is in existence some one capable of suing or at least some one to be sued (*Bucklin* v. *Ford*, 5 Barb. 393). Thus, where A. received money due the estate of B. after the death of B., and before letters of administration of his estate issued, held in an action by C. the administrator of B., to recover such money of A., that the statute did not commence to run until letters of administration issued to C. (*id.*)

h. In an action against joint debtors commenced by service of the summons on some only of the defendants before the statute limitation has expired, a defendant not served until after such limitation has expired cannot avail himself of the statutes as a defence (*Whites B'k of Buffalo* v. *Ward*, 35 Barb. 637).

i. An executor cited to account before a surrogate, may avail himself of the statute of limitations in bar of any claim presented against the estate, in the same manner as in a suit at law or in equity, upon such claim. A devise of real estate to an executor for the payment of debts generally, not specifying particular debts, or a known interest given to an executor for that purpose, does not prevent the running of the statute of limitations against debts which were due prior to the decease of the testator (*Martin* v. *Gage*, 5 Selden, 398).

k. The provisions of the Revised Statutes barring any action against the estate of a deceased person, not sued for within six months after its rejection by the executor, &c., applies to proceedings before the surrogate as well as actions at law (*Barsalous case*, 4 Abb. 135).

l. A foreign corporation sued in this State cannot avail itself of the statute of limitations (*Olcott* v. *Tioga R. R. Co.*, 20 N. Y. 210, reversing s. c. 26 Barb. 147, and see *Thompson* v. *Tioga R. R. Co.*, 36 Barb. 79).

m. The courts of this State do not notice the statutes of limitation of other States (*Carpenter* v. *Wells*, 21 Barb. 595).

crued; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form.

a. A right of dower which accrued prior to the Revised Statutes taking effect, is not affected by them (*Stewart* v. *Smith*, 14 Abb. 75; *contra*, *Brewster* v. *Brewster*, 32 Barb. 428). The code does not apply to causes of action already accrued (*Glen Cove Mut. Ins. Co.* v. *Harrold*, 20 Barb. 298).

b. Where a right of action had accrued previous to the code, and the debtor after the debt became due departed from the State, and resided out of it for different periods during a series of years, the successive absences are to be aggregated in computing the time, for the purpose of ascertaining whether the demand is barred by the statute (*Berrien* v. *Wright*, 26 Barb. 208; see *post*, § 100, and note).

c. The presumption of payment, arising under the statute of limitations, from lapse of time, is not that the payment was made at the expiration of the time fixed by the statute as a bar, but at some prior indefinite time, or when the obligation became due (*Martin* v. *Gage*, 5 Selden, 398; see *N. Y. Life Ins. Co.* v. *Covert*, 29 Barb. 436).

See section 110, and note; and *Wood* v. *Wood*, 26 Barb. 356.

§ 74. [67.] (Am'd 1849, 1851.) *Period of limitation, answer, &c.*

Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute, and in the cases mentioned in section seventy-three.

But the objection that the action was not commenced within the time limited, can only be taken by answer.

d. There is no rule of law fixing the period within which a man may discover that a writing does not express the contract which he supposes it to contain, and which bars him of relief for delay in asserting his rights, other than that contained in the statute of limitations (*Bidwell* v. *Astor Mut. Ins. Co.*, 16 N. Y. 263).

e. Where it appears on the face of the complaint that the cause of action is barred by lapse of time, the defendant cannot demur; he can avail himself of the statute bar only by answer; and this, whether the cause of action be of a legal or equitable nature (*Sands* v. *St. John*, 36 Barb. 628; 23 How. 140; *Voorhies* v. *Voorhies*, 24 Barb. 150; *Fellers* v. *Lee*, 2 Barb. 488), and whether it arose prior to, or since the code, took effect (*Stewart* v. *Smith*, 14 Abb. 75; *Lefferts* v. *Hollister*, 10 How. 383).

f. The same rule applies in proceedings before a surrogate (*Van Vleck* v. *Burroughs*, 6 Barb. 341).

CHAPTER II.

Time of commencing actions for the recovery of real property.

SECTION 75. When the people will not sue.
76. When action cannot be brought by grantee from the State.
77. When actions by the people or their grantees, to be brought within twenty years.
78. Seisin within twenty years, when necessary.
79. Seisin within twenty years, when necessary in action or defence founded on title, &c.
80. Action after entry, or right of entry.
81. Possession, when presumed. Occupation when deemed under legal title.
82. Occupation under written instrument, &c.
83. Adverse possession, under written instrument, &c.
84. Premises actually occupied, held adversely.
85. Adverse possession under claim of title not written.
86. Relation of landlord and tenant, as affecting adverse possession.
87. Descent cast. Effect of.
88. Persons under disability.

§ 75. *When the people will not sue.*

The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless,

1. Such right or title shall have accrued within forty years before any action or other proceeding for the same, shall be commenced; or unless,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of forty years.

See *People* v. *Rensselaer*, 8 Barb. 189; *People* v. *Livingston*, *id.*, 254; *People* v. *Arnold*, 4 Coms. 508.

§ 76. *When action cannot be brought by grantee from the State.*

No action shall be brought for, or in respect to, real property, by any person claiming by virtue of letters patent, or grants from the people of this State, unless the same might have been commenced by the people, as herein specified, in case such patent or grant had not been issued or made.

§ 77. *When actions by the people or their grantees, to be brought within twenty years.*

When letters patent or grants of real property shall have been issued or made by the people of this State, and the same shall be declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title, in such case an action for the recovery of the premises so conveyed may be brought either by the people of this State, or by any subsequent patentee or grantee of the same premises, his heirs or assigns, within twenty years after such determination was made, but not after that period.

§ 78. *Seisin within twenty years, when necessary.*

No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within twenty years before the commencement of such action.

§ 79. *Seisin within twenty years, when necessary in action or defence founded on title.*

No cause of action or defence to an action founded upon the title to real property, or to rents or services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question, within twenty years before the committing of the act in respect to which such action is prosecuted or defence made.

§ 80. *Action after entry or right of entry.*

No entry upon real estate shall be deemed sufficient, or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

§ 81. *Possession presumed. Occupation, when deemed under legal title.*

In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person, shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for twenty years before the commencement of such action.

§ 82. *Occupation under written instrument.*

Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim, for twenty years,—the premises so included shall be deemed to have been held adversely; except that where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

§ 83. *Adverse possession.*

For the purpose of constituting an adverse possession, by any person claiming a title founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:—

1. Where it has been usually cultivated or improved;

2. Where it has been protected by a substantial inclosure;

3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant;

4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been

left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

a. A corporation may claim title by adverse possession, the same as individuals (*Robie* v. *Sedgwick*, 35 Barb. 319), and twenty years' exclusive possession by a corporation under a claim of title, will raise the presumption of a valid title. (*Id.*)

b. An alien may defend his possession as against one showing title, by showing an adverse possession of twenty years (*Overing* v. *Russell*, 32 Barb. 263).

c. An adverse possession not founded on any written instrument, extends only to the land fenced, cultivated or improved (*Becker* v. *Van Valkenburgh*, 29 Barb. 319).

d. An adverse possession commenced in the life time of the ancestor, continues to run against his heir, although the heir may be under disability (*Becker* v. *Van Valkenburgh*, 29 Barb. 319).

e. A general assertion of ownership irrespective of any particular title, will constitute an adverse possession (*Crary* v. *Goodman*, 22 N. Y. 170; and see *Miller* v. *Garlock*, 8 Barb. 153; *Becker* v. *Van Valkenburgh*, 20 Barb. 319; *Fish* v. *Fish*, 39 Barb. 513).

§ 84. *Premises actually occupied held adversely.*

Where it shall appear that there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

§ 85. *Adverse possession under claim not written.*

For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure;
2. Where it has been usually cultivated or improved.

See *Miller* v. *Garlock*, 8 Barb. 153.

§ 86. *Relation of landlord and tenant.*

Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or,

where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent; notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

§ 87. *Descent cast.*

The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

§ 88. *Persons under disabilities.*

If a person entitled to commence any action for the recovery of real property, or to make an entry or defence founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue either,—

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence for a term less than for life; or,
4. A married woman,—

The time during which such disability shall continue, shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defence; but such action may be commenced or entry or defence made after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defence made, after that period.

CHAPTER III.

Time of commencing actions other than for the recovery of real property.

SECTION 89. Limitation prescribed.
90. Twenty years.
91. Six years.
92. Three years.
93. Two years.
94. One year.
95. Action upon a current account.
96. Action for penalties.
97. Action for other relief.
98. Action by the people.

§ 89. [69.] (Am'd 1849.) *Periods of limitation prescribed.*
The periods prescribed in section 74 for the commencement of actions other than for the recovery of real property, shall be as follows:

§ 90. [70.] (Am'd 1849.) *Twenty years.*
Within twenty years:

1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

2. An action upon a sealed instrument

a. This section applies to judgments of the marine and justices' courts (*Delavan* v. *Florence*, 9 Abb. 277 *note*).

b. Action or decree of a surrogate (see 1 Bradf. Sur. Rep. 4).

c. The presumption of payment of a judgment obtained before the revised statutes took effect, is rebutted by a sheriff's return of an execution partly unsatisfied (*Henderson* v. *Cairs*, 14 Barb. 15); and as to rebutting the presumption of payment of a judgment obtained prior to the revised statutes taking effect, (see *Waddell* v. *Elmendorf*, 10 N. Y. 170).

§ 91. [71.] (Am'd 1849.) *Six years.*
Within six years:

1. An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in section 90.

2. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for trespass upon real property.

4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. An action for relief on the ground of fraud in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such case, not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

a. The statute is a bar to an action on a promissory note brought by the payee against the maker; although the former, after the expiration of six years from the time the note became payable, paid the amount of it to his indorsee, and thus became repossessed of the note (*Woodruff* v. *Moore*, 8 Barb. 171).

b. Where services are performed for a series of years, without any express agreement as to the time or measure of compensation, no payments being made, the law will not imply an agreement that the payment shall be postponed until the termination of the employment, but will regard the hiring as from year to year, and the wages as payable at the same time (*Davis* v. *Gorton*, 16 N. Y. 255).

c. In an action for converting personal property, the statute commences to run from the time of the conversion (*Kelsy* v. *Griswold*, 6 Barb. 436). After the statute has commenced running, the case cannot be taken out of the statute by a demand and refusal of the property, made after the defendant had parted with the property (*id.*, and see *Bruce* v. *Tilson*, 25 N. Y. 194).

d. An action to enforce an equitable lien for the purchase-money of land, must be brought within six years. The debt is the cause of action (*Borst* v. *Corey*, 15 N. Y. 505).

e. One entrusted with a note for collection, and who receives the money, is not a trustee; and an action for the money must be within six years (*Hickok* v. *Hickok*, 15 Barb. 632).

f. A debt of an administrator for which a judgment has been recovered, is regarded as a simple contract debt, and must be prosecuted within six years (*Ball* v. *Miller*, 17 How. 300).

g. Under a general retainer to an attorney to prosecute an action, his right to costs against his client accrues on his perfecting judgment, and the statute limitation commences to run against his claim for costs from the time such judgment is perfected (*Adams* v. *Fort Plain B'k.*, 23 How. 45).

h. Where goods are left with factors for sale on commission, the owner has no cause of action for the price or value of the goods until a demand by him, and until such demand the statute of limitations will not commence running (*Baird* v. *Walker*, 12 Barb. 298).

i. The statute of limitations is a bar to a recovery for the use of goods for any period antecedent to six years before action brought (*Rider* v. *Union Rubber Co.*, 5 Bosw. 86).

j See *In the matter of the Estate of Delacroix, deceased*, 1 Bradford Rep. 1; *Mayne* v *Griswold*, 3 Sand. 463, and *ante*, page 89 *i*.

§ 92. [72.] (Am'd 1849.) *Three years.*

Within three years:

1. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

2. An action upon a statute, for a penalty or forfeiture, where action is given to the party aggrieved, or to such party and the people of this State, except where the statute imposing it prescribes a different limitation.

a. An action to charge defendants as trustees of a manufacturing corporation, organized under the statutes of this State with personal liability for debts of the company on the ground of omission to file report as required by law; and declaring improper dividends is an action upon a statute for a penalty, given to the party aggrieved, and must be commenced within three years after the cause of action accrued (*Merchants B'k. of N. Haven* v. *Bliss*, 21 How. 365).

b. An action to recover goods wrongfully taken by a sheriff under an execution, must be brought within three years from the day the levy was made (*Coddington* v. *Carnley*, 2 Hilton, 528; *Dennison* v. *Plumb*, 18 Barb. 89).

c. As to time of limitation in an action against a stockholder of the Rossie Galena Co. individually, under the act in corporating that company, see *Corning* v. *McCullough*, 1 How. App. Cas. 126.

§ 93. [73.] *Two years.*

Within two years:

1. An action for libel, slander, assault, battery, or false imprisonment.

2. An action upon a statute, for a forfeiture or penalty to the people of this State.

§ 94. [74.] *One year.*

Within one year:

1. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

§ 95. [75.] (Am'd 1849.) *Action upon a current account.*

In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be

deemed to have accrued from the time of the last item proved in the account on either side.

a. Items of debit for the contract price of work and of credits for payments do not make a case of "reciprocal demands." (*Peck* v. *U. S. & Liverpool Mail Ship Co.*, 5 Bosw. 226.)

b. Where a current account exists between parties and one of them purchases from a third party an open account against the other, without notice to or recognition of its validity by the latter, such purchased account does not become a part of the current account, and is barred in six years from the time it accrued (*Green* v. *Ames*, 14 N. Y. 225).

c. There must be items of account on both sides to make a mutual account (*Hallock* v. *Losee*, 1 Sand. 220, and see *Ogden* v. *Astor*, 4 *id.* 312).

d. Payment of all the items of a bill except one, the accuracy of which was denied, held not to prevent the statute running (*Peck* v. *U. S. & Liverpool Mail Ship Co.*, 5 Bosw. 226).

§ 96. [76.] *Actions for penalties, &c.*

An action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action be not commenced within the year by a private party, it may be commenced within two years thereafter in behalf of the people of this State, by the attorney-general, or the district-attorney of the county where the offence was committed.

§ 97. [77.] *Actions for other relief.*

An action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued.

e. In actions for specific performance, the time of limitation begins to run from the time the plaintiff might bring his action and has notice his right is denied. A new cause of action is not created by a subsequent demand (*Bruce* v. *Tilson*, 25 N. Y. 194; *Roberts* v. *Sykes*, 1 Abb. 345).

§ 98. [78.] (Am'd 1849.) *Actions by the people*

The limitations prescribed in this chapter shall apply to actions brought in the name of the people of this State, or for their benefit, in the same manner as to actions by private parties.

CHAPTER IV.

General Provisions as to the time of commencing Actions.

SECTION 99. When action deemed commenced.
100. Exception, defendant out of State.
101. Exception, as to person under disabilities.
102. Death of person entitled before limitation expires.
103. Suits by aliens.
104. Where judgment reversed.
105. Stay of action by injunction, &c.
106. Disability must exist when right accrued.
107. Two or more disabilities.
108. This title when not to apply.
109. The like.
110. New promise must be in writing.

* § 99. [79.] (Am'd 1849, 1851.) *When action deemed commenced.*

An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him.

An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this title when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; as, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days.

a. The endorsement, by a sheriff, or other officer, of the time of a receipt of a summons in an action, is not of itself evidence of the fact, so as to show the time of the commencement of the action (*Wardwell* v. *Patrick*, 1 Bosw. 406). When the plaintiff files with his judgment roll proof of the service of the summons, he is concluded by such proof as to the *time* of such service (*Burroughs* v. *Reiger*, 12 How. 170).

b. For the purpose of issuing a warrant under the non-imprisonment act, the action is sufficiently commenced by lodging the summons with the sheriff, with the intent that it should be served (*Gregory* v. *Weiner*, 1 Code Rep. N. S. 210).

See § 139, *post.*

**Amended—See Appendix.*

* § 100. [80.] (Am'd 1849, 1851.) *Exception, defendant out of State.*

If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited, after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

a. Successive absences can be accumulated, and the aggregate deducted from the time elapsed after the accruing of the action (*Cole* v. *Jessup*, 10 How. 515; 10 N. Y. 96; *Harden* v. *Palmer*, 2 E. D. Smith, 172; *Berrian* v. *Wright*, 26 Barb. 208; see *ante*, § 73, note).

b. A temporary absence from the State, without change of residence, does not prevent the running of the statute during such absence (*Hickok* v. *Bliss*, 34 Barb. 321). Absences by *various journeys* during six years amounting, in the aggregate, to one year, held not a sufficient finding of absence to warrant a judgment against a defendant who had set up the statute as a defence. (*Id.*)

c. The absence of one joint debtor from the State, suspends the running of the statute of limitations against him, although his co-debtor has remained within the State (*Denny* v. *Smith*, 18 N. Y. 567; overruling *Halden* v. *Crafts*, 4 E. D. Smith, 490; S. C. 2 Abb. 303). It is otherwise in the case of one of two joint and *several* debtors (*Bogert* v. *Vermilya*, 1 Code Rep. N. S. 212; 10 N. Y. 447; and see 2 Coms. 523; 3 How. 316); and after a joint contract has been severed by the death of one of the parties, the survivor cannot, by any act of his, keep the statute of limitations from running against or revive the debt as to the representatives of such deceased joint contractor (*Lane* v. *Doty*, 4 Barb. 530).

d. A foreign corporation is a person out of the State within this section (*Thompson* v. *Tioga R. R. Co.*, 36 Barb. 79; *Olcott* v. *Tioga R. R. Co.*, 20 N. Y. 210; reversing 26 Barb. 147). Where, at the time the cause of action accrued, the defendant is a citizen of and resident in another State, the period of limitation does not commence to run until he comes into the State (*Carpenter* v. *Wells*, 21 Barb. 594); and in such a case, to create a bar, there must be a presence in the State for the full period of limitation (*Gans* v. *Frank*, 38 Barb. 320).

e. Two partners, while out of the State, contracted a debt to parties within this state; afterwards one of the partners came into this State and procured his discharge under the then existing U. S. Bankrupt Law; after that, and more than six years after contracting the debt, the other partner came into this State, and was sued on said indebtedness; held the statute did not commence to run until he came into the State (*Davis* v. *Kinney*, 1 Abb. 440).

§ 101. [81.] (Am'd 1849, 1851, 1852.) *Exceptions, persons under disabilities.*

If a person entitled to bring an action mentioned in the last chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued, either,

**Amended—See Appendix.*

1. Within the age of twenty-one years; or,

2. Insane; or,

3. Imprisoned on a criminal charge, or, in execution under the sentence of a criminal court, for a term less than his natural life; or,

4. A married woman.

The time of such disability is not a part of the time limited for the commencement of the action; except that the period within which the action must be brought, cannot be extended more than five years by any such disability, except infancy; nor can it be so extended in any case longer than one year after the disability ceases.

§ 102. [82.] (Am'd 1849.) *Death of person entitled before limitation expires.*

If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his reprensentatives, after the expiration of that time, and within one year from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrator after the expiration of that time, and within one year after the issuing of letters testamentary, or of administration.

See *Bucklin* v. *Ford*, 5 Barb. 393; *Parker* v. *Jackson*, 16 *ib.* 34; and *Murray* v. *E. I. Co.*, 5 B. & A. 204.

§ 103. [83.] *Actions by Alien enemies.*

When a person shall be an alien subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

a. Who is an alien enemy? See *U. S.* v. *Vistor*, 16 Abb. 153.

§ 104. [84.] (Am'd 1863.) *Where Judgment reversed.*

If an action shall be commenced within the time prescribed

therefor, and a judgment therein be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after the reversal.

See *Long* v. *Fatheree*, 7 Sme. & M. 404.

§ 105. [85.] (Am'd 1849.) *Time of stay by injunction, &c.*
When the commencement of an action shall be stayed by injunction, or statutory prohibition, the time of the continuance of the injunction or prohibition, shall not be part of the time limited for the commencement of the action.

a. The period during which a plaintiff has been restrained by an injunction from commencing an action, is not to be reckoned, although he has not pleaded that the injunction was served on him. It is sufficient if he had notice of it (*Berrian* v. *Wright*, 26 Barb. 208).

§ 106. [86.] *Disability must exist when right of action accrued.*
No person shall avail himself of a disability, unless it existed when his right of action accrued.

§ 107. [87.] (Am'd 1849.) *Where several disabilities, all must be removed.*
When two or more disabilities shall co-exist at the time the right of action accrues, the limitation shall not attach until they all be removed.

See section 101.

§ 108. [88.] *This title not applicable to bills, &c. of corporations or to bank notes.*
This title shall not affect actions to enforce the payment of bills, notes, or other evidences of debt, issued by moneyed corporations, or issued or put in circulation as money.

§ 109. [89.] (Am'd 1849.) *Nor to actions against directors, &c. of moneyed corporations or banking associations. Limitation in such cases prescribed.*
This title shall not affect actions against directors or stock-

holders of a moneyed corporation, or banking associations, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

§ 110. [90.] (Am'd 1849.) *Acknowledgment or new promise must be made in writing.*

No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

a. This provision is wholly prospective. A debt barred when the code took effect is not revived by a verbal promise to pay made after that time (*Esselstyn* v. *Weeks*, 2 Ker. 635; 2 Abb. 272, overruling in that respect, S. C., 2 E. D. Smith, 116; and approving *Wadsworth* v. *Thomas*, 7 Barb. 445; see also *Gillespie* v. *Rosekrantz*, 20 Barb. 35; *Glen Cove Mut. Ins. Co.* v. *Harold*, id. 298; *Van Alen* v. *Feltz*, 9 Abb. 277; 32 Barb. 139).

b. A payment by one joint, or joint and several, debtor does not revive the liability of the other (*Van Keuren* v. *Parmelee*, 2 Coms. 523; *Bogart* v. *Vermilya*, 3 Code Rep. 142; 1 Code Rep. N. S. 212; *Barger* v. *Durvin*, 22 Barb. 68; *Dunham* v. *Dodge*, 10 Barb. 566; *Tracy* v. *Rathbun*, 3 Barb. 543; *Payne* v. *State*, 39 Barb. 634). One copartner cannot after the dissolution of the partnership do any thing to bind the other, without the authority of that other, or unless at his request (see *Bruce* v. *Tilson*, 25 N. Y. 194; *Roberts* v. *Sykes*, 8 Barb. 345). Thus where five years after the falling due of a joint and several note made by a principal and three sureties, the holder on applying to two of the sureties for payment, was by them referred to the principal, who on being informed of such reference made a payment; held such an acknowledgment as stayed the running of the statute of limitations as against those two sureties, but did not affect the third (*Winchell* v. *Hicks*, 18 N. Y. 558, and see *Munroe* v. *Potter*, 22 How. 49; *Bloodgood* v. *Bruen*, 4 Selden, 362). The case of *Reid* v. *McNaughton*, 15 Barb. 168, was reversed on appeal (see 18 N. Y. 561).

c. Proceeding to foreclose a mortgage by advertisement is an acknowledgment of the existence of the mortgagor's right to redeem (*Calkins* v. *Isbell*, 20 N. Y. 147).

d. An assignee in trust for creditors is not an *agent* authorized to renew a debt, or take it out of the statute, as against the assignor (*Pickett* v. *King*, 34 Barb. 193, disapproving *Barger* v. *Durvin*, 22 Barb. 68).

e. No acknowledgment or promise is sufficient evidence of a new or continuing contract to take a case out of the operation of the statute of limitations, unless contained in some writing signed by the party to be charged thereby (*Hope* v. *Bogart*, 1 Hilton, 544). What is a sufficient signing, see *Rowe* v. *Thompson*, 15 Abb. 377.

f. The new promise, not the original contract, is the cause of action (*Van Alen* v. *Feltz*, 9 Abb. 277; 32 Barb. 139; *Winchell* v. *Hicks*, 18 N. Y. 560, overruling *Carshore* v. *Huyck*, 6 Barb. 583).

a. When a note has been barred by the statute, in order to sustain an action thereon there must be proof of an unqualified promise to pay the entire debt, in express terms, or by fair and just implication from an explicit admission of it as an existing debt for which the debtor acknowledges himself liable, and which he is willing and intends to pay. If the promise be conditional to pay when able, present ability must be shown (*Sherman* v. *Wakeman*, 11 Barb. 254; S. C. 5 Selden, 85).

b. In order to take a demand out of the statute by part payment, it must appear that the payment was made on account of the debt for which the action is brought. And it must further appear that the payment was made as part payment of a larger debt (*Arnold* v. *Downing*, 11 Barb. 554, and see *Peck* v. *U. S. Mail Ship Co.*, 5 Bosw. 226). To make a part payment evidence of a promise to pay the balance, it must be voluntary on the part of the debtor, and must occur under such circumstances as are consistent with an intent to pay such balance (*Id.*)

c. A promise not made to the creditor nor to any one acting in his behalf, is not sufficient to revive a debt barred by the statute of limitations (*Wakeman* v. *Sherman*, 5 Selden, 86; *Bloodgood* v. *Bruen*, 4 Selden, 362, reversing S. C. 4 Sand. 427; *Watkins* v. *Stevens*, 4 Barb. 168; see *Philips* v. *Peters*, 21 Barb. 351).

TITLE III.

*Parties to civil actions.**

SECTION 111. Party in interest to sue.
112. Assignment of thing in action.
113. Actions by executor, trustee, &c.
114. Action by and against married women.
115. Infants, actions by and against.
116. Guardian, how appointed.
117. Who may be plaintiffs.
118. Who may be defendants.
119. One or more may sue or defend for all.
120. One action against the different parties to bills and notes.
121. Action when not to abate.
122. Court to decide controversy, &c. Interpleading.

* 111. [91.] (Am'd 1849, 1851, 1862.) *Action to be by party in interest. Action by grantee of land held adversely.*

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section one

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* *d.* One and the same person cannot be plaintiff and defendant in the action (*Sherwood* v. *Barton*, 23 How. 537; *Methodist Episcopal Church* v. *Stewart*, 27 Barb. 553). A man cannot sue himself (*Cole* v. *Reynolds*, 18 N. Y. 76).

e. A guardian *ad litem* is not a *party* to the action (*Brown* v. *Hull*, 16 T. R. 673; *Jarvis* v. *Boyd*, 5 Porter, [Ala.] R., 388; *Darrin* v. *Hatfield*, Co't App. Dec. 1852, Selden's notes; *Sinclair* v. *Sinclair*, 1 New Pr. Cas. 179; *Millink* v. *Collier*, 14 Jurist, 621).

f. A stockholder in a corporation is a party to a suit brought against such corporation (*Place* v. *Butternuts Woolen Manuf. Co.*, 28 Barb. 503).

* *Amended—See Appendix.*

hundred and thirteen; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract.

But an action may be maintained by a grantee of land in the name of a grantor, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the

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a. A person named as defendant, but not served with process, is not a party to the action (*Robinson* v. *Frost*, 14 Barb. 536; *Steigers* v. *Gross*, 7 Mo. R. 261; *Norton* v. *Hayes*, 4 Denio, 245; *East River B'k* v. *Cutting*, 1 Bosw. 636; see, however, *Dodge* v. *Averill*, 5 How. 8; *Woods* v. *De Figaniere*, 16 Abb. 1). "The former chancery practice is now adopted as to making parties" (*Wallace* v. *Eaton*, 5 How. 100; *Hollenback* v. *Van Valkenburg*, 5 *id.* 284; 1 Code R. N. S. 33; *Voorhis* v. *Childs' ex'r.*, 17 N. Y. 354). To the same effect, *Brownson* v. *Gifford* (8 How. 395).

b. An imprisoned debtor is equally subjected to be sued and prosecuted to judgment, and to be proceeded against in all the modes prescribed by law to enforce civil remedies, as if he were at large (*Morris* v. *Walsh*, 14 Abb. 387).

c. **Authority to commence Action.**—Except in the action of ejectment, as to which see 2 R. S. 305, § 17; *Howard* v. *Howard*, 11 How. 80; and 10 Wend. 568, the defendant is not ordinarily entitled to demand the production by an attorney of his authority to commence an action (*Thayer* v. *Lewis*, 4 Denio, 269); but the court may, in proper cases, require the attorney to produce his authority (*Vincent* v. *Vanderbilt*, 10 How. 324; and 1 Abb. 193), and may stay proceedings in the action or require security for costs (*Comm'rs of Excise* v. *Purdy*, 36 Barb. 266; 22 How. 506; 13 Abb. 434; rev's'g 22 How. 312). But when a respectable and responsible attorney appears for a party, the court will not ordinarily inquire into the fact whether he was actually authorized to appear or not (*Denton* v. *Noyes*, 6 Johns. 296; *Republic of Mexico* v. *Arrangois*, 1 Abb. 438). The objection that an action is commenced without authority, cannot be taken by answer (*Comm'rs of Excise* v. *Purdy*, 36 Barb. 266; 22 How. 506; 13 Abb. 434, rev's'g 22 How. 312).

d. **Plaintiff's address.**—The court has the right and in proper cases will require the attorney of a plaintiff to disclose the place of residence of the plaintiff (*Vincent* v. *Vanderbilt*, 10 How. 324, and 1 Abb. 193; *Harris* v. *Holler*, 19 Law Journ. Q. B. 62). In an action for an assault which took place among a large assemblage, the court under the circumstances and with a view to a fair trial, granted a rule that the plaintiff should disclose his place of residence and occupation to the defendants (*Johnson* v. *Birley*, 5 B. & A. 540).

e. An attorney who gives a false residence of his client, without using proper means to ascertain its correctness, subjects himself to the costs which may be incurred by moving for an attachment against him; but he is not liable to pay the costs of the action if he is *bona fide* unable, after proper inquiry, to give his client's residence (*Neal* v. *Holden*, 3 Dowl. Prac. Cas. 493); and fraudulently giving a false address is a contempt (*Smith* v. *Bond*, 11 M. & W. 326; 1 Dowl. & L. 287); and where an attorney refused to give his client's address, the court allowed the defendant to *non pros* the action, and ordered the attorney to pay the costs (*Gynne* v. *Kirby*, 1 Stra. 402). An attorney cannot be compelled, after verdict, to disclose the place of his client's residence (*Hooper* v. *Harcourt*, 1 H. Bl. 534; *Bracely* v. *Dalton*, 2 Stra. 705; *Shindler* v. *Roberts*, Barnes, 126). Where the address is incorrect, or too indefinite, the court may stay the proceedings until the true, or a more definite address is furnished (*Hodgson* v. *Gamble*, 3 Dowl. 174).

grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

a. This section is inapplicable to suits by official persons in their name of office under special statutory authority (*Hoogland* v. *Hudson*, 8 How. 343).

b. **Who is the real party in interest.**—A plaintiff who has an absolute right to the money due on a note, and to receive and appropriate it to his own use when recovered, is the real party in interest, although the payee of the note may be interested in the event of the suit, in such wise that if the note be not collected he will not receive any thing as its price, or by reason of his endorsement and sale of it (*Cummings* v. *Morris*, 3 Bosw. 560; see *infra*, *f*, *h*).

c. The fact that the plaintiff has not actual possession of the note sued upon does not affect his right to recover upon it. It is sufficient if he has the right to the money due upon it (*Selden* v. *Pringle*, 17 Barb. 468; *Hastings* v. *M'Kinley*, 1 E. D. Smith, 273). Whether the plaintiff's title be *legal* or *equitable* is immaterial; if he have the whole interest, he may maintain the action. (*Id.*)

d. A plaintiff who sues as the assignee of a cause of action in which he has no interest at the time of suit brought, cannot maintain his action by purchasing, after issue joined, the cause of action described in his complaint (*Garrigue* v. *Laescher*, 3 Bosw. 579).

e. A written instrument whereby the defendant promised "to pay V. C. as executive agent of the company, Bureau G. G. & Co., the sum of $8000," is legally payable to the company represented by V. C., and not to V. C., the agent; and V. C. cannot maintain an action in his own name on such an instrument (*Considerant* v. *Brisbane*, 2 Bosw. 471; 22 N. Y. 389).

f. Where an action was brought by an assignee of the original creditor, and the evidence showed that another person was to share in the proceeds of the judgment, held that the complaint should have been dismissed, although the assignment to the plaintiff was in writing and under seal (*Lewando* v. *Dunham*. 1 Hilton, 114; see *supra*, *b*).

g. Possession of a negotiable bill or note is presumptive evidence of title (*Mottram* v. *Mills*, 1 Sand. 37, and see *Wiltsie* v. *Northam*, 5 Bosw. 428); and where the plaintiffs, a bank, sued on a draft payable to the order of W. B. S., their cashier, and the complaint alleged that it was delivered to the said W. B. S., cashier, "*for the said bank*,"—*held* on demurrer to the complaint, that the action was well brought in the name of the bank (*Camden B'k* v. *Rogers*, 2 Code Rep. 45; 4 How. 63; *East River B'k* v. *Judah*, 10 *id.* 135). The presumption that the holder of a note is its owner, is not repelled by showing that it came into his hands after it was due (*James* v. *Chalmers*, 5 Sand. 52; 2 Selden, 214, and see *Farrington* v. *Park B'k*, 39 Barb. 645). A plaintiff who sues as indorsee of a note, and proves his title as such, is to be deemed the real party in interest until the contrary is shown (*Ib.* and see *Potter* v. *Chadsey*, 16 Abb. 146).

h. Where T., the holder of a note made by C., delivered the same to K., taking from the latter his own note for the amount, payable at a future day, upon the understanding that K. should prosecute the note of C., and that if he should not succeed in the collection thereof, he was not to pay the note given by him to T., but that such note was then to be returned to him,—held that K. could not maintain an action on the note of C., he not being the real party in interest (*Killmore* v. *Culver*, 24 Barb. 656, and see Anon. 16 Abb. 423) but in *Cummings* v. *Morris* (25 N. Y. 625) it was decided that the indorsee of a note for a consideration not to be paid till the note should be collected, is the real party in interest to maintain an action thereon (see *supra*, *b*).

i. Where an agent made a contract in writing in his own name and without disclosing his principal, it was held that the principal was the real party in interest, and might sue on the contract in his own name (*Erickson* v. *Compton*, 6 How. 471; *St. John* v. *Griffith*, 2 Abb. 198). But the action might have been brought in the name of the agent (*Morgan* v. *Reid*, 7 Abb. 215; *Nelson* v.

Nixon, 13 Abb. 104). A., as agent of the plaintiff, effected a policy of insurance on property of the plaintiff. The policy was in the name of A. as principal, and contained a clause that any loss should be paid to A. only. A loss having occurred, it was held the plaintiff might maintain an action—being the real party in interest (*Lane* v. *Columbus Ins. Co.*, 2 Code Rep. 65). But a mere agent cannot prosecute in his own name (*Redfield* v. *Middleton*, 7 Bosw. 649; *Poor* v. *Guilford*, 10 N. Y. 273; *Newberry* v. *Garland*, 31 Barb. 121). Thus a mere merchandise broker, not acting under a *del credere* commission, cannot maintain an action in his own name to recover the price of goods sold by him for the owner, unless he has advanced upon the goods or guaranteed the sale. (*White* v. *Chouteau*, 10 Barb. 202). See *post* note to section 113.

a. A carrier can maintain an action in his own name for an injury to property entrusted to him to carry (*Merrick* v. *Brainard*, 38 Barb. 574).

b. The master of a ship, although not an owner, may sue for freight (*Kennedy* v. *Eilau*, 17 Abb. 73; 36 Barb. 197).

c. An action against the trustees of a school district for wrongfully expelling a child from a common school, must be in the name of the child (*Stephenson* v. *Hall*, 14 Barb. 222).

d. The reversioner may recover for waste by a tenant, although after its commission he alienate the estate, and have no interest therein at the time the action is commenced (*Robinson* v. *Wheeler*, 25 N. Y. 252).

e. No *one* individual can maintain an action for specific performance of a public duty, imposed for the public benefit (*Getty* v. *Hudson River R. R. Co.*, 21 Barb. 617).

f. Property taken on execution is in law in the possession of the sheriff, and for any wrong in relation to such property, the action must be in the name of the sheriff (*Terwilliger* v. *Wheeler*, 35 Barb. 620).

g. An action against a carrier for the loss of goods is properly brought in the name of the consignor when he is the owner of the goods (*Price* v. *Powell*, 3 Coms. 322).

h. Where a trustee takes in his individual capacity, security for trust funds, and dies, an action on such security cannot be maintained in the name of his successor as trustee, the action should be by his personal representatives (*Renaud* v. *Conselyea*, 3 Abb. 346; aff'g 5 Abb. 280).

i. An action under the statute "of betting and gaming," to recover money deposited as a stake on an illegal wager, must be in the name of the real depositor, although the name of another may have been used in making the wager (*Ruckman* v. *Pitcher*, 20 N. Y. 9).

j. An action on a bond executed by a putative father, and his sureties on an order of filiation, in whose name to be brought? (*Hoogland* v. *Hudson*, 8 How. 343).

k. Whether a sequestrator of an incorporated company, as such, can maintain an action in the courts of the State of New York (*Brinton* v. *Woods*, 19 How. 162).

l. The holder of a thing in action, as collateral security, may enforce payment of it (*Nelson* v. *Edwards*, 40 Barb. 280); and *semble*, payment of the principal debt would not affect the continuance of the action in his name (*Greene* v. *Tallman*, 20 N. Y. at page 197).

m. Where an insurance policy contained a condition declaring that policies subscribed by the insurance should not be assignable, before or after a loss, without their consent, indorsed thereon, and that in case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the assurers in virtue of such policy should thenceforth cease, is to be construed to mean their liability as insurers for losses to accrue thereafter, and not for losses which had already occurred. If after a loss has occurred, the assured by deed, assigns to another the demand, and right of action which had accrued to him in consequence of a loss, the contract to insure in future, will not pass by the assignment; but the right of action for the debt or demand

will pass to the assignee, who may sue thereon (*Courtney* v. *N. Y City Ins. Co.*, 28 Barb. 116; and see *Carroll* v. *Charter Oak Ins. Co.*, 38 Barb. 402).

a. Assignees for the benefit of creditors cannot assign a claim due to them, as trustees, to a third person to collect the claim and appropriate the proceeds in accordance with the provisions of the original assignment. Nor does it help such an assignment that the *cestui que trusts* under the original assignment, have joined in the assignment of the claim, unless all the creditors of the original debtor have joined therein (*Small* v. *Ludlow*, 1 Hilton, 189).

b. Whether a married woman could, prior to the law of April, 1860, without the concurrence of her husband, assign a claim for damages for a tort—conversion of personal property—*query* (*Sherman* v. *Elder*, 1 Hilton, 178).

c. An assignment by a married woman, of certain specified goods and chattels, "as well as all claims and demands for any portion of them," carries the right of action for the previous wrongful taking of any of the assigned goods (*Sherman* v. *Elder*, 24 N. Y. 381); and a general assignment of all property for the benefit of creditors, was held to pass a right of action for the conversion of promissory notes (*Whittaker* v. *Merrill*, 30 Barb. 389; and see *Westcott* v. *Keeler*, 4 Bosw. 564).

d. One of several partners may assign a debt due the firm (*Everit* v. *Strong*, 5 Hill, 163; affirmed, 7 *id.* 585); and a surviving partner may assign a chose in action belonging to his late firm (*Pinckney* v. *Wallace*, 1 Abb. 82). But where one of two partners to whom a debt was due, made an assignment of *my* claim in a certain debt due *me*, and thereupon the assignee alone, and without joining the other partner, brought an action to recover said claim, held that he could not recover (*Mills* v. *Pearson*, 2 Hilton, 16).

e. The defendant cannot show on the trial that plaintiff is not the real party in interest, as by shewing an assignment by the plaintiff to a third person, unless that defence is set up in the answer (*Savage* v. *Corn Exch. Ins. Co.*, 4 Bosw. 2).

f. **What things in action may, and what may not be assigned.**—The only change made by the code in respect to the transfer of a thing in action, is to transfer with the beneficial interest the right of action also in those cases where, before the code, a court [of equity] would recognize and protect the right of the assignee. No new right of action is created; no authority is given to assign a right of action which before was not assignable (*Hodgman* v. *Western R. R. Co.*, 7 How. 493; and *Merchants' Ins. Co. of Buffalo* v. *Eaton*, 11 N. Y. Leg. Obs. 140). As a general rule, all choses in action, such as bonds, mortgages, notes, judgments, debts, contracts, agreements, as well relating to personal as real estate, are assignable, and will pass to the assignee a right of action, in the name of the assignee, against all parties liable to any action. But there are some exceptions to the above rule, see Willard's Equ. Juris. 460; Burrell on Assignments, pp. 65 to 69, and below).

g. **What may be assigned.**—The extra allowance promised by the legislature to canal contractors, by the laws of 1836, p. 201 (*Munsell* v. *Lewis*, 2 Den. 224).

h. A mere possibility, coupled with an interest, (1 R. S. 725, § 35; *Lawrence* v. *Bayard*, 7 Paige, 76; and see *Hinkle* v. *Wanzer*, 17 How. U. S. Rep. 368; *Field* v. *Mayor of N. Y.*, 2 Selden, 187).

i. Any interest in personal property, or a mere possibility, coupled with an interest in real estate. A life estate, charged with the support of infants (*Emmons* v. *Cairn*, 3 Barb. 243).

j. A claim against a foreign government, for an illegal capture (*Couch* v. *Delaplain*, 2 Coms. 397; *Milnor* v. *Metz*, 16 Peters, 221).

k. The services of an indented apprentice (*Guilderland* v. *Knox*, 5 Cow. 363; Willard's Equ. Juris. 460).

l. A replevin bond (*Acker* v. *Finn*, 5 Hill. 293).

m. A right of action against a sheriff for neglecting to arrest (*Dininny* v. *Fay*, 38 Barb. 18).

n. A right of action for negligently setting fire to grass and fences (*Fried* v. *N. Y. Cent. R. R. Co.*, 25 How. 285).

a. A right of action against a vender of land for fraudulent representations as to an incumbrance (*Haight* v. *Hoyt*, 19 N. Y. 464).

b. The interest of the mother or next of kin of a deceased infant, whose death has been caused by wrongful act in the damages which may be recovered in the suit for compensation (*Quin* v. *Moore*, 15 N. Y. 432; and see *Doedt* v. *Wiswall*, 15 How. 128).

c. A claim against an intruder into a public office for the fees received by him (*Platt* v. *Stout*, 14 Abb. 178).

d. A claim for converting funds intrusted to one as agent (*Gould* v. *Gould*, 36 Barb. 270).

e. A claim for sheriff's fees (*Birkbeck* v. *Stafford*, 23 How. 236; 14 Abb. 285).

f. Future debts (*Power* v. *Alger*, 13 Abb. 475).

g. A claim for negligently killing a yoke of oxen (*Butler* v. *N. Y. & Erie R. R. Co.*, 22 Barb. 110).

h. A right of action against or by a carrier for the loss of or injury to goods entrusted to him to carry (*Foy* v. *Troy & Boston R. R. Co.*, 24 Barb. 382; *Freeman* v. *Newton*, 3 E. D. Smith, 246; *Smith* v. *N. Haven R. R. Co.*, 16 How. 277; 28 Barb. 605; *McKee* v. *Judd*, 2 Kernan, 622; *Merrick* v. *Brainard*, 38 Barb. 574; *Waldron* v. *Willard*, 17 N. Y., 466; overruling *Thurman* v. *Wells*, 18 Barb. 500).

i. A guarantee (*Small* v. *Sloan*, 1 Bosw. 352).

j. An unexecuted contract for services to be performed and goods to be delivered (*Field* v. *Mayor of N. Y.*, 2 Selden, 179).

k. A contract to deliver trees (*Parsons* v. *Woodward*, 2 N. J. Rep. 196).

l. A claim against an innkeeper for money stolen at his inn from the trunk of a guest (*Stanton* v. *Leland*, 4 E. D. Smith, 88).

m. A claim for unliquidated damages for a breach of contract to employ (*Mohahan* v. *Story*, 2 E. D. Smith, 393).

n. A claim to allow a tenant certain privileges (*Munson* v *Riley*, 2 *id.* 130).

o. A valid policy of insurance effected by a person upon his own life (*St. John* v. *Am. Ins. Co.*, 3 Ker. 31; *Miller* v. *Hamilton Ins. Co.*, 17 N. Y. 609; *Fowler* v. *N. Y. Indem. Ins. Co.*, 23 Barb. 151).

p. A license to run a planing machine (*Wilson* v. *Stolly*, 5 McLean, 1).

q. After the conversion of a chattel or an injury to real or personal property, the owner may either sell the chattel itself, or assign his right of action for the conversion or injury (*Hall* v. *Robinson*, 2 Coms. 293; *Cass* v. *N. Haven R. R. Co.*, 1 E. D. Smith, 522; *Robinson* v. *Weeks*, 1 Code Rep. N. S. 311; *McGinn* v. *Worden*, 3 E. D. Smith, 355; *Wilson* v. *Cook*, *id.* 252; *Howell* v. *Kroose*, 4 *id.* 357; 2 Abb. 167; *North* v. *Turner*, 9 Serg. & R. 244; *Hoyt* v. *Thompson*, 1 Selden, 347; *McKee* v. *Judd*, 2 Kernan, 622; see *Hicks* v. *Cleveland*, 39 Barb. 573; *Waldron* v. *Willard*, 17 N. Y. 466).

r. Where a claim is on contract, it is not rendered non-assignable because there is fraud in the transaction (*Brady* v. *Bissel*, 1 Abb. 76; *French* v. *White*, 5 Duer, 254; and see *Atwell* v. *Le Roy*, 4 Abb. 438).

s. All such rights of action for tort as would survive to the personal representative (*Butler* v. *N. Y. & Erie R. R. Co.*, 22 Barb. 110).

t. The power to assign and to transmit to personal representatives are convertible (*Raymond* v. *Fitch*, 2 Cromp. M. & R. 588; *Comegys* v. *Vasse*, 1 Pet. 213).

u. One of several creditors agreed to compromise his claim for fifty cents on the dollar, provided the other creditors consented to do likewise. He received the fifty cents on the dollar, but the other creditors refused to compromise on the same terms,—held that the residue of the debt was still owing, and was assignable; and a cotemporaneous agreement that the assignor or assignee were to share whatever the latter collected on the claim, did not make the assignor a necessary party, the assignment being in writing and absolute on its face (*Durgin* v. *Ireland*, 4 Kernan, 322).

a. Upon a contract to pay H. C. or his wife annually a given sum during the life of the longest liver of them, a right of action survives to the wife, and is assignable by her after the death of her husband (*Prindle* v. *Caruthers*, 15 N. Y. 425).

b. No allegation in the complaint can change the real nature of the cause of action so as to render what is assignable not assignable (*Brady* v. *Bissell*, 1 Abb 76).

c. It is no objection to the assignability of a cause of action, that the assignor paid the money sought to be recovered, under a sealed agreement, and signed admissions that the several accounts upon which he made payments were correct (*Byxbie* v. *Wood*, 24 N. Y. 607).

d. When a chose in action is assignable it may be assigned in separate parcels to different persons, and either of the assignees may maintain an action to recover the portion to him assigned (*Field* v. *Mayor N. Y.*, 2 Selden, 179; *Cook* v. *Genesee Mut. Ins. Co.*, 8 How. 514). The rule includes judgments (*More* v. *Trumpbour*, 5 Cow. 488). As to assigning part of a bill of exchange, see *Hawkins* v. *Gardner*, 12 Mod. 213; *Hawkins* v. *Cardy*, L'd Raym. 360 Carth. 466. Where, however, a debt is assigned in separate parcels, it is in effect a *splitting* of the cause of action, and the whole debt, notwithstanding such assignments, should be sued for in *one action*. See *Poor* v. *Guilford*, 10 N. Y. 273; *Bowdoin* v. *Coleman*, 3 Abb. 431. If the owner of some part of the debt will not join as a co-plaintiff, he should be made a defendant. A judgment in an action for *one* part of the debt will not, it has been held, be a bar to an action for the remainder (*Cook* v. *Genesee Ins. Co.*, 8 How. 514). A *single* debt (*a single cause of action*) cannot be converted into *several* debts (*several causes of action*), unless with the consent of the debtor (*Love* v. *Fairchild*, 13 Mo. R. 300; *Palmer* v. *Merrill*, 6 Cush. 282; *Ingraham* v. *Hall*, 11 S. & R., 78.) The law relating to splitting causes of action applies. See "*Splitting cause of action*," in note to § 140, *post*.

e. **What may not be assigned.**—The beneficial interest of a *cestui que trust* in rents and profits, in certain cases (1 R. S. 730, § 63; *Hone* v. *Van Schaick*, 7 Paige 221; 20 Wend. 564).

f. Pensions granted by the general government for revolutionary services (Laws of the U. S., vol. 6. p. 274).

g. A simple expectancy, in which the assignee had no interest, and which is unpurchasable, cannot be assigned. * * * * * A mere *jus precarium*, a right resting in courtesy (*Munsell* v. *Lewis*, 4 Hill, 642).

h. A bare possibility of an uncertain interest (*Mitchel* v. *Winslow*, 2 Story's R. 630—query, otherwise in New York, see *infra*, *What may be assigned*.

i. A cause of action for a simple tort and for a special injury to the person (*Purple* v. *Hudson R. R. Co.*, 1 Abb. 33; 4 Duer, 74; *Hodgman* v. *Western R. R. Co.*, 7 How. 493; *Oliver* v. *Walsh*, 6 Cal. R. 456; even after verdict (*Brooks* v. *Hanford*, 15 Abb. 342).

j. A right of action to recover money paid pursuant to a wager on a horse-race (*Weyburn* v. *White*, 22 Barb. 82).

k. A cause of action on the case for deceit (*Zabriskie* v. *Smith*, 3 Kernan, 333).

l. For malicious abuse of legal process (*Somner* v. *Wilt*, 4 Serg. & R. 19).

m. For an excessive distress (*O'Donnell* v. *Seybert*, 13 *id.* 54).

n. For damages caused by the false and fraudulent representations of the solvency of the vendee of goods (*Zabriskie* v. *Smith*, 3 Kernan, 322; *Hystop* v. *Roundall*, 11 How. 97; 4 Duer, 660).

o. The right of action to cancel or avoid notes or other securities or contracts on the ground of usury (*Boughton* v. *Smith*, 26 Barb. 635).

p. The right of action for seduction of a servant (*Howard* v. *Crowther*, 8 M. & W. 601).

q. A ferry license (see 14 How. 260).

a. Any interest to which the personal representatives would not succeed (*Zabriskie* v. *Smith*, 3 Kernan, 335).

b. A claim for a trespass (*Nash* v. *Fredericks*, 12 Abb. 149).

c. The right to set aside a deed obtained from the assignor by fraud (*McMahon* v. *Allen*, 12 Abb. 275; 34 Barb. 56).

d. Query—a claim for a balance of account on a settlement of partnership affairs (*Spring* v. *Baker*, 1 Hilton, 526).

e. A right of re-entry for condition broken (see *Main* v. *Green*, 38 Barb. 448).

f. A right of action for money lost in gaming (*Meech* v. *Stoner*, 19 N. Y. 26.; *contra*, see *Hendrickson* v. *Beers*, 6 Bosw. 639).

g. Indian annuities granted by the government of the United States (5 Opin. Att. Gen'l. 285).

h. A contract with the United States government (5 *id.* 502; 7 *id.* 683).

i. A contingent right of dower (*Moore* v. *Mayor of N. Y.*, 4 Selden, 113).

j. A right of dower before assignment (*Green* v. *Putnam*, 1 Barb. 500; *Scott* v. *Howard*, 3 *id.* 31.) [These decisions applied to the law prior to the code. The right of dower before assignment is a chose in action, and may now as such be transferrable.]

k. A contract for convict labor (*Horner* v. *Wood*, 23 N. Y. 350).

l. A person cannot sell to another a debt against himself. A debtor has no assignable interest in debts owing by him. A demand due from a person to himself and another as partners, is to the extent of his own interest in it, no debt against him (*Van Scoter* v. *Lefferts*, 11 Barb. 140).

m. An assignment of a demand and a book account made by one under sentence of imprisonment in the State Prison is void (*Miller* v. *Finkle*, 1 Park, Cr. R. 374).

n. As to assignment of the assets of a corporation, see *Nelson* v. *Eaton*, 16 Abb. 119; *Ogden* v. *Raymond*, 5 Bosw. 26.

o. The assignment of a bond by one of two joint obligees, partners, in the name of the firm, is void (*Hudson* v. *McKenzie*, 1 E. D. Smith, 358).

p. The widow of a man deceased, not being his executrix or administratrix, cannot assign his choses in action (*Heidenheimer* v. *Wilson*, 31 Barb. 636).

q. **Form of Assignment.**—No formality is necessary to effect the transfer of a chose in action. Any transaction between the contracting parties which indicates their intention to pass the beneficial interest in the instrument from one to the other, is sufficient for that purpose; a debt or claim may be assigned by parol as well as by writing (2 Sto. Eq. 311; *Heath* v. *Hull*, 4 Taunt. 326; Roberts on Fr. 275; *Rowe* v. *Dawson*, 1 Ves. 331; *Hinkle* v. *Wanzer*, 17 How. U. S. Rep. 368; *Judson* v. *Corcoran*, *id.* 612; *Slaughter* v. *Faust*, 4 Blackf. 380; *Montgomery* v. *Dillingham*, 3 Sme. & M. 647; *Hastings* v. *M'Kinley*, 1 E. D. Smith, 273; *Waldron* v. *Baker*, 4 *id.* 440; *Dickenson* v. *Phillips*, 1 Barb. 454; *Gould* v. *Ellery*, 39 Barb. 163; *Payton* v. *White*, 2 Hilton. 77; *Sexton* v. *Fleet*, *id.* 485; *Briggs* v. *Dorr*, 19 Johns. 95; *Horner* v. *Wood*, 15 Barb. 371; *Green* v. *Hart*, 1 Johns. 580; *Canfield* v. *Munger*, 12 *id.* 346; *Prescott* v. *Hull*, 17 *id.* 284); and thus, a judgment of a court of record, a bond or covenant, and a mortgage of real estate, may all be assigned orally, by mere delivery, without any instrument in writing, declaring the transfer (*Ford* v. *Stuart*, 19 Johns. 342; *Briggs* v. *Dorr*, id. 95; *Dawson* v. *Cole*, 16 *id.* 51; *Runyon* v. *Mesereau*, 11 *id.* 534; see, however, *Artcher* v. *Zeh*, 5 Hill, 200); and so of a chattel mortgage (*Langdon v. Buel*, 6 Wend. 80). Yet to constitute an assignment by parol is must be shown that the owner surrendered all control over the *chose*, and made an absolute appropriation of it (*Rupp* v. *Blanchard*, 34 Barb. 627). As a specialty may be assigned by parol, so it may be assigned by writing without seal (*Ford* v. *Stuart*, 19 Johns. 95; *Dawson* v. *Cole*, 16 *id.* 51); and there are cases in which something short of an actual transfer and delivery of a chose in action will operate as an equitable assignment of the whole or some part of it (*Dickerson* v. *Phillips*, 1 Barb. 458; and see further, Willard's Eq. Juris. 463). An assignment of a judgment is sufficient if it state

correctly the title of the suit (*i. e.* the names of the parties—plaintiff and defendant) though the amount, the time when recovered, and the court in which it was rendered, be omitted (*The People* v. *Eleming*, 4 Denio, 137); and if in the title of the suit the middle letter of the plaintiff's name be omitted, it is immaterial (*Aylesworth* v. *Brown*, 10 Barb. 167). The word assigned, with the assignor's signature written on the back of an account, is a sufficient assignment (*Ryan* v. *Maddex*, 6 Cal. Rep. 247; *Sexton* v. *Fleet*, 2 Hilton, 478). Where a written assignment of a claim, with the name of the assignee left in blank, is delivered to a party with intent to transfer the same to him, it will operate to vest in him the title assignee; but he may fill in the name of a third person, and deliver the instrument to the latter, and so transfer the title to him (*Waldron* v. *Baker*, 4 E. D. Smith, 440).

a. The defendant made and signed an order as follows: "Messrs. F. & L. pay J. L. or order $68 in such furniture as he may select, and charge same to my account for value received." On the back of this order J. L. wrote: "Pay to H. L.;" and signed his name thereto; held that the endorsement invested H. L. with all the rights of J. L., and entitled him to sue on said order (*Lens* v. *Jansen*, 18 How. 265).

b. A written instrument for the payment of money upon a contingency, may be transferred by delivery merely, although drawn payable "to order." Such an instrument is not negotiable, and no indorsement is requisite to transfer the title. A delivery with intent to vest in the party all the payee's interest in it is sufficient (*Loftus* v. *Clark*, 1 Hilton, 310).

c. The rule that a bill payable *to order* must be transferred by *indorsement*, applies only to make the instrument negotiable; but the transfer by delivery is sufficient to enable the holder to sue upon such a bill or note in his own name (*Savage* v. *Bevier*, 12 How. 166; *Billings* v. *Jane*, 11 Barb. 620; *White* v. *Brown*, 14 How. 282; *Houghton* v. *Dodge*, 5 Bosw. 326; *Sexton* v. *Fleet*, 2 Hilton, 485; *Brown* v. *Richardson*, 20 N. Y. 472; 1 Bosw. 402; *Farrington* v. *Park B'k.*, 39 Barb. 645; *Gould* v. *Ellery*, *id.* 163).

d. **Consideration for assignment.**—An assignee of a right of action is not bound to show that he gave any valuable consideration for the assignment. The owner of a cause of action may give it away if he choose, and the donee will have as good a right as though he were an assignee for value (*Clark* v. *Downing*, 1 E. D. Smith, 406; *Beach* v. *Raymond*, 2 *id.* 497; *Mills* v. *Fox*, 4 *id.* 220; *Richardson* v. *Mead*, 27 Barb. 178; *Arthur* v. *Brooks*, 14 Barb. 79; *Merrick* v. *Brainard*, 38 Barb. 574; *Vogel* v. *Babcock*, 1 Abb. 177). In the absence of evidence to the contrary, it will be presumed the assignment was for a sufficient consideration (*Eno* v. *Crooke*, 10 N. Y. 60; *Potter* v. *Chadsey*, 16 Abb. 146), and in case of the assignment of a note that it was assigned before it became due (*Andrews* v. *Chadbourne*, 19 Barb. 147). Proof of a valuable consideration is only necessary to be made when a defence is set up which, unless the plaintiff was a purchaser for value, would conclude him (*James* v. *Chalmers*, 5 Sand. 52; 2 Selden, 214); and where the object is to prove that the alleged assignment to the plaintiff is a mere sham, and that although an assignment in form has been executed, it was executed under an arrangement that the recovery should be for the benefit of the alleged assignor; but the mere fact that there was no consideration does not alone amount to anything (*Burtnett* v. *Gwynne*, 2 Abb. 81; and see *Bell* v. *Drew*, 4 E. D. Smith, 62; *Merrick* v. *Brainard*, 38 Barb. 575); and when in pleading, the assignment is alleged to have been for value received, the allegation as to value received is immaterial (*Wilson* v. *Codman*, 3 Cranch, 193; *Vogel* v. *Babcock*, 1 Abb. 177).

e. **Effect of assignment on the character of the claim.**—A cause of action originally within the exceptions of the act of 1831, to abolish imprisonment for debt, does not lose that character by being assigned to a third person (*King* v. *Kirby*, 28 Barb. 49); and the assignee of such a cause of action may institute proceedings thereon for the arrest and imprisonment of the judgment debtor (*id.*; and see *French* v. *White*, 5 Duer, 256).

f. **Proof of assignment.**—An assignment is proved by the evidence of the payee of the note in suit, that he had indorsed the note to the plaintiff, and

that he had no interest in the note when sworn (*Brown* v. *Richardson*, 20 N. Y. 472). The production by the plaintiff on the trial, of an assignment to himself, after due proof of the execution thereof by the assignor, is sufficient evidence of a delivery of such assignment (*Story* v. *Bishop*, 4 E. D. Smith, 423), and that it was delivered on the day it bears date (*Bell* v. *Davis*, 8 Barb. 210; and see *Genter* v. *Morrison*, 31 Barb. 155).

a. **Parol proof to explain assignment.**—An assignment of a judgment absolute in form, may be shown to have been made and received as security for loans (*Storer* v. *Coe*, 2 Bosw. 662, and see *Lewando* v. *Dunham*, 1 Hilton, 114).

b. **Re-assignment.**—The re-delivery and surrender by the assignee to the assignor of the written assignment of a claim, and its acceptance by the latter, with the mutual understanding that the assignment is thenceforth to be void, operates as an equitable re-assignment of the claim to the original owner, and divests the assignee of his title (*Ball* v. *Larken*, 3 E. D. Smith, 555; and see *Tomlinson* v. *Borst*, 30 Barb. 47).

c. **Implied Warrantee in assignment.**—In every assignment of an instrument, even not negotiable, the assignor impliedly warrants that the instrument is valid, and the obligor liable to pay it (*Lile* v. *Hopkins*, 12 Sme. & M. 302; see 2 El. and Bl. 849); and that there is no legal defence to its collection, arising out of his own connection with its origin (*Delaware B'k.* v. *Jarvis*, 20 N. Y. 226); that the party was competent to contract (*Erwin* v. *Downs*, 15 N. Y. 574); that the amount is unpaid (*Furness* v. *Ferguson*, 15 N. Y. 439).

d. **Assignment of principal debt carries with it all collateral securities.**—Where a debt is assigned, the assignment carries with it all the collateral securities held by the assignor for its collection, although they are not mentioned or referred to in the assignment (*Parmelee* v. *Dann*, 23 Barb. 461; *Sexton* v. *Fleet*, 2 Hilton, 484). Thus the assignment of an undertaking given by a defendant in an action of claim and delivery, carries with it the judgment in the action, *semble* (*Morange* v. *Mudge*, 6 Abb. 243). The assignment of a guaranteed note carries with it the guarantee (*Gould* v. *Ellery*, 39 Barb. 163); and the assignment of a debt necessarily carries with it, as an incident, a collateral mortgage (*Jackson* v. *Blodgett*, 5 Cow. 202), by which it is secured. So the assignment of a judgment carries with it the debt and any mortgage given to secure it: and if the assignment be of a part of the debt or judgment, it carries with it a similar part of the mortgage (*Pattison* v. *Hull*, 9 Cow. 747). An assignment of shares of stock in an incorporated company, passes the growing profits of such shares (*Kane* v. *Bloodgood*, 7 Johns. Ch. R. 108; Willard's Eq. Juris. 462). An assignment by a defendant, who prevails in an action of claim and delivery, of the judgment recovered by him, and all moneys to be obtained by means thereof, or by any proceedings to be had thereon, transfers to the assignee any undertaking executed in the action, upon requisition made for the delivery of property to plaintiff; and the assignee may maintain an action upon such an undertaking (*Bowdoin* v. *Colman*, 3 Abb. 431; 6 Duer, 182). An assignment of "all my property and estate of every kind," or "interest," transfers a right of action existing in favor of the assignor for the conversion of a chattel (*McKee* v. *Judd*, 2 Kernan, 622; *Waldron* v. *Willard*, 17 N. Y. 466). A sale of goods does not carry with it a right of action for their conversion (*Hicks* v. *Cleveland*, 37 Barb. 573; *ante*, 109 *e*). Where the assignment of the principal security carries with it all subsidiary securities, it is not necessary to allege in the complaint more than the assignment of the principal security (*Hosmer* v. *True*, 19 Barb. 106).

e. Where the plaintiff on trial of a cause at the circuit settled with one defendant under a written agreement, by which he was to take judgment in the action, which the defendant agreed to pay on certain conditions, and subsequently plaintiff sold the judgment subject to such agreement, and the assignee brought an action against the defendant, on the ground of deceit and fraud in making the agreement,—held on demurrer that the action could not be maintained. The assignment of the judgment was an affirmance of it by the plaintiff therein, and might have left in *him* the right of action for the fraud;

but the assignment of the judgment did not carry with it such right of action (*Borst* v. *Baldwin*, 17 How. 285; 8 Abb. 351; 30 Barb. 180).

a. The assignment of a right of action on a policy after a loss, held not to carry with it the policy (*Courtney* v. *N. Y. Ins Co.*, 28 Barb. 116).

§ 112. [92.] (Am'd 1849.) *Assignment of thing in action.*

In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before due.

b. This section does not change the substantial rights of the assignor and assignee (*Beckwith* v. *Union B'k*, 5 Selden, 211). In the action by the assignee, the defendant may avail himself of any defence he might have interposed, had the action been by the assignor, and which existed in favor of the defendant against such assignor at the time of the assignment (*Western Bank* v. *Sherwood*, 29 Barb. 383; *Beckwith* v. *Union Bank*, 4 Sand. 610; aff'd, 5 Seld. 211; *Myers* v. *Davis*, 22 N. Y. 489), or in some cases at the time of receiving notice of the assignment (*Solomon* v. *Holt*, 3 E. D. Smith, 189).

c. An assignee takes the demand subject to all equities existing between the parties to the contract (*Western Bank* v. *Sherwood*, 29 Barb. 383; *Bush* v. *Lathrop*, 22 N. Y. 535; *Wood* v. *Perry*, 1 Barb. 115; *Ainslie* v. *Boynton*, 2 Barb. 258). He stands in exactly the same situation as the assignor (*Mangles* v. *Dixon*, 3 Ho. of L. Cas. 702; 18 E. Law & Eq. R. 82; *Roberts* v. *Carter*, 24 How. 44; *Butler* v. *N. Y. & Erie R. R. Co.*, 22 Barb. 110). This rule applies to an assignment of a warehouse receipt (*Commercial Bank of Rochester* v. *Colt*, 15 Barb. 506), and to assignments for the benefit of creditors (*Maas* v. *Goodman*, 2 Hilton, 275; *Marine Ins. Co.* v. *Jauncey*, 1 Barb. 486).

d. Where a liquidated demand *not due* is assigned, the debtor cannot set off a like demand he has against the assignor, but not due at the time of the assignment (*Watt* v. *Mayor of N. Y.*, 1 Sand. 23), although the assignor was insolvent (*Myers* v. *Davis*, 22 N. Y. 489).

e. Where a bank depositor, an indorser on a bill held by the bank, running to maturity, and in whose favor there was a balance of account nearly equal to the bill, made a general assignment for the benefit of creditors; and soon after and before notice of the assignment the bill was protested, the assignor fixed as indorser, and the amount of the bill charged to his account on the books of the bank, and the bill was held by the bank uncanceled, when notice of the assignment was given; it was held that the assignee was entitled to recover from the bank the entire sum in deposit, without any deduction for the amount of the bill (*Beckwith* v. *Union Bank*, 5 Seld. 211; and see *Wells* v. *Stewart*, 3 Barb. 40; *Robinson* v. *Howes*, 20 N. Y. 84).

f. Where W. & L., after ordering goods to be manufactured by D., and before they could, with reasonable diligence, be completed, became insolvent and assigned all their property to plaintiff, including a claim against D. for goods sold; D. after completing and tendering said goods ordered by W. & L., was sued by the plaintiff to recover said assigned claim, held that D. could not, in such action, set off the price of the goods so manufactured (*Myers* v. *Davis*, 22 N. Y. 489; see *Maas* v. *Goodman*, 2 Hilton, 275; *infra*).

g. A., on the 1st September, 1857, sold goods to B. on a credit of six months, *i. e.*, to be paid for March 1, 1858. On August 31, 1857, B. purchased a note of A., dated February, 1857, and falling due December, 1857. On September 12, 1857, A. assigned for the benefit of his creditors, among other property

the said debt of B. After the time of payment had arrived, A.'s assignee sued B. for said claim; held that B. might set off said note (*Maas* v. *Goodman*, 2 Hilton, 275).

a. In an action by an assignee, the defendant cannot set off a judgment for costs obtained against the plaintiff's assignor subsequent to the assignment, and in an action in which the said assignee took no part (*Ogden* v. *Prentice*, 33 Barb. 160).

b. Courts protect the rights of assignees against all persons having either express or implied notice of the assignment (*Wilkins* v. *Batterman*, 4 Barb. 47; and see *Williamson* v. *Brown*, 15 N. Y. 354). But the assignee of a demand is not protected against the subsequent dealings of his assignor with the debtor, where the latter acts in good faith (*Huntington* v. *Potter*, 32 Barb. 300). A debtor who sees his obligation transferred by the holder to a bona fide purchaser, without giving any notice of his set off, his estopped from setting up such set off against the purchaser (*Tyles* v. *Yates*, 3 Barb. 222; and see *Rae* v. *Lawser*, 18 How. 23).

c. The assignee of a cause of action, assigned *after* action brought, is liable to the defendant for costs, if he (the assignee) proceed in the action after the assignment; and in such a case he takes the demand *cum onere*, and is liable for the costs which had accrued *before* as well as those which arise *after* the assignment (10 Wend. 622; 20 *ib.* 630, 632). See section 321, *post*.

d. The declarations of an assignor of a chose in action, made while he is the holder, and before assignment, are not evidence against his assignee (*Smith* v. *Webb*, 1 Barb. 230; *Tousley* v. *Barry*, 16 N. Y. 497; *Booth* v. *Sweezy*, 4 Seld. 276). Nor are admissions by the assignor, made *after* the assignment, evidence against his assignee (*Garland* v. *Harrison*, 17 Mo. R. [2 Ben.] 282; and see *Schenk* v. *Warner*, 37 Barb. 261; *Osborn* v. *Robbins*, *id.* 481; *Foster* v. *Beals*, 21 N. Y. 247; *Jones* v. *East. Soc. Metho. Epis. Church*, 21 Barb. 161; *Hanna* v. *Curtis*, 1 Barb. Ch. R. 263).

§ 113. [93.] (Am'd 1851.) *Action by executor, trustee, &c.*

An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

a. **Bonds to the People.**—Bonds taken in the name of the people should be prosecuted in the name of the people, and not in the name of the party in interest (*Bos* v. *Seaman*, 2 Code R.; *The People* v. *Clarke*, 21 Barb. 214; The *People* v. *Norton*, 5 Selden, 176). Where after a decree had been made by a surrogate for the payment of an administrator, his certificate filed and docketed, and execution issued thereon returned unsatisfied, the surrogate assigned the administration bond to the person in whose favor his decree was made, for the purpose of being prosecuted pursuant to laws of 1837, p. 535, held that an action on such bond, was properly brought in the name of the person in whose favor such decree was made (*Baggot* v. *Boulger*, 2 Duer, 160); but where the surrogate made an order on an administrator to pay the claim of a creditor, and the administrator failed to pay; and thereupon on proof of his refusal the surrogate directed that the administration bond should be prosecuted under laws of 1830, ch. 330, held that such action was properly brought in the name of the people (*The People* v. *Laws*, 3 Abb. 450, 4 *id.* 292; *The People* v. *Townsend*, 37 Barb. 521).

a. The attorney general may bring an action in the name of the People, to restrain a municipal corporation from doing unlawful acts (*The People* v. *Mayor, &c., of N. Y.*, 32 Barb. 35).

b. **Public Officers.**—Actions *by* public officers as such should be brought in their individual names with the title of their office added (*Paige* v. *Fazackerly*, 36 Barb. 392; *Gould* v. *Glass*, 19 *id.* 179), and not merely in the name of the office (2 R. S. 473, §§ 92, 93; *Superv'rs of Galway* v. *Stimson*, 4 Hill, 136; *Highway Comm'rs of Courtlandville* v. *Peck*, *id.*). The statutory provisions relate only to actions *by* and not to actions *against* public officers, and an action against a county in the name of the board of supervisors, without naming the indiduals who for the time being were supervisors of the several towns of the county, was held to be properly brought (*Hill* v. *Board of Supervisors of Livingston Co.*, 2 Kernan, 63; See *Weld* v. *Supervisors of Columbia*, 9 How. 316).

c. **Constable's Bonds.**—An action upon a bond given by a constable of the city of New York, pursuant to 2 R. L. of 1813, p. 397, § 147, is properly brought in the name of the mayor, &c., of the city of New York (*Mayor of N. Y.* v. *Doody*, 4 Abb. 121; *Mayor of N. Y.* v. *Brett*, 2 Hilton, 560).

d. **Joint Stock Companies.**—Any company or association, composed of not less than seven persons, who are owners, or who have an interest in any property, right of action, or demand, jointly, or in common, or who may be liable to any action on account of such ownership or interest, may sue and be sued in the name of the president or treasurer for the time being of such joint-stock company or association; and all suits and proceedings so prosecuted, by or against such joint-stock company or association, and the service of all process or papers in such suits and proceedings, on the president or treasurer for the time being of such joint-stock company or association, shall have the same force and effect as regards the joint rights, property and effects of such joint-stock company or association, as if such suits and proceedings were prosecuted in the names of all the shareholders or associates, in the manner now provided by law (Laws of 1849, p. 389; Laws 1851, p. 838; and see Laws 1853, p. 283, and note to § 71, *ante*). These statutes were intended merely to obviate the inconvenience of joining all the shareholders or associates as parties, and not to confer any new right of action (*Corning, Pres. &c.* v. *Greene*, 23 Barb. 33). It is only in cases where an association as such are the owners, or have an interest joint, or in common, in any property, right of action or demand, that a suit may be maintained in the name of the association. The separate owners of demands, or of separate rights of action, cannot voluntarily associate and elect a president and, under the acts of 1849 and 1851 above cited, recover in the name of such president, in one suit the separate demands. (*Id.*) Those statutes have been held not to apply to the fire companies of the city of New York, so as to enable the foreman of one of those companies to sue in his own name as such foreman, the foreman of another company in his name as foreman, to recover the possession of a fire-engine (*Masterson* v. *Botts*, 4 Abb. 130); but where the complaint in an action on a promissory note alleged in effect that the "Forestville Division, No. 411, Sons of Temperance," is an association composed of seven persons and upwards, and that the note was given for the benefit of the association, and was the common property of the members of the association, and that T., in whose name the action is brought, is the treasurer of the association,—a demurrer, *on many grounds* (so says the report) was overruled, and that the action was properly brought in the name of the treasurer. The statutes apply to any *company* or *association*, consisting of seven or more, having a treasurer—but the court abstained from saying whether the act would apply to ordinary commercial partnerships (*Tibbetts* v. *Blood*, 21 Barb. 655). And in *Austin* v. *Searing* (16 N. Y. 113), the court doubted whether these statutes applied to private partnerships or companies having more than seven members, not organized in pursuance of any statute. The New York superior court held that these provisions apply to *unincorporated* companies and associations (*N. Y. Marbled Iron Works* v. *Smith*, 4 Duer, 362). The supreme court, however, held that the statute applied to an *un*incorporated religious association (*De Witt* v. *Chandler*, 11 Abb. 459).

signment being made parties. Such an assignment is the transfer of a debt merely, and does not require the assent thereto of the assurers (*Mellen* v. *Hamilton Ins. Co.*, 5 Duer, 101; aff'd 17 N. Y. 615). An assignee of a demand in trust to pay certain creditors of the assignor, and the balance to the assignor himself, may bring an action in his own name without joining the *cestui que* trusts as plaintiffs (*Lewis* v. *Graham*, 4 Abb. 106). On a promissory note given to an executor or administrator, on account of the decedent's estate, he may sue either individually or in his representative character (*Bright* v. *Currie*, 5 Sand. 433; *Merritt* v. *Seaman*, 2 Selden, 168). And so for a conversion of the property of the deceased (*Shelden* v. *Hoy*, 11 How. 15). A deputy sheriff holding an execution took a bond running to his principal, conditioned to indemnify the latter, and all persons assisting him in the premises, held an action would lie in the name of the sheriff for the benefit of the deputy, without any assignment of the cause of action by the latter (*Stillwell* v. *Hurlbert*, 18 N. Y., 374). One partner is not ordinarily a trustee for his co-partner. "But we do not mean to say that a contract in writing may not be so framed as to constitute one partner a trustee for his co-partners within section 113." (*Secor* v. *Keller*, 4 Duer, 420). An officer of a foreign corporation or company may maintain an action in his own name in behalf of his company if his complaint states facts, showing his authority to sue on their behalf, for in such case he may be regarded as the trustee of an express trust (*Myers* v. *Machado*, 6 Abb. 198; 14 How. 149; *Considerant* v. *Brisbane*, 22 N. Y. 389).

a. As a trustee of an express trust *may sue* without joining with him the person for whose benefit the action is brought, it follows that he *may be sued*, and that the *cestui que trusts* are before the court by representation (*Mead* v. *Mitchell*, 5 Abb. 106). See ante note to section 111.

b. **Penal action.**—Actions for penalties under the act to suppress intemperance (Laws 1857, ch. 628), should be in the name of "the Board of Commissioners of Excise" of the county; not in the names of the commissioners (*Pomroy* v. *Sperry*, 16 How. 211; *B'd of Comm'rs* v. *Doherty*, id. 46; *Haight* v. *Benson*, 18 How. 302). Actions for penalties under the act relating to the port-wardens and pilots of the port of New York, must be brought in the name of the master-warden of the port of New York (*The People* v. *Deming*, 1 Hilton, 271; 13 How. 441). Suits by common informers are to be in the names of the informers (2 R. S. 481, § 5; *Seward* v. *Beach*, 29 Barb. 239). Actions for penalties under the law regulating the Brooklyn Fire Department must be in the individual names of the trustees (*Trustees of Fire Department* v. *Acker*, 26 How. 263).

c. **Boards of Health.**—Boards of Health, as constituted by statute, have not the capacity to sue or be sued (*The People* v. *Supervisors of Monroe*, 18 Barb. 567; *Gardner* v. *N. Y. B'd of Health*, 10 N. Y. 409).

d. **Indians.**—The Seneca nation of Indians may sue in their collective same (*The Seneca Nation of Indians* v. *Tyler*, 14 How. 109).

e. **Receivers and Sheriffs.**—Receivers appointed pursuant to sections 244 and 298 of the code, and rule 92 of the supreme court, and sheriffs in the cases mentioned in section 232 of the code, may sue in their own names; and foreign receivers see *Runk* v. *St. John*, 29 Barb. 585).

f. **Republic.**—A republic, acknowledged as such by the government of the United States, is an independent sovereign power, and therefore a state just as certainly, and in the same sense, as a monarchy, limited or absolute. It has the same right to sue for a debt as an individual creditor, and the same right to sue by its appropriate name, as a foreign corporation by its corporate name (*The Republic of Mexico* v. *De Arangois*, 5 Duer, 635).

g. **Officer of foreign government.**—An officer of a foreign government specially authorized to sue for government property in his own name, may sue in the courts of this State, and arrest a defendant charged with fraudulent misapplication of that property (*Peel* v. *Elliott*, 16 How. 481; 7 Abb. 433).

h. **Persons not in being.**—Under section 113 persons not in being held to be represented by a trustee of the property in which such persons not in being might on coming into being have an interest (*Mead* v. *Mitchell*, 5 Abb. 92).

a. **United States.**—Actions on behalf of the United States are to be brought in the name of the United States—not of any public officer (7 Opin. Att. Gen. 50).

b. **Bond of Town Superintendents.**—Action on official bond of town superintendent of common schools must be in the name of the Supervisor to whom the same was given, or his successor in office (*Fuller* v. *Fullerton*, 14 Barb. 59).

c. **Trustees of Religious Societies** cannot sue as such except by the corporate name or title of the society (*Bundy* v. *Birdsall*, 29 Barb. 31).

It is not pretended that this note comprises every statutory provision as to parties to actions; and in cases not here mentioned, reference should be made to the statutes at large. See also notes to sections 114, 115, and 118, *post*.

§ 114. [94.] (Am'd 1851, 1857.) *Action by and against a married woman.*

When a married woman is a party, her husband must be joined with her, except that,

1. When the action concerns her separate property, she may sue alone;

2. When the action is between herself and her husband, she may sue or be sued alone,—

And in no case need she prosecute or defend by a guardian or next friend.

d. Since the act of 1860 (Laws 1860, ch. 90), married women may sue and be sued in actions at law, in all matters relating to their separate estates, in the same manner as *femes sole*, and such actions are commenced by the like process, continued to judgment by the like proceeding, and the judgment enforced by the like means as actions against *femes sole* (*Barton* v. *Beer*, 21 How. 309; 35 Barb. 81; *Morrell* v. *Cawley*, 17 Abb. 76); and since 1860 an action for an assault on a married woman should be in her name, and by herself as sole plaintiff,—a joint action by husband and wife for such an assault cannot be maintained (*Mann* v. *Marsh*, 21 How. 372). To such a joint action the appropriate ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action (*id.*); and in an action by or against a married woman for contracts relating to her separate estate, her husband should not be joined (*Klen* v. *Gibney*, 24 How. 31; *Brownson* v. *Gifford*, 8 How. 395; *McKune* v. *McGarvey*, 6 Cal. 497; *Smith* v. *Kearney*, 9 How. 466; *Hillman* v. *Hillman*, 14 How. 456; *Sherman* v. *Burnham*, 6 Barb. 403; *Walker* v. *Swayzee*, 3 Abb. 136; *Smart* v. *Comstock*, 24 Barb. 411); and so in an action for the conversion of the separate property of the wife (*Ackley* v. *Tarbox*, 29 Barb. 512; *Spies* v. *Accessory Transit Co.*, 5 Duer, 662), or for the recovery of possession of real property (*Darby* v. *Callaghan*, 16 N. Y. 71; and see 9 Abb. 402; 17 How. 563; and *Merchants' Ins. Co.* v. *Hinman*, 34 Barb. 410; *Newberry* v. *Garland*, 31 Barb. 121).

e. In an action against husband and wife for slander by the husband and also by the wife, the wife may demur on the ground that several causes of action are improperly joined (*Malone* v. *Stilwell*, 15 Abb. 425).

f. An action to recover damages for a tort by the wife, should be against the husband and wife (*Matthews* v. *Fiestel*, 2 E. D. Smith, 90; *Malone* v. *Stilwell*, 15 Abb. 425; and see *infra*).

g. *Semble*, the act of 1860 does not authorize a married woman having no separate estate, to contract for the purchase of real estate on credit (*Ross* v. *Bell*, 38 Barb. 25).

a. The residue of the note to this section must be read in connection with the statute of 1860.

b. If there is a joint interest in the husband and wife, the husband should join, or the suit would be defective (*Smith* v. *Kearney*, 9 How. 468). Thus, in an action to recover real property, when the wife is the owner of the fee and the husband tenant by the curtesy initiate, the husband and wife may and should join in the action (*Ingraham* v. *Baldwin*, 12 Barb. 9). So in an action to recover damages for slanderous words spoken of a married woman, if the words are actionable *per se*, the husband is a necessary party as plaintiff; but if the words are actionable only by reason of special damage, the husband must sue alone (*Klein* v. *Hentz*, 2 Duer, 633; *Williams* v. *Holdredge*, 22 Barb. 396); and where a married woman brought an action for slanderous words, actionable only by reason of speeial damage, and alleged special damage, a demurrer assigning for cause that the plaintiff's husband was not a party, was allowed. (*Id.*)

c. In an action to foreclose a mortgage, executed by husband and wife, on the lands of the wife, and to enforce payment of the bond executed by both, it was held that the action was properly brought against both the husband and wife (*Conde* v. *Shepherd*, 4 How. 75; *Conde* v. *Nelson*, 2 Code Rep. 58). And in an action for the partition or sale of real estate of the husband held in common, the wife is a necessary party (*Ripple* v. *Gilburn*, 8 How. 456).

d. An action may be maintained against the husband and wife jointly for any debt of the wife contracted before marriage (Laws of 1853, p. 1057).

e. In one case (*Smith* v. *Scribner*, 12 How. 501) an action against a husband as sole defendant for a debt contracted by his wife carrying on a separate business and having a separate estate, the debt, however, having been contracted with his *presumed* consent, *Roosevelt J.*, held that in such a case the plaintiff might elect either to sue the husband alone, or the husband and wife jointly.

f. In *Rusher* v. *Morris* (9 How. 266) the action was by husband and wife as co-plaintiffs, to foreclose a mortgage made to the wife during her coverture. The defendant demurred, alleging for cause a defect of parties plaintiff. Roosevelt J., overruled the demurrer, on the ground that the husband was properly made a party, or at least there was "nothing illegal in the husband becoming a co-plaintiff."

g. In an action by husband and wife, the complaint alleged the breaking into the dwelling house *occupied* by the wife, whereby she was hindered in the enjoyment of said house. To this the defendant demurred for a defect of parties. The demurrer was allowed, the complaint not alleging the premises to be the separate estate of the wife, the action should have been by the husband alone (*Dunderdale* v. *Grymes*, 16 How. 195).

h. Prior to the law of 1860, the earnings of a wife are the property of her husband; and this rule holds good where her earnings are from a business carried on with moneys of her separate estate. Therefore, where a married woman kept a boarding-house, which was alleged to be her separate estate, it was held that the board money of her boarders belonged to her husband, and must be sued for in his name, and not in the name of the wife or of the husband and wife jointly (*Dunderdale* v. *Grymes*, 16 How. 195; *Rouillier* v. *Werniki*, 3 E. D. Smith, 310; *Avogadro* v. *Ball*, id. 385; *Freeman* v. *Orser*, 5 Duer, 477). And the same rule applied to a demand for services rendered by both husband and wife (*Id.*; and see *Sherman* v. *Elder*, 1 Hilton, 476).

i. In an action by a married woman relating to her separate estate, her husband should be made a party defendant, if he has any interest to be affected by the action; otherwise not (*Hillman* v. *Hillman*, 14 How. 456; see *Goelet* v. *Gori*, 31 Barb. 314).

j. The husband alone is liable for necessaries furnished to the wife during coverture; and in an action therefor she ought not to be joined as a defendant (*Main* v. *Stephens*, 4 E. D. Smith, 86).

k. By the revised statutes, a married woman may sue alone, if her husband

be sentenced to the State prison for life; and in actions relating to real property, if husband and wife are impleaded, and the husband absent himself and will not defend the wife's rights, the wife may apply before judgment, to be allowed to defend without her husband; and where a husband voluntarily and absolutely deserts his wife, and renounces, so far as he can do it, his marital relation, and leaves, and continues absent from the State, the wife may be regarded as a feme sole (*Chapman* v. *Lemon*, 11 How. 235).

a. A married woman not being competent to appoint an attorney, should plead in proper person (*Bergman* v. *Howell*, 3 Abb. 330; *Phillips* v. *Burr*, 4 Duer, 113; see *Henderson* v. *Easton*, 8 How. 201; *Towner* v. *Towner*, 7 *id.* 387; *Oulds* v. *Sansom*, 3 Taunt. 261). But after a trial on the merits without objection, it is too late to object that the answer is by an attorney. (*Id.*)

See note to subd. 4 of sec. 144, *post.*

§ 115. [95.] (Am'd 1849.) *Infant to appear by guardian.*

When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

b. The taking judgment against an infant defendant as for want of an answer, without appointing a guardian *ad litem*, is an irregularity (*Kellog* v. *Klock*, 2 Code R. 28); and the plaintiff's want of knowledge that the defendant is a minor will not make the judgment regular. The judgment so taken will be set aside on motion, and without imposing terms. (*Id.*) The motion papers may be signed by attorneys as attorneys for the defendant. (*Id.*)

c. Under the former practice in chancery, it was customary for the guardians to put in a mere general answer submitting the rights of the infant to the court. But where the circumstances rendered a special answer necessary, the guardian was bound to make it (*Knickerbocker* v. *De Forest*, 2 Paige, 304), and the court would take care that the rights of the infant were not prejudiced by the answer put in (*Barret* v. *Oliver*, 7 Gill & John. 191). The answer was termed the answer of the guardian, and not of the infant (*Rogers* v. *Cruger*, 7 Johns. 581); for which reason the infant was not bound by the answer, and might, where his interests required it, put in a further answer on coming of age. See 1 Barb. Ch. Pr. 149.

d. Where an infant sues without the appointment of a guardian, the defendant may move, on affidavits showing the fact of infancy, to have the proceedings set aside (*Freyberg* v. *Pelerin*, 24 How. 202). *Semble*, or the defendant may set up as a defence the infancy of the plaintiff (see *Treadwell* v. *Bruder*, 3 E. D. Smith, 597).

e. To authorize the appointment of a guardian *ad litem* for a lunatic, idiot, &c., defendant, the summons must have been served personally or by publication upon the lunatic, &c. (*Rogers* v. *McLean*, 10 Abb. 306).

f. The infant coming of age pending the action, does not render any change in the title necessary (*Mitford Pl.* 124 n).

g. **Appointment of guardian on appeal.**—On an appeal from the marine or a district court, where one of the parties is, *after* the appeal, ascertained to be an infant, the appellate court, upon the application of the opposite party, as well as upon the infant's request, will appoint a guardian *ad litem* where none has been appointed in the court below (*Fish* v. *Ferris*, 3 E. D. Smith, 567; and see *Moody* v. *Gleason*, 7 Cow. 480). The application may be made at special term, but not until after the return is filed. (*Id.*)

* § 116. [96.] (Am'd 1851, 1852, 1862, 1863.) *Guardian, how appointed.*

The guardian shall be appointed as follows:

* *Amended—See Appendix.*

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant. If made by a relative or friend of the infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this State; if he has none, then to the infant himself if over fourteen years of age, and within the State; or if under that age, and within the State, to the person with whom such infant resides.

And in case an infant defendant, having an interest in the event of the action, shall reside in any State, with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the court, the court may appoint a guardian *ad litem*, for such absent infant party, for the purpose of protecting the right of such infant in said action, and on such guardian *ad litem*, process, pleadings and notices in the action may be served, in the like manner as upon a party residing in this State.

And in actions for the partition of real property, or for the foreclosure of a mortgage or other instrument, when an infant defendant resides out of this State, the plaintiff may apply to the court in which the action is pending, at any special term thereof, and will be entitled to an order designating some suitable person to be the guardian for the infant defendant for the purposes of the action, unless the infant defendant, or some one in his behalf, within a number of days after the service of a copy of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian for the said infant; and the court shall give special directions in the order for the manner of the service thereof, which may be upon the infant himself, or by service upon any relation or

person with whom the infant resides, and either by mail or personally upon the person so served.

a. Where an infant is plaintiff, he must have a guardian appointed before the action is commenced (*Hill* v. *Thatcher*, 2 Code Rep. 3; 3 How. 407); and if an action on behalf of an infant be commenced by a *next friend* instead of a guardian, it is irregular (*Hoftailing* v. *Teal*, 11 How. 188). Where the infant is a married woman suing as a co-plaintiff jointly with her husband, no guardian for her seems necessary (*Cook* v. *Rawdon*, 6 How. 233; 1 Code Rep. N. S. 382). The guardian should be a responsible person, competent to answer for the costs (*Id.*) A responsible person is one worth at least $250 above all debts (*Robertson* v. *Robertson*, 3 Paige, 387).

b. It seems that there is no authority for the appointment of a guardian for an infant for the purpose of a submission of a controversy without action (*Fisher* v. *Stilson*, 9 Abb. 33).

c. Where an infant defendant is a married woman, it is customary to appoint her husband her guardian, unless he has an interest adverse to her, if he be competent in other respects (1 Barb. Ch. Pr. 85).

d. It seems that that part of Rule 60 of the supreme court which requires the guardian *ad litem* to be the general guardian, or an attorney, &c., or other officer of the court, does not apply to a guardian for the plaintiff (*Cook* v. *Rawdon*, supra.)

e. In *McConnell* v. *Adams* (1 Code Rep. N. S. 114), the defendant was an infant, over the age of 14. The summons was served in December, and no guardian having been applied for by the plaintiff, a guardian was appointed on the petition of the defendant on the 25th of February. On motion to dismiss the complaint, it was insisted that the defendant could not regularly petition for the appointment of a guardian after twenty days from the service of the summons; but held that the appointment was properly made, that section 116 was intended for the protection of the infant, to secure him the opportunity of having a guardian of his own selection by giving him twenty days after the service of the summons in which no other person could apply. After that time the plaintiff or any relative or friend of the infant, might make the application; but the infant was still at liberty to apply himself, until forestalled by such application. See *E. B.* v. *E. C. B.* (8 Abb. 44; 28 Barb. 299).

f. In the appointment of a guardian *ad litem* for an infant defendant, the person should be selected who will be most likely to protect the rights of the infant. And where his father or other natural guardian is complainant, the next nearest relative is entitled to be heard on the selection of a guardian. To authorize the appointment of such a guardian it should be distinctly shown either that the infant has been personally served with process or proceeded against as an absentee (*Grant* v. *Van Schoonhoven*, 9 Paige, 255).

g. The motion for the appointment of a guardian may be made at chambers (5 Abb. 53). The appointment of a guardian for a plaintiff should be alleged in the complaint; see in note to section 142 *post*, and where the infant is defendant a copy of the order appointing a guardian for him should be served with the answer (2 Saund. 117, g. n. 1).

h. A guardian *ad litem* is a species of attorney whose duty it is to prosecute for the infant's rights, and to bring those rights directly under the notice of the court (*Knickerbocker* v. *De Freest*, 2 Paige, 304). He can do nothing to the injury of the infant, and cannot compromise or settle his suit (*Miles* v. *Kaigler*, 10 Yerg. [Tenn.] R. 10), and a payment to him is not satisfaction unless ratified by the infant at majority (*Allen* v. *Rountree*, 1 Speers [S. C.] R. 80; *Edsall* v. *Vandemark*, 39 Barb. 589). He is not a party to the suit, and his duty ends with the final judgment therein (*Brown* v. *Hull*, 16 T. R. 673; *Jarvis* v. *Boyd*, 5 Porter [Ala.] R. 388; *Darrin* v. *Hatfield*, Court of Appeals, December, 1852, Selden's Notes; *Sinclair* v. *Sinclair*, 1 New Pr. Cas. 179; *Millinck* v. *Collier*, 14 Jurist, 621). The reason of his appointment is that there may be a responsible person before the court, accountable for the costs (*The People* v. *N. Y. Com. Pleas*,

11 Wend. 166). Being liable for costs (*Leopold* v. *Meyer*, 10 Abb. 41; 2 Hilton, 580; Code §§ 316, 115), he is not compelled to incur any liability other than for the costs of the adverse party, and for these he has a remedy over against the estate of the infant. He is entitled to have any expenses necessarily incurred by him in the action, reimbursed out of the proceeds recovered in such action; but his application for such reimbursement must be made before the fund has been parted with by the attorney to the plaintiff, and therefore where a recovery was had and the money had been paid over by the plaintiff's attorney to the infant plaintiff without notice of any claim of the guardian, held that the attorney was not liable to reimburse the guardian expenses incurred by him. (*Id.*) A person cannot be appointed guardian *ad litem* against his consent. (*Id.*)

a. The appointment of a guardian to prosecute or defend for an infant in an action for partition of lands, is regulated by the revised statutes, and not by the code. See section 448, *post*.

See Supreme Court Rules, 60 *et seq.*; and see § 420.

§ 117. [97.] *Who to be joined as plaintiffs.*

All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

b. This section now furnishes the rule as to the parties plaintiff in all cases, whether such as were formerly subjects of suits in equity, or of actions at law (*Loomis* v. *Brown*, 16 Barb. 331; 18 N. Y. 76); except actions for partition of real estate (See note to § 448, *post*).

c. In an action on an injunction bond, the *subject* of the action being the damages sustained by the plaintiffs in consequence of an injunction, all the obligees may join as plaintiffs, notwithstanding the claim of one of them is different in its character and amount from that of the others. (*Id.*)

d. Different creditors of a corporation having a common interest in the relief sought, may unite in the same complaint (*Conro* v. *Port Henry Iron Co.*, 12 Barb. 28; and see *Dix* v. *Briggs*, 9 Paige, 595).

e. Different persons owning separate tenements affected by a nuisance, may join in a suit to restrain by injunction the continuance of the nuisance (*Peck* v. *Elder*, 3 Sand. 126; *Brady* v. *Weeks*, 3 Abb. 157; *contra*, *Hudson* v. *Madison*, 35 Eng. Ch. R. 352).

f. Where a person stakes upon an illegal wager money belonging to himself, and others, in an action against the stake-holder to recover the money deposited, he can only recover the amount deposited by himself (*Ruckman* v. *Pitcher*, 13 Barb. 556).

g. An action for a libel on members of a company or association, a hose company in the city of New York—neither being partners nor persons having a community of pecuniary interest wherein they could sustain damage, cannot be sustained by them jointly (*Giraud* v. *Beach*, 3 E. D. Smith, 337).

h. Section 111 is imperative, and is subject to no exceptions other than those stated in section 113. Hence, a dormant partner is a necessary party plaintiff in an action for the recovery of a partnership debt founded on a partnership contract, whether the relief sought be legal or equitable (*Secor* v. *Keller*, 4 Duer, 416). But in an action on a contract made with the ostensible members of a firm, the defendants cannot avail themselves of the non-joinder of a secret partner, unless the plaintiff knew of such secret partner (*N. Y. Dry Dock Co.* v. *Treadwell*, 19 Wend. 525; cited *Van Valen* v. *Russell*, 13 Barb. 592; and see *Hurlbut* v. *Post*, 1 Bosw. 28; *Brown* v. *Birdsall*, 29 Barb. 549; *Bishop* v. *Edmiston*, 16 Abb. 466). Suits in relation to the business of a limited co-partnership, may be brought and conducted by and against the *general* partners in the same manner as if there were no special partner (1 R. S. 766, § 14; see *Schulten* v. *Lord*, 4 E. D. Smith, 206).

a. Persons having distinct claims against another cannot unite to enforce such claims in one action (*Wood* v. *Perry*, 1 Barb. 114; and see *Mead* v. *Malt*, 15 How. 347). The commissioners of highways of two towns cannot unite as plaintiffs in an action to recover a penalty for an encroachment upon a highway running on the line between such towns (*Bradley* v. *Blair*, 17 Barb. 480).

b. As a general rule when a fund is in the hands of a trustee, which he is bound to distribute to different persons in unequal proportion, all who are interested in the distribution are necessary parties to an action against the trustee. But when the sum that each is to receive has been ascertained by a proceeding binding on the trustee, each of the persons entitled to participate in such distribution may maintain a separate action for his proportionate share thus ascertained (*Gen. Mut. Ins. Co.* v. *Benson*, 5 Duer, 168).

c. Owners of real property as tenants in common *may* sue jointly or separately for use and occupation (*Porter* v. *Bleiler*, 17 Barb. 149; *Jones* v. *Felch*, 3 Bosw. 63). It was held in an action on a bond given for the benefit of several creditors to discharge an attachment under 2 R. S. 12, § 57, may be sued either in the name of a single creditor or of all the creditors (*Pearce* v. *Hitchcock*, 2 Coms. 388).

d. In an action for the hire of a vessel owned by several persons jointly, all the joint owners must join as plaintiffs (*Coster* v. *N. Y. & Erie R. R.*, 8 Abb. 332). Where one had received a sum of money, the proceeds of real estate belonging to tenants in common, it was held that each tenant might maintain a separate action for his proportion of such proceeds (*Van Wart* v. *Price*, 14 Abb. 4, note).

e. Tenants in common of a chattel must join in an action for its conversion. If they do not, and the defendant does not object by answer or demurrer, he cannot at the trial defeat a recovery. The damages will be apportioned, and the plaintiff may recover for his interest; and when afterwards the other tenant sues to recover for his interest, the defendant cannot raise the objection of the non-joinder of his co-tenant (1 Chit. Pl. 66; 7 T. R. 279; 5 Hill, 59, *note*; *Rice* v. *Hollenback*, 19 Barb. 664). When tenants in common of a chattel have united in an action for its conversion, one of them cannot release or settle the action so as to defeat the rights of the other to proceed and recover his portion of the damages (*Gock* v. *Keneda*, 29 Barb. 120). How the action may be proceeded with after a settlement by or death of one of several plaintiffs, see note to § 121, *post*.

f. In actions brought by or against executors, it is not necessary to join those as parties to whom letters testamentary have not been issued, *and* who have not qualified (Laws 1838, p. 103); but all the executors to whom letters have been issued, and who have qualified should join (*Scrantom* v. *Farmers' Bank of Rochester*, 33 Barb. 531; *Moore* v. *Willett*, 2 Hilton, 522).

g. On a promissory note given to an executor or administrator on account of the decedent's estate, he may sue either individually or in his representative capacity (*Bright* v. *Currie*, 5 Sand. 433; *Merritt* v. *Seaman*, 2 Selden, 168).

* § 118. [98.] (Am'd 1849.) *Who to be defendant.*

Any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein.

h. **Account.**—In an action by one of eleven harbor-masters of the port of New York against *another* of them, for an account of fees received by him on account of the whole eleven, held that all the harbor-masters should be parties (*Dean* v. *Chamberlin*, 6 Duer, 691).

**Amended—See Appendix.*

a. **Assignor and assignee.**—The master of a vessel having an unsettled account with her owner, for his wages and for his receipts from the earnings of the vessel and disbursements on her account, assigned his claim to a third person. The assignee sued, and it appeared on the trial that there was a balance due from the defendant; held that the defendant could not require the master to be made a party to the action for the purpose of enforcing an accounting (*Allen* v. *Smith*, 16 N. Y. 415). Where an action is brought by the assignee of a demand it is not, in ordinary cases, necessary to make the plaintiff's assignor a party defendant (*Freeman* v. *Newton*, 3 E. D. Smith, 246). But in some cases the court may order an alleged assignor of a claim in suit to be brought in as a party to protect the defendant against another action in the name of such assignor, in which the execution of any assignment might be denied by the latter. (*Id.*)

b. **To cancel fraudulent certificates.**—Where spurious certificates of stock in a railway corporation, issued by the officer having apparent authority to do so, and undistinguishable on their face from the genuine certificates, are in the hands of various holders; the corporation may sue all such holders in one action for the cancelling of such certificates (*N. Y. & N. Haven R. R. Comp.* v. *Schuyler*, 17 N. Y. 592; and see 38 Barb. 537; 1 Abb. 417).

c. **Award.**—In an action to set aside an award of arbitrators, the arbitrators need not be made defendants (*Knowlton* v. *Mickles*, 29 Barb. 470).

d. **Fraudulent deeds.**—In an action by judgment creditors, or a receiver, to set aside alleged incumbrances on or conveyances of the judgment debtor's estate, for fraud, and to have the estate applied to satisfy plaintiff's judgments, the judgment debtor, and all the incumbrances or grantees of the estate, should be united as defendants (*Morton* v. *Weil*, 33 Barb. 30; 11 Abb. 421; and see *Wallace* v. *Eaton*, 5 How. 99; *Jacot* v. *Boyle*, 18 How. 106; *Sage* v. *Mosher*, 28 Barb. 287; *Shaver* v. *Brainard*, 29 Barb. 25; *Cox* v. *Platt*, 32 Barb. 126; *Reed* v. *Stryker*, 12 Abb. 47; reversing 6 Abb. 109; *Vanderpool* v. *Van Valkenburgh*, 2 Selden, 190), and an incumbrancer should be made a party although a resident out of the State (*Gray* v. *Schenck*, 4 Coms. 460). But one who innocently accepted a deed of the property for the benefit of the alleged fraudulent grantee and who has conveyed in accordance with the trust, is not a proper party (*Spicer* v. *Hunter*, 14 Abb. 4). Where the complaint against the original debtors and their assignees, seeks to set aside an assignment made for the benefit of creditors, it is not necessary to make all the creditors parties defendant. The assignees in such case represent all the creditors interested in the trust. It would be otherwise if the action were to establish and carry out the assignment, or for portions of the trust fund (*Bank of British North America* v. *Suydam*, 6 How. 379).

e. In an action by creditors against an assignee for the benefit of creditors for an account and to have the assignment to the defendant reformed, held that the assignors and the persons to be affected by the alteration of the assignment were necessary parties defendant (*Garner* v. *Wright* 24 How. 144).

f. **Heirs and Next of Kin.**—An action against heirs to recover a debt of their ancestor must be against the heirs jointly and not separately (Laws 1837, p. 537, § 73,) but this does not make them joint debtors (*Kellogg* v. *Olmstead*, 6 How. 487).

g. The term "next of kin" as used in the statute authorizing actions to be brought against the next of kin of any deceased person to recover the value of any assets paid to them by an executor or administrator, means those to whom, under the statute of distributions, the personal estate of the deceased would pass, and includes the widow of the deceased, but not the husband of such widow (*Merchants' Ins. Co.* v. *Hinman*, 34 Barb. 410).

h. **Stockholders.**—In an action to charge stockholders personally with debts of their corporation, judgment creditors of the corporation are not proper parties defendant without showing why they were not made parties plaintiff (*Young* v. *N. Y. and Liverpool Steamship Co.*, 10 Abb. 229). In such an action, the corporation is not necessarily a party defendant (*Perkins* v. *Church*, 31 Barb. 84).

a. **Ejectment—Ejectment for Dower.**—See *post*, § 455.

b. **Executors—Legacies.**—In an action against an executor for the recovery of a legacy which the executor alleges has been paid by him to a stranger, for the benefit of the legatee, the stranger need not be joined as a defendant (*Gleason* v *Thayer*, 24 Barb. 82). In an action by a residuary legatee for his share of the residue, all persons interested in the residue must be made defendants (*Tonnelle* v. *Hall*, 8 Abb. 205; and see *Towner* v. *Tooley*, 38 Barb. 598).

c. The executor of D. H. died, leaving funds of his testator mingled with his own, and they passed so mingled into the hands of his executor, the defendant; held that in an action by a legatee named in the will of D. H. the residuary legatees named in said will should be parties (*Theological Sem. of Auburn* v. *Kellogg*, 16 N. Y. 84).

See note to section 117.

d. **Foreclosure.**—The owner of the equity of redemption is a necessary party to a suit for the foreclosure of a mortgage. And the objection that he is not made a party may be made by the mortgagor in his answer. The fact that the deed from the mortgagor to the present owner of the equity of redemption was not recorded at the time of the commencement of the suit, and of the filing the notice of *lis pendens*, does not excuse the omission of the owner of the equity of redemption as a party (*Hall* v. *Nelson*, 23 Barb. 88; 14 How. 32, and see *Griswold* v. *Fowler*, 6 Abb. 113). Where the mortgagor has parted with all his interest in the premises, and the owner of the equity of redemption is personally liable for any deficiency, it is not necessary to make the mortgagor a party defendant (*Drury* v. *Clark*, 16 How. 424). And where the mortgagor had previously entered into a written agreement with a person to convey the premises, held that although such person was a proper party defendant, the omission to make him a party would not prevent the rendition of a valid judgment; and *semble*, the non-joinder of such person cannot be taken advantage of by demurrer or answer (*Crooke* v. *O'Higgins*, 14 How. 154). Every party interested in the division of the proceeds of the estate should be made a party defendant (*Denton* v. *Nanny*, 8 Barb. 618). The wife or widow of the mortgagee must be made a party to bar her dower. (*Ib.*) Even on the foreclosure of a mortgage given to secure purchase-money, the wives of the grantees of the mortgagor are necessary parties in order to extinguish their contingent rights of dower (*Mill* v. *Van Voorhies*, 23 Barb. 125; 10 Abb. 152). And the same was held in the Superior Court at General Term. See note to section 114, *ante*.

e. In a suit to foreclose a mortgage, one who claims adversely to the title of the mortgagor, and prior to the mortgage, cannot properly be made a party defendant for the purpose of trying the validity of such adverse claim of title (*Corning* v. *Smith*, 2 Selden, 82). But prior incumbrancers may be made parties to have the amount due them liquidated (*Holcomb* v. *Holcomb*, 2 Barb. 20; and see *Chapman* v. *Draper*, 10 How. 367).

f. **To set aside Mortgage.**—The assignee of a mortgage may be made a defendant in the action to set aside the mortgage as usurious (*Niles* v. *Randall*, 2 Code Rep. 31).

g. **Foreign State.**—Although a sovereign or sovereign state, in his or its political capacity, cannot be sued in the courts of another state for the purpose of *enforcing* any remedy against them, yet a foreign state may be made defendant in an action, to give it an opportunity to appear, and thus enable a court to decide more intelligently in relation to demands which are sought to be enforced against other defendants (*Manning* v. *The State of Nicaragua*, 14 How. 517).

h. **Infant.**—Where an infant is a party to a contract, in an action on such contract it is necessary to make the infant a party (*Slocum* v. *Hooker*, 13 Barb. 536, reversing S. C., 12 *id.* 563; 6 How. 167; *Butler* v. *Morris*, 1 Bosw. 333).

i. **Negligence.**—Where the plaintiff complained that while a passenger in the cars of the Harlem Railroad Company, he was injured by the conjoint negligence of the servants of that company and the servants of the New Haven

Railroad Company—Query, whether the plaintiff can join both companies as defendants (*Colgrove* v. *N. Y. and Harlem R. R. Comp.*, 6 Duer. 382; 20 N. Y. 492). Master and servant may be joined as defendants in an action to recover for the negligence of the servant (*Montfort* v. *Hughes*, 3 E. D. Smith, 591).

a. **Partition.**—See note to section 448, *post.*

b. **Partners.**—The defendants were partners, and as such contracted to receive and sell on commission a quantity of lumber to be forwarded to them by the plaintiff. Before it was all sold, Briggs retired from the firm, and the business was continued by Vose on his own account,—held that Briggs was jointly responsible with Vose to the plaintiff for the proceeds of the lumber received by Vose after the dissolution (*Briggs* v. *Vose*, 15 N. Y. 471; and see *Hurlbut* v. *Post*, 1 Bosw. 28). Persons giving credit to a firm supposed to consist of five persons, without any knowledge of two other partners, in the absence of any allegation or proof that the connection of those two with the firm was notorious, or was in any way disclosed, have the right, but are not bound, to sue all the partners (*Brown* v. *Birdsall*, 29 Barb. 549). A partner making a sale with warranty in his own name, without disclosing the fact of the sale being on behalf of a partnership, may be sued alone (*Cookingham* v. *Lasher*, 38 Barb. 656). And where one of several partners makes a *joint and* several promissory note, and subscribes to it the name of his firm, he may be sued on such note alone without joining the other partners (*Snow* v. *Howard*, 35 Barb. 55).

c. Where a lease is made to two partners, and they afterwards dissolve the partnership, and agree to, and do, each occupy separately distinct portions of the demised premises, they do not thereby affect the lessor's right to maintain an action for the rent against such lessees jointly (*Hurlbut* v. *Post*, 1 Bosw. 28; see *St. Paul's Church* v. *Ford*, 34 Barb. 16).

d. As to the case of two firms having one common member, and one firm performing work for the other, how it must be sued for (*English* v. *Furniss*, 4 E. D. Smith, 587; *Decker* v. *Furniss*, 14 N. Y. 611; reversing, 3 Duer, 587, and see 18 N. Y. 76).

e. The personal representative of a deceased partner cannot be joined, as a party-defendant, with the surviving partner, to an action for a partnership debt, unless it be shown on the face of the complaint that the plaintiff cannot procure satisfaction from the survivor (*Voorhis* v. *Child's Ex'or*, 17 N. Y. 354; *Copcutt* v. *Merchant*, 4 Bradf. Sur. Rep. 18; *Higgins* v. *Freeman*, 2 Duer, 650; *Voorhies* v. *Baxter*, 1 Abb. 45; S. C., 18 Barb. 592; *Moorehouse* v. *Ballou*, 16 Barb. 289; *Tracy* v. *Suydam*, 30 Barb. 110; Dubois case, 3 Abb. 177; contra, *Ricart* v. *Townsend*, 6 How. 460; *Parker* v. *Jackson*, 16 Barb. 34). The objection is waived if not raised by demurrer (*Wright* v. *Storrs*, 6 Bosw. 600).

f. **Receiver.**—The receiver of a bank should not be joined as a party defendant in an action against the bank on a mere money demand where no relief is prayed and no cause of action shown against such receiver (*Arnold* v. *Suffolk B'k.*, 27 Barb. 424).

g. **Relief.**—Certain securities were by the owners deposited with A., as agent to sell them or negotiate loans on them. A., in violation of the trust, disposed of the securities to various parties; whereupon the owners brought suit against A., and all the transferrees of the securities, praying appropriate relief against each as the nature of the transaction with each required,—held that the transferrees could not be joined as defendants (*Lexington & Big Sandy R. R. Co.* v. *Goodman*, 5 Abb. 493; 15 How. 85; 25 Barb. 469).

h. **Sheriff and deputy.**—A sheriff, although not present when goods are wrongfully taken by his deputy, is yet liable as a trespasser for the acts of the deputy, and may therefore be joined with the deputy as a defendant in an action for the recovery of damages for the wrongful taking (*King* v. *Orser*, 4 Duer, 431; see, however, *Waterbury* v. *Westervelt*, 5 Selden, 598; *Moulton* v. *Norton*, 5 Barb. 287; *Nichols* v. *Michael*, 28 N. Y. 269).

i. **Tort—Slander.**—It is not necessary to join all the parties to a tort as defendants; one or more or all may be sued jointly, or each separately (6 Johns.

26, 31; *Nichols* v. *Michaels*, 23 N. Y. 269). Where a tort, however, consists of a verbal slander by two or more, a separate action must be brought against each, they cannot be sued jointly. (*Ib. Forsyth* v. *Edmiston*, 2 Abb. 431). See in note to § 114.

a. **To stay proceedings on a judgment.**—In an action to stay proceedings on a judgment against three defendants brought by one of said defendants, against the plaintiff in the first suit, and a general assignee of the said defendants, it was held that the other two defendants in the first judgment should have been made parties (*Bowers* v. *Tallmadge*, 16 How. 325).

b. **Vendor and Vendee.**—Where, after a vendor of real estate has conveyed it with covenants for title and warranty, a mortgage is discovered unsatisfied of record, but which the vendor insists is satisfied, the vendee of the land may, in an action to have the mortgage satisfied of record, join his vendor and the holder of the mortgage as defendants (*Wandle* v. *Turney*, 5 Duer, 661). The vendee of an estate is a necessary party to an action to stay waste, intermediate the contract for sale and the completion of the contract (*Kidd* v. *Dennison*, 6 Barb. 9). In an action for specific performance of the contract to convey several lots of land, being part of a tract owned by one of the defendants, and upon which he had given mortgages prior to the contract to sell,—held that the prior mortgagees were improperly made parties defendants to the action (*Chapman* v. *Draper*, 10 How. 367).

c. **Principal and Surety.**—Where a principal and his surety are liable upon the same instrument they may be sued jointly in one action (*Carman* v. *Plass*, 23 N. Y. 286; *Le Roy* v. *Shaw*, 2 Duer, 626). Where the liability arises on different instruments, although on the same paper, they cannot be sued jointly (*id. De Ridder* v. *Schermerhorn*, 10 Barb. 638; *Allen* v. *Fosgate*, 11 How. 218). And where a promissory note had a guarantee written upon it, the court held that the maker of the note and the guarantor could not be included in the same action. (*Id.* and *Phalen* v. *Dinges*, 4 E. D. Smith, 379; *Brewster* v. *Silence*, 4 Selden, 214).

d. **Remedy for improper joinder of defendants.**—Where there is an improper joinder of parties defendant, and that fact does not appear on the face of the complaint, the remedy is by motion, to strike out the defendant to improperly joined (*Bailey* v. *Easterly*, 7 How. 495; Wayne Co. Co't).

§ 119. [99.] (Am'd 1849.) *Parties to be joined, &c.*

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

e. Where the parties are so numerous that it would be impossible to bring them all in, or, if brought in, to prevent the suits being continually abated by death, or a change of interest. In such a case, it has been allowed for one of the parties in interest to commence a suit on behalf of himself and all others equally interested with him; and this must be distinctly stated in the outset, by a proper averment in the complaint, because those others might acquire an interest in and control over the suit, of which it would not be in his power to deprive them (*Smith* v. *Lockwood*, 1 Code Rep. N. S. 319; 13 Barb. 218; and

see *Wood* v. *Draper*, 4 Abb. 322; *Bouton* v. *City of Brooklyn*, 15 Barb. 375; *Kirk* v. *Young*, 2 Abb. 453; *Roosevelt* v. *Varnum*, 12 How. 469; *McKenzie* v. *L'Amoreaux*, 11 Barb. 516; *Towner* v. *Tooley*, 38 Barb. 598). The nature of the common interest of the parties must appear to be such as would entitle them, were they all before the court, to maintain the action in their own right or in their own names (*Habicht* v. *Pemberton*, 4 Sand. 657). The parties being thirty-five in number, was held not to be an excuse for one suing on behalf of all (*Kirk* v. *Young*, 2 Abb. 453).

a. A member of an unincorporated association cannot maintain in his name, for the benefit of the association, an action on a note given to or held by the association, without showing by his complaint the articles or other instrument which gives him such right or authority. The mere fact that the society is unincorporated, and its members numerous, will not warrant such a suit. Nor will a statement that the plaintiff is specially authorized to bring the suit on behalf of the company (*Habicht* v. *Pemberton*, 4 Sand. 657). For one may not prosecute or defend "for the benefit of the whole" where the right to be protected or the obligation to be enforced is not common to all (*Reid* v. *The Evergreens*, 21 How. 319). Persons having adverse or conflicting interests in relation to the subject-matter of the litigation, ought not to be joined (*Grant* v. *Van Schoonhoven*, 9 Paige, 255). Where the right is common, but there is a question as to its enforcement, that does not constitute a conflicting interest (*Brooks* v. *Peck*, 38 Barb. 519; see *Bishop* v. *Edmiston*, 16 Abb. 466; rev'g 13 Abb. 346).

b. A creditor cannot maintain an action on his own behalf alone to set aside an assignment for the benefit of creditors, made contrary to the statute respecting limited partnerships. He must sue for the benefit of himself and the other creditors. Where, in such a case, a creditor sues the assignee for himself alone, the assignee may make the objection for the first time on the trial (*Green* v. *Breck*, 10 Abb. 42).

c. The words "those who are united in interest," in this section, refer to such cases as those of joint-tenants, co-trustees, partners, joint-owners, or joint-contractors simply, where in fact a separate judgment in favor of one of them would not be proper on the case as stated in the complaint (*Jones* v. *Felch*, 3 Bosw. 66).

d. An action may be brought by preferred creditors in an assignment for the benefit of creditors in behalf of themselves and other creditors for an accounting, and to obtain a judgment that the defendant close up his trust by selling the assets and distributing the proceeds, where the creditors are so numerous that it would be impracticable to bring them all before the court (*Brooks* v. *Peck*, 38 Barb. 519).

e. It is the right of a party who is sued to require that any other person jointly liable with him shall be made a co-defendant (*Wooster* v. *Chamberlin*, 28 Barb. 602). But where joint debtors reside in different States, they may be sued separately in the States having jurisdiction of their respective persons or property (*Brown* v. *Birdsall*, 29 Barb. 549); and the judgment in one State against one joint debtor is not a bar to a subsequent action in another State against the other debtor. (*Id.*)

f. The fact that certain parties in interest are numerous and unknown, is a sufficient excuse for not joining them as defendants (*Coe* v. *Beckwith*, 10 Abb. 296).

g. The rule that persons only severally and not jointly liable cannot be joined as defendants, has not as a general rule been altered by the code. The only exceptions are those prescribed by section 120. No exception is created by § 167, since the causes of action which may be united under that section must affect all parties to the action (*Le Roy* v. *Shaw*, 2 Duer, 626).

h. An attorney claiming a lien on a judgment for costs cannot, in an action to recover such costs, no collusion being charged, make the judgment debtor a defendant (*Adams* v. *Fox*, 40 Barb. 442).

a. Joint action against joint assignees of a lease (*Van Rensselaer* v. *Layman*, 10 How. 505).

b. The executor or administrator of a deceased joint debtor or owner of real or personal property, cannot be joined in an action with the survivor for a debt due the joint debtors or for an injury to their real property (*Bucknam* v. *Brett*, 22 How. 233; 13 Abb. 119; 35 Barb. 596).

c. In an action by a receiver of a judgment debtor to set aside as fraudulent a conveyance to one defendant, and a subsequent conveyance of the same property of such defendant to another defendant, the judgment debtor is a necessary party (*Shaver* v. *Brainard*, 29 Barb. 25).

d. In an action by a mortgagee of chattels for damages to his reversionary interest, caused by a sale of them in parcels while in the possession of the mortgagor under an execution against his property. Query, Can a purchaser of part of the chattels be joined as defendant with the parties directing and making the sale (*Manning* v. *Monaghan*, 28 N. Y. 539)?

§ 120. [100.] *Parties to bills and notes, &c.*

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action at the option of the plaintiff.

e. Although the several parties to a bill or note may be sued in one action, yet their being so sued does not make them jointly liable (*Alfred* v. *Watkins*, 1 Code Rep. N. S. 343), or joint-debtors (*Kelsey* v. *Bradbury*, 21 Barb. 531).

f. An action may be brought against the maker and the executor of the indorser of a promissory note, although the maker is solvent, but separate judgments must be entered (*Churchill* v. *Trapp*, 3 Abb. 306).

g. This section applies to an action on a replevin bond (*Brainard* v. *Jones*, 11 How. 569).

h. An action by a subsequent endorser, against prior endorsers, to recover the amount he has been compelled to pay in a suit brought upon the note, is an action for *money paid for the use of the defendants*,, and not an action on the note within this section (*Barker* v. *Cassidy*, 16 Barb. 177), and therefor such an action cannot be maintained. (*Id.*)

§ 121. [101.] (Am'd 1849, 1857, 1862.) *Existing suits. Action when not to abate.*

No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made, to be substituted in the action.

After a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action now survives by law.

At any time after the death, marriage, or other disability of the party plaintiff, the court in which an action is pending upon notice to such persons as it may direct, and upon application of any person aggrieved, may, in its discretion, order that the action be deemed abated, unless the same be continued by the proper parties, within a time to be fixed by the court, not less than six months nor exceeding one year from the granting of the order.

a. **Actions commenced prior to the Code.**—It was held that a bill of revivor and supplement was necessary to revive a suit commenced before July, 1848, except in cases where the party sought to be made a defendant would voluntarily come in as a party to the suit (*Phillips* v. *Drake*, 1 Code Rep. 63; *Spier* v. *Robinson*, 9 How. 331). It was afterwards adjudged that this section, so far as it is made applicable to suits pending before July, 1848, and to transfers of interest made before that time, is unconstitutional (*Vroorman* v. *Jones*, 5 How. 369; 1 Code Rep. N. S. 80).

b. **Action by Corporation.**—An action by a corporation is not abated by the dissolution of the corporation, but may be continued without any application to the court in its corporate name (*N. Y. Marbled Iron Works* v. *Smith*, 4 Duer, 362).

c. **Cross-suit.**—The provision authorizing a suit to be revived against the executor of a deceased party, applies as well to a defendant in a cross-bill as to the original suit (*Hatfield* v. *Bloodgood*, 1 Code Rep. N. S. 212).

d. **Party civilly Dead.**—When the plaintiff or defendant in a civil action is sentenced to imprisonment in the State prison, although only for a term of years, the suit is abated (*O'Brian* v. *Hagan*, 1 Duer, 664; *Freeman* v. *Frank*, 10 Abb. 370).

e. **Death of Sole Plaintiff.**—On the death of a sole plaintiff the defendant is entitled to have the action continued in the name of the representatives of the decedent (*Ridgeway* v. *Bulkley*, 7 How. 269); or after a year a supplemental complaint filed within a time to be prescribed by the court (*Green* v. *Bates*, 7 How. 296); or to have the original complaint dismissed (*Banta* v. *Marcellus*, 2 Barb. 373); but the personal representatives of a deceased sole plaintiff are not bound to continue an action commenced by the decedent against an insolvent defendant; especially when for other reasons the object of the suit cannot be obtained by reason of facts which occurred or came to the plaintiff's knowledge after the commencement of the action. In such cases the court may allow the personal representatives to discontinue without costs (*id.*); or with costs to be paid out of the decedent's estate (*id.*; and see *Chowick* v. *Dimes*, 3 Beavan, 290). One who succeeds another in the administration of an estate may continue a suit commenced by his predecessor: he is not compelled to do so against his will (*Bain* v. *Pine*, 1 Hill, 616).

f. Where intermediate the argument and decision of a motion to strike out an answer the plaintiff died, held that the order deciding the motion could not be entered until an order was obtained reviving the action in the name of the proper party; and that the order could not be entered *nunc pro tunc* as of the day when the motion was submitted (*Reed* v. *Butler*, 11 Abb. 128). As to the cases in which an order or judgment may be entered *nunc pro tunc*, see *id.*; *Beach* v. *Gregory*, 2 Abb. 203.

a. The death of a sole plaintiff, before verdict, suspends all further proceedings in the action, except moving to have the plaintiff's representative brought in as plaintiff (*Jarvis* v. *Felch*, 14 Abb. 46). If the plaintiff's representatives do not move for leave to continue the action the defendant may move that they continue it (*id.*), or that the complaint be dismissed. (*Id.*)

b. The death of the plaintiff in a foreclosure suit, after the usual decree for sale by a referee does not prevent the referee from proceeding to make the sale, and executing a deed to the purchaser (*Lynde* v. *O'Donnell*, 21 How. 34). It is not necessary to revive the action and bring in the representatives of the deceased plaintiff. (*Id.*) *Semble*, the death of party after verdict or interlocutory judgment or report of referee does not in any action prevent the entry of judgment (*Reed* v. *Butler*, 11 Abb. 128; *Scranton* v. *Baxter*, 1 Code Rep. N. S. 88).

c. After the death of a sole plaintiff the defendant cannot move to dismiss the complaint for want of prosecution until the action has been revived by the plaintiff's representatives (*Jarvis* v. *Felch*, 14 Abb. 46).

d. Where on the death of a sole plaintiff his executor did not apply to continue the action, but transferred the subject matter of the action to A.; held that A. could not have the action continued in his name (*Rogers* v. *Adriance*, 22 How. 97).

e. A plaintiff suing as special receiver having died pending the action, his successor was allowed to continue the action by supplemental complaint (*Palmer* v. *Murray*, 18 How. 546).

f. An administrator of a deceased plaintiff may have leave to continue the action, if the pleadings show a cause of action which *survives*, without regard to the *merits* of the action (*Wing* v. *Ketcham*, 3 How. 385; 2 Code Rep. 7). And if, in an action to recover real property, the plaintiff should die, leaving a widow, she need not, as widow, join in an application, on the part of the heirs, for leave to continue the action in the name of the heir (*Ash* v. *Cook*, 3 Abb. 389).

g. **Death of one of several Plaintiffs, Partners.**—In an action by the several members of a firm, on the death of one of the plaintiffs, a member of the firm, the right of the remaining members to continue the action, in a case in which the right of action survives, is unaffected, and no leave to continue the action is necessary, because no one is to be substituted. A suggestion on the record is sufficient. This section applies only in the case where a representative, or successor of the deceased, is to be substituted as a party (*Taylor* v. *Church*, 9 How. 190; *La Chaise* v. *Libby*, 13 Abb. 7; 21 How. 362).

h. **Death of one of several Plaintiffs.**—Where some of several complainants die, and the cause of action does not survive, but continues as to the survivors, the latter cannot be compelled to revive the suit as to the representatives of the deceased complainants (*Williamson* v. *Moore*, 5 Sand. 647). The survivors have a right to proceed with their suit. It is the privilege of a defendant, in such a case, to have an order requiring such representatives to show cause why the suit should not stand revived in their names, or that the suit be dismissed so far as their interests are concerned. To obtain such an order a *petition* must be presented. Section 121 of the code does not apply to such a case. (*Id.*)

i. In an action by tenants in common for conversion of personal property, if, pending the action, one of the plaintiffs dies, the action may be continued by the survivor, without bringing in the personal representative of the deceased (*Buchman* v. *Brett*, 13 Abb. 119; 35 Barb. 596; 22 How. 233), and as to transfer of the interest or settlement of the action by one of several plaintiffs in such an action (see *Gock* v. *Keneda*, 29 Barb. 120).

j. After the death of one of several plaintiffs in an ejectment suit, commenced before the code took effect, a motion was made by the surviving plaintiffs, at special term, to substitute the names of two individuals and the people of the State, to prosecute the suit, as representatives or successors in interest of the deceased plaintiff; it being a matter of doubt which of the three parties proposed, was entitled to the right. The motion was denied (*St. John* v. *West*, 4 How. 329; 3 Code Rep. 85; affirmed on appeal, 10 How. 253).

a. Where one of several plaintiffs dies pending an action, the cause of which survives, and the defendant enters judgment against all, no order to proceed by or against the surviving plaintiffs having been made, the judgment is irregular, and will be set aside. And the judgment cannot be amended and allowed to stand as against the surviving plaintiffs (*Holmes* v. *Honie*, 8 How. 383).

b. **Death of a sole Defendant.**—Where, pending an action, and before verdict or interlocutory judgment, a sole defendant dies, his representatives cannot have an order against the wishes of the plaintiff, to be substituted as defendants in the action (*Keene* v. *La Farge*, 1 Bosw. 671; 16 How. 377). In that case the motion of the deceased defendant's representatives was denied without costs, but leave was given to them to enter an order that the action be discontinued, unless the plaintiff within ten days, consented to an order that the action should be continued against defendant's representatives. An action for the recovery of possession of specific real or personal property against a sole defendant, wholly abates if the defendant dies before verdict or judgment; and the court has no power in such case to order the action to be continued against the personal representatives of defendant (*Hopkins* v. *Adams*, 5 Abb. 351; *Mosely* v. *Mosely*, 11 Abb. 105; *Putnam* v. *Van Beuren*, 7 How. 81; *Mosely* v. *Albany N. R. R. Co.*, 14 How. 71; overruling *Waldorph* v. *Bortel*, 4 How. 358).

c. On the death before verdict of a sole defendant in an action to recover damages for death by wrongful act, the action may be continued against the personal representatives of the deceased (see *Yertore* v. *Wiswall*, 16 How. 8; *Doedt* v. *Wiswall*, 15 How. 128; in effect overruling *Norton* v. *Wiswall*, 14 How. 42).

d. Where an action is commenced against a defendant, and pending the action he dies and his administrators are substituted as defendants [*qr.* at their instance or the instance of the plaintiff], and the action is continued against them, without any presentment of the plaintiff's claim to them, or offer to refer under the revised statutes, the plaintiff can recover costs if he succeed in the action (*Tindall* v. *Jones*, 19 How. 469, overruling previous decisions to the contrary).

e. **Death of one of several defendants.**—"If a defendant shall die and the cause of action shall not survive, and the complainant shall neglect or refuse to procure an order for the revival of the suit, the court may order it to stand revived, upon the petition of a surviving defendant, against the representatives of the deceased party (2 R. S. 184, § 120). In such case, the surviving defendant may proceed against such representatives, in the same manner as a complainant, to compel them to appear, abide the answer of the deceased party, or answer, if an answer be required, or to have the bill or his petition taken as confessed against them; and the court may, in its discretion, stay the suit as against him, until such proceedings have been had" (*Id.* § 121). These provisions are referred to, as though still in force, in *Keene* v. *Lafarge* (16 How. 377). Where one of several defendants died pending the reference of an action of foreclosure, and the plaintiff suffered more than a year to elapse without taking any step in the action, the surviving defendant moved to have it dismissed as against him. The court directed the action to be dismissed as to the surviving defendant with costs, unless the plaintiff within sixty days obtained leave to file and serve a supplemental complaint (*Chapman* v. *Foster*, 15 How. 241). Where pending an action for trespass, one of the defendants die, the plaintiff may treat the action as abated as against such deceased defendant, and proceed regularly against the surviving defendants. But whether or not an order to enable him to proceed is necessary, is doubtful (*Gardner* v. *Walker*, 22 How. 405). *Semble*, that by order the plaintiff might proceed *separately* against the surviving defendants and the representatives of the deceased defendant. (*Id.*) Where, in such case, the plaintiff having proceeded against the surviving defendants and the representatives of the deceased defendant, was on the trial put to his election to proceed against either one or the other, and elected to proceed against the representatives of the deceased, the court thereupon dismissed the complaint against the surviving defendants

and held that these defendants might enter judgment for their costs without waiting for the disposal of the issues as to the other defendants. (*Id.*)

a. In case one of several defendants dies, pending an action, all that is necessary to put the case in a position to proceed, is to obtain, within a year, an order that the action be continued against those who have succeeded to the interest of the deceased party (*Gordon* v. *Sterling*, 13 How. 405). Notice of the application is usually given; but where the surviving defendants have no interest in the question, and would have no right to resist the motion, notice is unnecessary. (*Id.*)

b. **Death of one of several executors, &c., pending the action.**—In actions by or against executors, trustees, joint-tenants, or co-partners, on the death of one of the executors, &c., the action continues by or against the survivors, a suggestion of the death entered on the judgment roll is the only addition to or alteration in the proceedings occasioned by the death (*Lachaise* v. *Libby*, 13 Abb. 7; 21 How. 362); and so of an action by tenants in common of a chattel (*Bucknam* v. *Brett*, 13 Abb. 119; 22 How. 233; 35 Barb. 596).

c. **Abatement of suits by or against public officers.**—Under 2 R. S. 447, § 100, providing against the abatement or discontinuance of suits by or against certain public officers from their removal, or resignation, or expiration of their term of office, it is optional with the parties authorized to apply for a substitution, whether they will make such application or not, and until they or the adverse parties apply for a substitution, the suit is to proceed in the names of the original parties (*Manchester* v. *Herrington*, 10 N. Y. 164). The statute did not extend to allow a substitution on a writ of error (*Overseers of Clayton* v. *Beedle*, 1 Barb. 111).

d. **Death of judgment debtor pending supplementary proceedings.**—The death of a sole judgment debtor pending proceedings supplementary to the execution abates the proceedings (*Haswell* v. *Penman*, 2 Abb. 230; S. C. 13 How. 114).

e. **Death of party pending an appeal.**—Where a judgment debtor dies pending an appeal from the judgment, and after the appeal has been argued and submitted, and judgment is affirmed, but judgment of affirmance entered *nunc pro tunc* as of a day before the death, the judgment creditor may proceed to collect the judgment, but the representatives of the deceased cannot appeal until they cause themselves to be made parties (*Beach* v. *Gregory*, 2 Abb. 203). After judgment for the plaintiff, in an action of tort, and appeal taken by the defendant, the defendant died, pending the appeal; on motion, it was ordered that the appeal might be continued in the name of his personal representatives (*Miller* v. *Gunn*, 7 How. 159). In *Hastings* v. *M'Kinley*, (8 How. 175), the court of appeals held that section 121 did not apply to that court, and that where a party in a cause dies *after* appeal taken and the return filed in the court of appeals, that court has power to and will allow his legal representatives to be substituted.

f. **Transfer of plaintiff's interest.**—In case of a transfer of the interest of the plaintiff, in the subject of the action, it is optional with the court, on the death of the plaintiff, whether or not to allow the assignee to be substituted and the action continued in his name; and on the application, the defendant should be heard, and his interest taken into account (*Sheldon* v. *Havens*, 7 How. 268; and see *Harris* v. *Bennett*, 1 Code Rep. N. S. 203; *Murray* v. *Gen'l Mut. Ins. Co.*, 2 Duer, 607; *Ford* v. *David*, 1 Bosw. 571). And the superior court hold that where a plaintiff transfers his interest after the commencement of a suit, no order of substitution will be made, unless special circumstances are shown to satisfy the court of its propriety or necessity (*Howard* v. *Taylor*, 11 How. 380; 5 Duer, 604).

g. When, pending an action, the whole interest of the plaintiff has been transferred to a third person, the court, on the application of such third person, may allow him to be substituted as plaintiff (*Banks* v. *Maher*, 2 Bosw. 690). Although the original plaintiff sues as the receiver of a bank, and his appointment as receiver is put in issue, the court, on a motion to substitute

the transferee of the receiver's interest, will not try such issue: that can only be done on the trial of the cause (*Id.*); nor will the court on such a motion consider the objection that the complaint does not state facts sufficient to constitute a cause of action. (*Id.*)

a. When two persons are named as defendants, and only one is served, and judgment is thereupon perfected against him, there is no action pending against the one not served, until he is served (1 Bosw. 636; 14 Barb. 536; 2 E. D. Smith, 75). So that if afterwards the cause of action becomes vested in a third person, and then the defendant not previously served is served, the assignee cannot be substituted as plaintiff in the action against the defendant last served (*East River Bank* v. *Cutting*, 1 Bosw. 636).

b. Where a party becomes assignee of the cause of action, pending the action, and is substituted as plaintiff *ex parte*, he takes the place of his assignor, and is subject to the same right of set-off (*Terry* v. *Roberts*, 15 How. 65).

c. **Transfer of defendant's interest.**—Where, pending an action of ejectment, all the interest of the defendant in the property was transferred to A., by operation of law, and A. entered and held possession of the premises,—held that the original cause of action did not continue against A., and he could not be substituted as a party to the action (*Moseley* v. *Albany North. R. R. Co.*, 14 How. 71). In *Hornfager* v. *Hornfager* (1 Code Rep. N. S. 180), an action for partition, one of the defendants, after the commencement of the action, assigned all his interest in the premises to one Ely; and it was held that Ely might have been substituted as a party to the action, in place of the defendant who had assigned to him.

d. **Order to continue, &c., how obtained.**—To substitute an assignee, pending the action, a motion must be made on behalf of the assignee (*McGowan* v. *Leavenworth*, 2 E. D. Smith, 24; *Howard* v. *Taylor*, 11 How. 380; 5 Duer, 604); or if made by the assignor, it must be on notice to the assignee (*id.*); and to the parties to the action (*Howard* v. *Taylor*, 11 How. 380). The making the order is not a matter of course (see *ante*, p. 132 *a*). The motion must be made within a year from the time of the death or transfer of interest; after the lapse of a year, the right to apply by motion is gone, and a supplemental complaint must be resorted to (*Greene* v. *Bates*, 7 How. 296; *Coon* v. *Knapp*, 13 *id.* 175; *Gordon* v. *Sterling*, *id.* 405); but the action cannot be continued by supplemental complaint, unless by leave of the court first obtained (*Johnson* v. *Williams*, 2 Abb. 229). Where a plaintiff had, pending the action, transferred his interest and died, and after his death his assignee, on notice to the defendant alone, moved to be substituted as plaintiff, the motion was denied for want of notice to the personal representatives of the deceased plaintiff (*Franklyn* v. *Graham*, MS. Daly, J.).

e. The assignee of a cause of action can only be substituted as plaintiff on his own motion (*Emmet* v. *Bowers*, 23 How. 300, disapproving *Sherman* v. *Coman*, 22 How. 517, in which an assignee was ordered to be substituted as plaintiff on the defendant's motion).

f. No leave to serve a supplemental complaint as prescribed by this section is required (*Re Borsdorff*, 17 Abb. 168; see *Allen* v. *Walter*, 10 Abb. 379; and cases collected in note).

g. After the expiration of a year, the court has no power on motion to order a continuance of the action (*Re Borsdorff*, 17 Abb. 168; *Allen* v. *Walter*, 10 Abb. 379 and *note*).

h. An action may be dismissed for want of prosecution, but not for a neglect to revive it (*Williamson* v. *Moore*, 5 Sand. 647).

i. **Appeal from orders.**—An order admitting (or refusing to admit) an action to be continued in the name of surviving plaintiffs, or in the name of the representatives in interest of the deceased plaintiff, affects a substantial right and is appealable to the general term (*St. John* v. *Croel*, 10 How. 253; *Norton* v. *Wiswall*, 14 *id.* 42–46); but as the granting or refusing an application to permit an action to be continued in the name of an assignee, pending the action,

of the cause of action, rests in the discretion of the court, an order made on such application is not appealable (*M'Gown* v. *Leavenworth*, 2 E. D. Smith, 24; *Murray* v. *Gen'l Mut. Ins. Co.*, 2 Duer, 607).

§ 122. [102.] (Am'd 1849, 1851.) *Court may determine controversy; bring in parties, &c.—Interpleader.*

The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in. And when, in an action[b] for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.

A defendant against whom an action is pending upon a contract, or for specific, real, or personal property, may at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order.

a. By the phrase "when a complete determination of the controversy cannot be had without the presence of other parties," is meant that there are persons not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined; and there are other cases in which *a defendant* may require other parties to be brought in for the protection of his rights; but this is his privilege. He may waive it (*McMahon* v. *Allen*, 12 How. 39).

b. In an action against several for a specific performance of their joint contract to purchase real estate of the plaintiff, and secure a part of the price by their bond and mortgage, all of them must be served with the summons or appear in the action, to enable the court to render a judgment which will be a complete determination of the controversy; and if the action is brought to trial upon the answers of some of the defendants only, when the others have not been served with process, or appeared in the action, the court will not permit the trial to proceed (*Powell* v. *Finch*, 5 Duer, 666).

c. When it appears that the presence of other parties than those before the court is necessary to the complete determination of the controversy, it is the imperative duty of the court to order such persons to be made parties to the action (*Davis* v. *Mayor, &c., of N. Y.*, 2 Duer, 663; *Shaver* v. *Brainard*, 29 Barb. 25). Although such parties may be non-residents (*Sturtevant* v. *Brewer*,

17 How. 571; 9 Abb. 414). *Semble*, where parties are ordered to be brought in, and the cause stands over in consequence, the defendant is not entitled to any costs;—he should have demurred (*Mitchel* v. *Bailey*, 3 Madd. 61); and the order may be made at any stage of the action (*State of N. Y.* v. *Mayor of N. Y.*, 3 Duer, 121) before judgment (*Carswell* v. *Neville*, 12 How. 445). But the court will not order new parties defendant to be brought in, against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action (*Sawyer* v. *Chambers*, 11 Abb. 110).

a. This section must be confined to actions for the recovery of real or specific personal property (*Judd* v. *Young*, 7 How. 79); and it does not extend to an action on contract to recover money (*id.*), nor to an action in the nature of a creditor's bill (*Tallman* v. *Hollister*, 9 How. 508); nor to an action to wind up a partnership (*Dayton* v. *Wilkes*, 5 Bosw. 655). A partition suit is within this provision; and in such a suit the court may order a person, not a party, but having an interest in the subject-matter, to be made a party (*Waring* v. *Waring*, 8 Abb. 246). And in an action for the recovery of personal property seized under an execution against a third party, the plaintiff in the execution is entitled, on applying, to be made a defendant (*Conklin* v. *Bishop*, 3 Duer, 646).

b. To entitle the landlord to defend, in his own name or otherwise, he must be shown to be the landlord of the defendant, or have a privity of interest with him in the premises in question (*Godfrey* v. *Townsend*, 8 How. 398).

c. See note to section 148, *post*.

d. **Interpleader.**—This provision is only applicable to cases in which an action is already *pending*. Where no action is pending, a resort must be had to an action in the nature of a bill of interpleader (*Beck* v. *Stephani*, 9 How. 193). A bill of interpleader was one asking no relief against any of the defendants, but merely asking the direction of the court as to which of two adverse claimants the plaintiff should pay a fund, or deliver property in his hands to which which he claimed no right, and to be protected from such adverse claimants. The only decree to which the complainant was entitled was to be at liberty to bring the fund into court, and have his costs, leaving the defendants to settle the question of ownership beetween themselves (*Bidell* v. *Hoffman*, 2 Paige 200; *Mitchell* v. *Hayne*, 2 Sim. & Stu. 63). This provision of the code is founded upon an English statute, and the decisions on that statute, it is said, may properly be referred to as guides for the interpretation of this section (*Sherman* v. *Partridge*, 1 Abb. 260; 11 How. 154). A person in danger of being doubly vexed by adverse claimants might always resort to a bill of interpleader (*Yates* v. *Tisdale*, 3 Edw. Ch. R. 74; *Martinus* v. *Helworth*, 2 Ves. & B. 412). The code has not introduced new cases of interpleader, but merely provides a summary mode of relief (*Sherman* v. *Partridge*, 1 Abb. 260; 11 How, 154; 4 Duer, 646; *Vosburg* v. *Huntingdon*, 15 Abb. 254). To entitle a party to interplead, he must,—admit a right in two or more claimants (*Brownning* v. *Watkins*, 10 Sme. & M. 482; *Desborough* v. *Harris*, 4 De G., M. & G. 439; 31 Eng. Law & Eq. R. 592); show two or more claimants in existence capable of interpleading (*Browning* v. *Watkins*, 10 Sme. & M. 482); show himself to be indifferent to the claims of either party (*Marvin* v. *Elwood*, 11 Paige, 374; *Oppenheim* v. *Leo Wolfe*, 3 Sand. Ch. 571; *Newton* v. *Moody*. 7 Dowl. 582; *Van Buskirk* v. *Roy*, 8 How. 425; *N. Haven. R. R.* v. *Schuyler*, 1 Abb. 14, 417; *Eagleson* v. *Clarke*, 2 *id.* 364); that he claims no beneficial interest in the subject of the controversy *Atkinson* v. *Manks*, 1 Cow. 703; *Anderson* v. *Wilkinson*, 10 Sme. & M. 601; *Moore* v. *Usher*, 7 Sim. 384; *Mitchell* v. *Hayne*, 2 Sim. & Stu. 63). Thus, an auctioneer could not interplead as to a deposit in his hands, out of which he claimed his commission (*id.*, see, however, *Bleecker* v. *Graham*, 2 Edw. Ch. 64); nor a wharfinger having a claim for wharfage (3 Mo. & S. 131; 9 Bing. 84); the existence of a lien on the grounds in dispute, and which must be paid by the party entitled, does not prevent an interpleader (*Cotter* v. *Bank of England*, 3 Mo. & S. 180; 2 Dowl. 728; and see *Lucas* v. *London Dock Co.*, 4 B. & Ad. 378); admit a title as against himself in all the defendants (*Gwin* v *Green*, 1 Ire. Eq. R. 229; *Anderson* v. *Wilkinson*, 10 Sme.

& M. 601); deny collusion with either party (*Marvin* v. *Elwood*, 11 Paige, 365; *Shaw* v. *Coster*, 8 Paige, 339; *Atkinson* v. *Manks*, 1 Cow. 754; *Wilson* v. *Duncan*, 11 Abb. 7); he must not be a wrong-doer, or in default as to either defendant (*Shaw* v. *Coster*, 8 Paige, 339; *Gwin* v. *Green*, 1 Ire. Eq. R. 229; *McGaw* v. *Adams*, 14 How. 461; *Dalton* v. *Midland R. R. Co.*, 12 Com. B. 458); must not by his own act have placed himself in the position to be sued (*U. S.* v. *Vietor*, 16 Abb. 153; 9 Bing. 82; *Crawshaw* v. *Thornton*, 7 Sim. 391; 2 Myl. & Cr. 1; *Pearson* v. *Carden*, 4 Sim. 218; 2 Rus. & M. 606; *Paterni* v. *Campbell*, 3 Dowl. N. S. 397; 12 M. & W. 277); must not have accepted an indemnity from either party (*Tucker* v. *Morris*, 1 C. & M. 73; 1 Dowl. 639); must be ignorant of the rights of the adverse claimants (*Bell* v. *Hunt*, 3 Barb. Ch. R. 391); where a party was taxed in two towns for the same property, when he was liable to be taxed only once (*Thompson* v. *Ebbetts*, 1 Hopk. 272; *Mohawk R. R.* v. *Clute*, 4 Paige, 384); where a person has purchased property, and payment thereof is claimed by different parties (*James* v. *Pritchard*, 7 M. & W. 216; *Glyn* v. *Duesbury*, 11 Sim. 139); where a person is a stakeholder, and there are different claimants (*Patterson* v. *Perry*, 14 How. 505; *Bender* v. *Sherwood*, 15 id. 259; *Hoggart* v. *Cutts*, 1 Cr. & Phillips, 197; *Atkinson* v. *Manks*, 1 Cow. 730; *Wilson* v. *Duncan*, 8 Abb. 354); but he cannot interplead, if he is the stakeholder on an illegal wager (*Applegarth* v. *Colley*, 2 Dowl. N. S. 223); or if the amount of the stake is disputed (*Diplock* v. *Hammond*, 27 Eng. Law & Eq. R. 202). A receiver against whom adverse claims are made, may interplead (*Winfield* v. *Baron*, 24 Barb. 155).

a. Where an action was brought to recover a sum of money deposited with the defendant (a bank) by F. F., and which was still standing to his credit in the books of the bank. It appeared that after making the deposit, F. F. transferred his interest in the deposit to the plaintiff; and about the time of such transfer, an order was made restraining the defendant from paying over the money to any person until the further order of the court. The defendant had also been notified by other parties not to pay over the money to the plaintiff; held that the defendant was entitled to an order, that the claimants of the fund be substituted as defendants (*Fletcher* v. *Troy Savings B'k.* 14 How. 388). The order provided, that if the receiver did not appear in the action within twenty days after being served with the summons and complaint, the defendant might pay over the money to the plaintiff, (see *Van Buskirk* v. *Le Roy*, 8 How. 425; and see *Richards* v. *Salter*, 6 Johns. Ch. 445).

b. Where several claims under the mechanic's lien law are filed against the owner, and suit brought against him by one of the claimants, and the amount is unascertained, the owner [defendant] cannot be permitted to allege that he is indebted to the contractor in a less sum than the plaintiff's claim against the contractor, and be allowed under this section to pay the balance into court, and have the claimants substituted in his place (*Chamberlain* v. *O'Connor*, 8 How. 45). The owner of a building was refused leave to interplead the contractor who erected the building for him, upon claims under the lien law (*Dry Dock Metho. Church* v. *Carr*, 2 Barb. 60).

c. In an action commenced in the Superior Court of New York city to recover of defendants moneys deposited with them by plaintiff's assignors, the defendants showed that after the action was commenced, they had been served with an attachment in another action, by third parties claiming the fund, and that there was also another suit pending in the Supreme Court by claimants on behalf of creditors seeking to set aside the assignment which was the ground of the plaintiff's claim in this action in the Superior Court, held that the defendants were entitled to interplead, and have the claimants, the plaintiffs in the action in the Supreme Court, substituted as defendants (*Wilson* v. *Duncan*, 8 Abb. 354).

d. The court refused to allow a savings bank to implead adverse claimants of a deposit in the bank (*Lund* v. *Seaman's Savings' B'k.*, 20 How. 461; and 23 *id.* 258).

e. In general, a tenant cannot require his landlord to interplead for the rent with an adverse claimant, yet under certain circumstances he can (see *Seaman* v. *Wright*, 12 Abb. 304; *Badeau* v. *Tylee*, 1 Sandf. Ch. 270).

a. In an action to recover specific personal property, it is a sufficient answer to a motion for an order to interplead, that the defendant is not in a position to deposit the property in court (*Vosburgh* v. *Huntington*, 15 Abb. 255).

b. **Costs.**—In *Miller* v. *Livingston*, 1 Abb. 234, on a bill of interpleader, the unsuccessful claimant was adjudged to pay all costs recovered by the plaintiff, and all costs of his co-defendant, both on the bill, and in an action at law between the claimants.

c. **Appeal.**—An order substituting an adverse claimant as defendant is an appealable order (*Wilson* v. *Duncan*, 11 Abb. 3); and an order disposing of a fund in court is appealable to the court of appeals (*Kirby* v. *Fitzpatrick*, 18 N. Y. 484).

TITLE IV.

Of the place of trial of Civil Actions.

SECTION 123. Actions to be tried where subject-matter situated.
124. Actions to be tried where cause of action arose.
125. Actions to be tried where the parties reside.
126. Changing place of trial.

§ 123. [103.] (Am'd 1849.) *Actions to be tried where subject-matter situated.*

Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in the cases provided by statute:

1. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

2. For the partition of real property;

3. For the foreclosure of a mortgage of real property;

4. For the recovery of personal property distrained for any cause.

a. In an action to foreclose a mortgage, the mortgaged premises were in the county of Cortland; the money was loaned in the county of Columbia, where the mortgage, after being recorded, was delivered to the mortgagee. The county of Columbia was designated in the complaint as the place of trial; defendant moved to change the place of trial from Columbia to Cortland,—held that Cortland county should have been designated as the place of trial (*Miller* v. *Hall*, 3 How. 325; 1 Code Rep. 113; and see *Vallejo* v. *Randall*, 5 Cal. Rep. 461). But it is no objection to the regularity of the proceedings in a foreclosure suit, that the place of trial was in a county other than that in which the mortgaged premises are situated, where there has been no demand or motion made to change the place of trial named in the complaint (*Marsh* v. *Lowry*, 26 Barb. 197; 16 How. 41).

b. Where a complaint among other things prayed, that the right of the defendant to the land in question might be adjudged to be subordinate to the right of the plaintiff, and that the defendant might be ordered to give up possession of the said land,—held to be a case within the latter clause of subd. 1, of § 123 (*Mairs* v. *Remsen*, 3 Code R. 138).

c. An action to set aside a conveyance of real estate as fraudulent, is an action for the determination of an interest in real property, and must be tried in the county in which the real estate is situate (*Wood* v. *Hollister*, 3 Abb. 14; *contra*, see *Rawls* v. *Carr*, 17 Abb. 96). The changing the place of trial in such an action is a matter of right (*Starks* v. *Bates*, 12 How. 465).

d. This section does not apply when the land, the subject of the action lies out of the State (*Newton* v. *Bronson*, 3 Kernan, 587; *Mussina* v. *Belden*, 6 Abb. 166).

§ 124. [104.] (Am'd 1849.) *Actions to be tried where cause of action arose.*

Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court, to change the place of trial in the cases provided by statute:

1. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offence was committed;

2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer.

a. An action by the people, and prosecuted by the attorney-general, is within the second subdivision (*The People* v. *Hayes*, 7 How. 248). Where the act of an officer is one his office gives him no authority to do, he is not within this section; but for an act within his authority, but improperly performed, he is entitled, if sued, to the benefit of the statute (*Brown* v. *Smith*, 24 Barb. 419). A public officer, when sued for an official act, may waive the benefit of the statutory provision that, unless it appears upon the trial that the act was done within the county where the trial was had, the jury shall be discharged and a judgment of discontinuance be entered. It is upon the trial that the objection must be raised; and the omission of the defendant to raise it then, is to be regarded as a waiver by which he is concluded (*Howland* v. *Willetts*, 5 Sand. 219).

b. Actions against the Superintendent of the Albany Penitentiary personally, must be tried in Albany county (*Porter* v. *Pillsbury*, 11 How. 240).

§ 125. [105.] *Actions to be tried where parties reside.*

In all other cases the action shall be tried in the county in which the parties, or any of them, shall reside at the commencement of the action; or if none of the parties shall reside in the State, the same may be tried in any county which the plaintiff shall designate in his complaint; subject, however, to the power of the court to change the place of trial, in the cases provided by statute.

a. By the word "*parties*" is meant *parties in interest*, and not the *nominal parties, or parties to the record* (*Hart* v. *Oatman*, 1 Barb. 229; and see *Henry* v. *B'k. of Silina*, 5 Hill, 532). Therefore, on a motion to change the venue from New York to Monroe, on the ground, among others, that neither of the parties to the action were residents of the city of New York, but that one resided in Seneca and the other in Monroe county, it appearing by affidavit, that one

Fielder was the real party in interest, and that he resided in the city of New York, the motion was denied.

a. In an action in the nature of a *quo warranto*, the place of trial may properly be laid in any county in the State. The people are a party whose residence extends to every county (*The People* v. *Cook*, 6 How. 448).

b. Can a railroad corporation have a residence in any county? (*Vermont R. R. Co.* v. *Northern R. R. Co.*, 1 Code Rep. N. S. 401; 6 How. 106). It is a resident of every county through which its road passes (*Sherwood* v. *Saratoga R. R. Co.*, 15 Barb. 650; *Belden* v. *N. Y. and Harlem R. R. Co.*, 15 How. 17; and see *The People* v. *Pierce*, 31 Barb. 138). And a resident of the county where the office of the company is located, and its general business carried on (*Conroe* v. *Nat. Pro. Ins. Co.*, 10 How. 403); and the fact that such corporation has an office in another county, where some of their business is done, does not change in effect their residence (*Hubbard* v. *Nat. Pro. Ins. Co.*, 11 *id.* 149; see, however, *Pond* v. *Hudson River R. R. Co.*, 17 How. 543; as to a foreign corporation see *Internat. Ass. Co.* v. *Sweetland*, 14 Abb. 240).

c. The place of trial *of a transitory action*, where the plaintiff and defendants reside in differerent counties, should be in the county where the principal transaction between the parties occurred, and where it appears the largest number of the witnesses, who know anything of the facts, reside (*Jordan* v. *Garrison*, 6 How. 6).

d. The common-law maxim, that the domicil of the wife follows that of the husband, has no application in actions for a divorce. In such a case, the law will recognize the wife as having a separate existence and separate rights. Therefore, in an action for a limited divorce, *a mensa et thoro*, for cruel and inhuman treatment, the plaintiff, a wife, may properly lay the venue in the county where she actually resides at the commencement of the action, although the domicil of the defendant (where both parties formerly resided, and where the defendant actually resides), is in another county (*Vence* v. *Vence*, 15 How. 497, affirmed, *id.* 576; and see 2 R. S. 147, § 57).

e. Except in so far as the place of trial in actions to recover damages for injuries to the person has been regulated by 2 R. S. 409; such actions are transitory, and triable in any county which the plaintiff may elect (*McIvor* v. *McCabe*, 16 Abb. 319).

§ 126. [105.] (Am'd 1851.) *Change of place of trial.**

If the county designated for that purpose in the complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time for answering expire, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court, as is provided in this section.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose in the complaint is not the proper county:

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* *f.* As to changing place of trial in actions in the superior court and common pleas, see § 33, *ante*.

2. When there is reason to believe that an impartial trial cannot be had therein:

3. When the convenience of witnesses and the ends of justice would be promoted by the change.

When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties, in writing, duly filed, or order of the court; and the papers shall be filed or transferred accordingly.

1. On changing the place of trial named in the complaint, for the reason that the county designated is not the proper county.

a. By the "*proper county*" is meant a county in which one of the parties to the action resides (*Lynch* v. *Mosher*, 4 How. 88; 2 Code Rep. 54). Where the plaintiff is a foreign corporation, and the defendant is a resident of this State, the proper county for trial is that in which the defendant resides (*Internat. Ins. Co.* v. *Sweetland*, 14 Abb. 240). The proper county was Saratoga, and the defendant served a demand that the cause be tried in the "county of New York;" his demand was held to be irregular (*Beardsley* v. *Dickerson*, 4 How. 81). The demand must be made before the time for answering expires; and the time for answering will be deemed to expire on the service of the answer, although the answer may be put in before the expiration of the time allowed for that purpose; and the demand to have the trial in the proper county served *after* an answer, may be disregarded (*Milligan* v. *Brophy*, 2 Code Rep. 118). But the demand may be made simultaneously with the service of the answer (*Mairs* v. *Remsen*, 3 Code R. 138).

b. In an action to foreclose a mortgage, the court is not expressly authorized to change the place of trial, where the county designated for that purpose in the complaint, is not the proper county. A *demand* to change the place of trial and a consent or order of the court thereon, are essential to change it (*March* v. *Lowry*, 16 How. 41; 26 Barb. 197).

c. The demand does not of itself change the place of trial (*Hasbrouck* v. *M'Adam*, 3 Code Rep. 39; 4 How. 342; *Houck* v. *Lasher*, 17 How. 520); and if after such a demand the plaintiff neglects or refuses to make the change, the defendant *may* move to have the place of trial changed, on the ground that the place of trial mentioned is not the proper county (*id.*; *Mairs* v. *Remsen*, 3 Code Rep. 138; *Moore* v. *Gardner*, 3 *ib.* 224; 5 How. 243; *Hasbrouck* v. *M'Adam*, 3 Code Rep. 39; 4 How. 342); but a motion is only requisite or allowable in the event the demand is disregarded. The object of the demand is to allow the plaintiff an opportunity of voluntarily correcting his error by amendment, stipulation, or otherwise, without the expense and delay of a motion (*Vermont Cent. R. R.* v. *North. R. R.*, 6 How. 107). The motion may be made before issue joined, or at any time thereafter before trial or before judgment, if no trial is had (*Hubbard* v. *Nat. Pro. Ins. Co.*, 11 How. 149; *Conroe* v. *Nat. Pro. Ins. Co.*, 10 *id.* 403).

d. The plaintiff cannot oppose such a motion on the ground of the convenience of witnesses, because the defendant has no opportunity to answer what may be alleged on that head (*id.*), and because the motion by the defendant to change the county of trial named in the complaint to the proper county, and the granting an order on such motion, will not prejudice the right of the plaintiff afterwards to move at the proper time, and on the necessary affidavits, to change the place of trial, either for the convenience of witnesses or to obtain an impartial trial (*Moore* v. *Gardner*, 3 Code Rep. 224; 5 How. 243). In *Mason* v. *Brown* (6 How. 483), Harris, J., referring to *Moore* v. *Gardner*, said the decision *was* right when made, but the law had been changed. In a subsequent case (*Park* v. *Carnley*, 7 How. 356), Barculo, J., referring to the case of

Mason v. *Brown*, says, that was a case *sui generis*, and inapplicable to ordinary motions to change the venue to the proper county, and that, where the action is *local*, and the complaint lays the venue out of the proper county, the defendant, on showing the fact, is entitled to an order changing the place of trial to the proper county, and the plaintiff cannot oppose the motion on the ground of the convenience of witnesses. The change for the convenience of witnesses must be made on a separate motion; but such motion may, as in the case of *Mason* v. *Brown* (*supra*), be heard at the same time as the motion to change the place of trial to the proper county.

a. The motion must be made in the district in which the county named in the complaint is situate, or in a county adjoining the county named in the complaint, such county being the proper place of trial until changed (*Bangs* v. *Selden*, 13 How. 163; 379; *Chubbuck* v. *Morrison*, 6 How. 367; *Beardsley* v. *Dickerson*, 4 How. 81; *Askins* v. *Hearns*, 3 Abb. 186).

b. A notice of motion in the alternative to "change the venue *or* place of trial," is sufficient (*Hinchman* v. *Butler*, 7 How. 462).

c. In general, all the defendants should unite in making the motion (6 Wend. 508; 19 *ib.* 700). But the motion may be made by one or some of several defendants (*Mairs* v. *Remsen*, 3 Code R. 138; and see 6 Wend. 508; 1 How. 156; 4 Hill, 62, note; Laws 1841, p. 272, § 1; 19 Wend. 700; *Job* v. *Butterfield*, 1 Eng. Law and Eq. R. 417; 5 Exch. 827; 20 L. Jour. Rep. N. S. Ex. 8). Where the motion is made by one of several defendants, it must be on notice to the other defendants (*id.*), unless the other defendants are in default for not answering, in which case it is presumed the motion may be made without notice to them (12 Wend. 200). And where the action is against several, but some only have been served, those served may move alone, and without notice to those unserved (4 Hill, 62, note). Where the motion is made by one or more of several defendants, without notice having been given to the defendants who do not move, the court will permit the motion to stand over, in order that notice may be given (*Mairs* v. *Remsen*, *supra*). But a denial of a motion made by one defendant does not prejudice the right of another defendant *subsequently* served with the summons, to make a similar motion (*N. J. Zinc Co.* v. *Blood*, 8 Abb. 148).

d. In *Northrop* v. *Van Deusen* (3 Code R. 140), Parker, J., said that on all motions to change the place of trial to the proper county, where costs were asked for by the notice, costs to abide the event would be allowed, and this whether the order was granted or refused; and see *Hubbard* v. *Nat. Pro. Ins Co.* (11 How. 149).

e. If the place of trial is changed for the reason that the proper county is not specified in the complaint, papers on file at the time of the order making such change are to be transferred to the county specified in such order, and all other papers in the cause are to be filed in the county so specified (Rule 3).

f. By the judiciary act (Laws 1847, p. 333, § 46), said to be in force, notwithstanding anything in the code (*Lynch* v. *Mosher*, 4 How. 86; 2 Code Rep. 54), it is enacted that no motion to change the place of trial, when made by the defendant, shall be granted, unless the defendant making the same shall have made and served, with the notice of such motion, an affidavit of merits; and the 59th rule of the supreme court provides that in addition to what has usually been stated in affidavits concerning venue, either party *may* state the nature of the controversy, and show how his witnesses are material, and may also show where the cause of action or the defence, or both of them, arose; and these facts will be taken into consideration by the court in fixing the place of trial. The affidavit of merits on a motion by defendant to change the place of trial, must state distinctly:—

1st. That the defendant has fully and fairly stated *the case* to his counsel [in the cause], and give the name and residence of such counsel;

2d. That he is advised by his said counsel that he has a good and substantial defence on the merits;

3d. That he believes he has such a defence.

a. And an affidavit which stated that the defendant had a good defence, &c., "as he is advised by his counsel, A. B., &c., and *as he believes truly*," was held insufficient. (*Ib.*) And see *Richards* v. *Sweetzer* (1 Code Rep. 117; 3 How. 413), where it was held that an affidavit that the defendant had stated "*the facts of his defence*," instead of "*the case*," was insufficient; and again, in *Ellis* v. *Jones* (6 How. 296), an affidavit which stated that the defendant had stated "*his case in this cause*," was held insufficient; but an affidavit that the defendant had stated "*the facts of this case*," was held sufficient (*Jordan* v. *Garrison*, 6 How. 6; see note to § 258, *post*). The 59th rule does not, as has been said, *require* the defendant to disclose in his affidavit the matters which he intends to set up in his answer. He *may do so*, but if he prefers to omit it, or make only a partial disclosure of his intended defence, he may do so (*Mixer* v. *Khun*, 4 How. 412).

b. By rule 58 of the supreme court it is provided, that no order to stay proceedings for the purpose of moving to change the place of trial shall be granted, unless it shall appear from the papers that the defendant has used due diligence in preparing the motion for the earliest practicable day after issue joined. Such order shall not stay the plaintiff from taking any other step, except subpœnaing witnesses for the trial, without a special clause to that effect. On presenting to and filing with the officer granting the order, an affidavit showing such facts as will entitle the plaintiff, according to the settled practice of the court, to retain the place of trial, the officer shall revoke the order *to stay proceedings*; and the plaintiff shall give immediate notice of such revocation to the defendant's attorney.

c. By the former practice, the plaintiff could not move to change the venue (the place of trial named in the complaint), (16 Johns. 149); but if, before the trial, he discovered that he had laid his venue in the wrong county (named the wrong county as the place of trial in the complaint), he might amend, as of course (*ib.* and 7 Cow. 164 *a*); and now if, by the demand of the defendant or otherwise, the plaintiff is made aware that the county named by him in his complaint is not the proper county, and he is desirous of inserting the proper county, he may so amend, of course, at any time within the time allowed by section 172 for amendments of course; and if he permit that time to elapse, and afterwards desire to change the place of trial named in the complaint, he should make a motion for leave to amend his complaint in that respect.

2. As to changing the place of trial for the convenience of witnesses, or because an impartial trial cannot be had in the county designated in the complaint as the place of trial.

d. There is no distinction between action *ex contractu* and actions *ex delicto*, in respect to granting and refusing motions to change the place of trial. Where there are several defendants, they should all join in the motion (6 Wend. 508; 1 How. 156), unless some have suffered a default, in which case the others may move alone (12 Wend. 200). So, where the action is, in form, against several, and process has been served upon some only, the defendant served may make the motion (4 Hill, 62, note). And in a joint action against the several parties to a bill or note, under section 120, the motion may be made by any one of the defendants (Laws 1841, p. 272, § 1); although before the act last referred to, the rule was otherwise (19 Wend. 700; see 4 Hill, 62, note). The plaintiff cannot move to change the place of trial (16 Johns. 149), but he may change it by amending his complaint of course,—(*Ib.*; 7 Cowen, 164, *a*),—or by motion for leave to amend.

e. MOTION, WHEN AND HOW MADE.—The motion cannot be made until after issue (*Merrill* v. *Grinnell*, 10 How. 32; *Hubbard* v. *Nat. Ins. Co.*, 11 *id.* 149; *Hinchman* v. *Butler*, 7 *id.* 462; *Hartman* v. *Spencer*, 5 How. 185; Rule 58).

f. It is not necessary to make a demand in writing, to have the trial in the proper county, before making a motion to change the place of trial for the convenience of witnesses (7 How. 464).

g. In an action on a promissory note, the county of trial stated in the complaint, was Albany. The plaintiff resided in Schenectady county; the defend-

ant in Schoharie county; the defendant in due time demanded to have the county of trial changed to the proper county, and, after service of his answer, moved to "change the place of trial from Albany to Schoharie." The affidavit, served with the notice of motion, set out the fact as to places of the parties' residence, the demand to have the place of trial changed to the proper county, and the further fact that the defendant had a large number of material witnesses residing in Schoharie. Immediately after the service of this notice of motion, the plaintiff served an amended complaint,—the amendment being the substitution of Schenectady for Albany county as the place of trial. The defendant did not serve an amended answer, and when the motion came on, it was objected by the plaintiff that it could not be heard, as the cause was not at issue. It was held, however, that the cause was at issue when the defendant served his notice of motion, and that the plaintiff's amendment was without prejudice to the proceedings already had, and its only effect was to deprive the defendant of one ground on which he moved. The motion was heard and granted (*Toll* v. *Cromwell*, 12 How. 79).

a. STAYING PROCEEDINGS FOR THE PURPOSE OF MOTION.—The defendant, if circumstances require it, may obtain an order to stay the proceedings for the purpose of making the motion. But no such order will be granted, unless it shall appear from the papers that the defendant has used due diligence in preparing the motion for the earliest practicable day after issue joined (Rule 58). The plaintiff may get the order to stay proceedings revoked, by presenting to and filing with the officer by whom it was granted, an affidavit, showing such facts as will entitle him, according to the practice of the court, to retain the place of trial (Rule 58). And he must give immediate notice of such revocation to the defendant's attorney (*Ib.*) But he cannot treat the order obtained by the defendant as a nullity, on the ground that the papers on which it was procured fail to conform to the requisites demanded by the rule, in respect to delay, although the effect of the order be, to throw the cause over both the circuit in the county designated in the complaint as the county of trial, and that in the county to which it is proposed to be changed (22 Wend. 633).

b. THE MOTION.—The motion to change the venue is founded on affidavit, which must, in general, be made by defendant himself, though, under special circumstances to be set forth in the affidavit, it has been held sufficient when made by his attorney in the action (4 Hill, 64, note). If the motion is grounded on the convenience of witnesses, the affidavit should state the name of the witnesses residing in the county to which the defendant seeks to change the venue (6 Cowen, 389), and their residences (3 Hill, 445), stating the town, village, or particular place of residence, in addition to the county (1 How. 195); and that each and every of them is material to the defence, as the defendant is advised by counsel, and verily believes (3 Wend. 425; 9 *Id.* 431; 1 Hill, 668); and without the benefit of the testimony of each and every of them, he cannot safely proceed to trial, as he is advised by counsel, and verily believes (3 Wend. 425; 9 *Id.* 431); that he has fully and fairly stated the case to his counsel, giving the name and residence of such counsel (Rule 21; 4 How. 86; 3 *Ib.* 413; 6 *Ib.* 296; 1 Code Rep. 117), and has fully and fairly disclosed to him the facts which he expects to prove by each and every of his witnesses (9 Wend. 10; 1 How. 55, 70, 165; 1 Hill, 668); and that he has a good and substantial defence on the merits (1 How. 162), as he is advised by his said counsel, and verily believes (4 Hill, 64, 66; 1 How. 62). The affidavit should also state the name of the county designated in the complaint as the county of trial (1 How. 184; 1 Hill, 668); and if not made by all the defendants, it should show the reason why it is not so made (1 How. 156; see *ante*, p. 148 *a*). In addition to what has usually been stated in the affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and *may* also show where the cause of action, or the defence, or both of them, arose; and those facts will be taken into consideration by the court, in fixing the place for trial (Rule 59). The affidavits as well those in support as those in opposition, should state what is expected to be proved by the witnesses (*Amer. Ex. B'k.* v. *Hill*, 22 How. 29).

a. The convenience of plaintiff's witnesses residing out of the State will not be regarded as ground for denying the defendant's application to change the place of trial (*N. J. Zinc Co.* v. *Blood*, 8 Abb. 147).

b. The county in which the witnesses reside, rather than the distance they will have to travel, must govern, on motions to change the place of trial (*People* v. *Wright*, 3 Code R. 75; 5 How 23).

c. In deciding motions to change the place of trial, "courts now look beyond the affidavits of the parties and the advice of their counsel, to the cause of action and the defence, to ascertain what is to be tried, and determine from a view of the whole case as presented by the pleadings and affidavits, whether a change of the place of trial will really accommodate and be most convenient for the greatest number of witnesses, who, in the reasonable and proper exercise of care and prudence in the preparation for trial, will be required to attend the circuit" (*King* v. *Vanderbilt*, 7 How. 385). In determining such motions, the convenience of witnesses is the main consideration, though the dispatch or delay in the trial of the action, by the change, is not to be wholly overlooked. (*Ib.*) And it seems that the objection to changing the place of trial to the city and county of New York, on account of the pressure of business in that city, and apprehended delays in the trial, may be obviated by granting an election to the parties to substitute an adjoining county, Kings, Richmond, Westchester, or Rockland (*Goodrich* v. *Vanderbilt*, 7 How. 467). The place of trial of a transitory action should be in the county where the principal transactions between the parties occurred, unless the preponderance of witnesses is so great as to warrant the court to retain the place of trial in another county (*Ib.*; *Jordan* v. *Garrison*, 6 *id.* 6). Therefore, where in a *transitory action* the plaintiff resided in Ulster and the defendant in Orleans county, and the place of trial named was Ulster county, and the defendant moved to have the place of trial changed to Orleans county, and swore to sixteen witnesses residing in Orleans county; and the plaintiff opposed the motion on an affidavit drawn in the usual form, swore to eighteen witnesses residing in Ulster, and then stated that he expected to prove by Schoonmaker, one of the witnesses, the sale of the demand to the plaintiff,—that he expected to prove by six other witnesses the value of the woodwork of the wagons; by nine others, acknowledgments of the defendant, made at various times, that the work had been sold to him, and his promises to pay therefor; and by one other witness, the handwriting of the defendant to certain letters, written by the defendant to Schoonmaker on the subject of the property, Harris J., granted the motion. (*Id*).

d. Very little reliance can be placed upon an allegation of the materiality of witnesses, unless it be shown wherein they are material (*The People* v. *Hayes*, 7 How. 248). But the place of trial may be changed upon such an affidavit, when no witnesses are shown to reside in the county named in the complaint as the county of trial. (*Id.*) In *Hull* v. *Hull* (1 Hill, 671), a motion was made to change the venue from Alleghany to Cattaraugus, on an affidavit that the defendant had fifteen witnesses in the latter county. It was shown, in opposition, that the defendant's witnesses resided nearer to the court-house in Alleghany than to the court-house in Cattaraugus; viz: twenty-five miles from the former, and twenty-seven miles from the latter. But the court granted the motion, and Bronson, J., said, "On a question of venue, we look to the county in which the witnesses reside, rather than the distance they will have to travel. As a general rule, the convenience of witnesses will be best consulted by having the trial in the county where they reside. That course will be less likely to disturb their social and business relations than calling them to a foreign county." This case was cited and approved by Parker, J., in *The People* v. *Wright* (3 Code R. 75; 5 How. 33; and see *Beardsley* v. *Dickerson*, 4 How. 81). The court cannot, on a motion to change the place of trial for the convenience of witnesses, order a change for the reason that the proper county is not designated, no previous demand to change having been made (*Houck* v. *Lasher*, 17 How. 520).

e. Opposing the Motion.—The plaintiff may resist the motion, by an affidavit showing material witnesses (1 How. 56) residing in the county named

in the complaint as the county of trial (2 Caines' R. 374; 5 *id.* 95; 2 Johns. 481; 7 Cowen, 102; 19 Wend. 10). But he must swear unqualifiedly, that he has witnesses in or near the county named in the complaint as the county of trial, of an equal number with those of the defendant, or a greater number, or the place of trial will be changed (12 Wend. 294). And the residence of a greater number of witnesses in an adjoining State, adjacent to the place of trial named in the complaint, is not sufficient to retain the place of trial (2 Wend. 282; 6 *id.* 541; 4 Hill, 68, note). It is no answer to a motion to change the place of trial that by granting it the plaintiff will lose a trial or a term, where the defendant is not chargeable with laches; and even where he is so chargeable, his neglect must be such as to produce the delay, or the motion will be granted (*Lynch* v. *Mosher*, 4 How. 86; 22 Wend. 615). Formerly it was no answer to the motion, that the cause was at issue on demurrer only (2 Hill, 382); but now, see *Gould* v. *Chapin*, 2 Code R. 107. And where, on motion to change the venue from the county of O. to the county of C. the defendant's affidavit stated that the action was brought to recover for services as attorney, rendered by the plaintiff while residing in the county of C., that the defendant had twenty witnesses in the latter county, and that, if the plaintiff should claim to have more than one witness (naming him), in the county of O. the others could only be material for the purpose of proving the value of the plaintiff's services, which could as well be proved by witnesses residing in the county of C.; and the plaintiff, in opposition to the motion, swore to twenty-five witnesses in the county of O., ten of whom were attorneys, but omitted to answer the matters specially set forth in the defendant's affidavit, —the motion was granted (5 Hill, 509; 1 How. 73). The court, in deciding the motion, will consider the convenience of witnesses (4 Wend. 208; 9 *id.* 451; 1 Hill, 668, 671); and where the plaintiff outnumbers the defendant in witnesses (12 Wend. 294; 1 Hill, 668, 671), or swears to an equal number (5 Cow. 414; 12 Wend. 291), the motion will be denied (*Austin* v. *Hinckley*, 13 How. 576); but not under all circumstances (5 Hill, 509; 1 How. 73). So where it is clear that the defendant's object is merely delay (12 Wend. 298; 22 *id.* 615; 10 *id.* 571), or where his affidavit is defective (19 Wend. 617; 9 *id.* 431; 22 *id.* 636; 2 Hill, 359), the motion will be denied. And where, in a common action of assumpsit, the defendant swore to seventy-eight witnesses as material to his defence, it was considered a fraud upon the court, the nature of the action not being fully explained to satisfy the court that the number of witnesses was necessary (1 How. 122; 4 Hill, 536).

a. Where a party meets an application made by his adversary to change the venue, by a stipulation not to give any evidence except as to facts occurring in the county where the venue is laid, the venue will not be changed (*Smith* v. *Averill*, 1 Barb. 28).

b. Where the plaintiff undertook to bear all the expenses of bringing the defendant's witnesses to the county where the venue was laid, the motion to change was denied (*Worthy* v. *Gilbert*, 4 Johns. 492). But in another case it is said that the *venue* will not be retained if it ought to changed for the convenience of witnesses, on the adverse party stipulating to pay the expenses of defendant's witnesses (*Rathbone* v. *Harman*, 4 Wend. 208).

c. Where after service of papers for a motion to change the venue, together with an order to stay proceedings, the plaintiff amended his declaration by changing the venue to another county, and it appeared on the motion that the plaintiff had a sufficient number of witnesses to retain the venue in the latter county, and that the defendant had had time to serve new papers since the amendment, but omitted to do so, the motion was denied (1 Hill, 374). And where, on receiving notice of the motion, the plaintiff agreed to change the venue, according to the wish of the defendant, provided he would accept short notice of trial, the motion was denied, as defendant could not show it to be impossible for him to prepare for trial on short notice (2 Wend. 498). So, where the defendant after service of his papers, and before the motion was actually made, suffered a default for not pleading, this was held to defeat the application, even though he obtained and served an order staying proceedings (4 Hill, 69, note).

a. Where the ground of the motion is that a fair and impartial trial cannot be had in the county named in the complaint as the place of trial, this fact must be made to appear to the court very conclusively, in order to induce it to change the venue. Accordingly, the motion was refused where it was founded merely on the fact that the sheriff of the county was a party to the suit (2 Caines' R. 46), or that the corporation of the city of New York was a party, where the venue was laid in that city (2 Johns. Cas. 335), or in an action for slander or libel that a violent party spirit prevailed in a county (1 Caines' R. 487). And the existence of a strong popular excitement in the county on the subject-matter of a libel-suit, was held to be no cause for refusing to change the place of trial on an ordinary affidavit (2 Wend. 250; 3 Caines' R. 127). But the place of trial was changed on the ground of excitement after two ineffectual attempts to obtain a verdict in the county where it was laid (12 Wend. 203). And it was held sufficient cause to change the place of trial, that the circuit judge of the district where the venue was laid, was, previous to his appointment, counsel in the cause (2 Wend. 290; but see note to § 23). A supposed excitement or prejudice, which makes it doubtful whether a fair and impartial trial can be had in the county to which it is moved to change the place of trial. is no cause for refusing the motion. The inability to obtain a fair and impartial trial must be clearly established. Ordinarily, an actual experiment, by way of trying the cause, or attempting to impannel a jury, should first be made (*People* v. *Wright*, 3 Code R. 75; 5 How. 23); but the preliminary is not required in every case (*Budge* v. *Northam*, 20 How. 248).

b. The intention of the court to change the place of trial of an action will not be inferred from the mere fact that the court has made an order referring the cause to a referee resident of a county other than that named in the complaint as the county of trial (*Wheeler* v. *Maitland*, 12 How. 35).

c. Where a motion to change the venue was made by the defendant, and during the time the question was held under advisement, the plaintiff took an inquest on a regular call of the calendar, there being no stay of proceedings, —*held* that the plaintiff was *irregular*. The plaintiff took the risk of having his proceedings set aside if the motion was decided against him (*Wilson* v. *Henderson*, 15 How. 90).

TITLE V.

Manner of Commencing Civil Actions.

SECTION 127. Actions, how commenced.
128. Summons, requisites of.
129. Notice to be inserted in summons.
130. Complaint need not be served with summons.
131. Defendant unreasonably defending.
132. Notice of lis pendens.
133. Service of summons.
134. Return of summons.
135. Publication of summons.
136. Proceedings when part only of defendants served.
137. When service by publication complete.
138. Proof of service.
139. When jurisdiction of action acquired.

§ 127. [106.] *Actions, how commenced.*

Civil actions in the courts of record of this State, shall be commenced by the service of a summons.

a. The *only* mode of commencing an action under the code is by summons (§ 99, 127), or the obtaining a provisional remedy (§ 139; *Ex parte Ransom*, 8 Code Rep. 148; *Moore* v. *Thayer*, *ib.* 176; *Treadwell* v. *Lawlor*, 15 How. 8). The summons is the process of the court, and should be governed and regulated by the rules of practice formerly applicable to a *capias*, so far as those rules can properly be made to apply (*Blanchard* v. *Strait*, 8 How. 84).

b. For the purpose of issuing a warrant, under the non-imprisonment act, the action is sufficiently commenced by lodging the summons with the sheriff, with intent that it should be served (*Gregory* v. *Weiner*, 1 Code Rep. N. S. 210).

c. In an action against a sheriff for an escape, the voluntary return of the prisoner before the actual service of the summons, although after its delivery to the coroner for service, is a good defence; the return was before the action was commenced (*Wiggin* v. *Orser*, 5 Duer, 118).

d. There is no other mode of bringing a party into court against his will, except by the service of a summons. And where a plaintiff amended his complaint by adding parties, and then proceeded to judgment without serving the summons on such added defendants,—held that he was irregular (*Akin* v. *Albany North. R. R. Co.*, 14 How. 337; and see *O'Hara* v. *Brophy*, 24 *id.* 383).

e. The action should not be commenced until the cause of action has accrued (*Smith* v. *Holmes*, 19 N. Y. 271; *McCullough* v. *Colby*, 4 Bosw. 603).

See section 139, *post*.

§ 128. [107.] *Summons. Requisites of.*

The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place

within the State, to be therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service.

a. **Stamp on summons.**—A fifty cent United States revenue stamp should be affixed to the summons. The court will vacate the proceedings on the ground that such a stamp has not been affixed (*German Leiderkranz* v. *Schiemann*, 25 How. 388; *contra*, *Walton* v. *Bryenth*, 24 How. 357); and in *Watson* v. *Morton* (26 How. 383), James, J., set aside the proceedings because the defendant was not informed, either by memorandum on the copy served or by exhibition of the original, that a stamp was affixed to the summons. *Semble*, the stamp is no part of the document to which it is affixed, and where a copy of a stamped document is required, it does not include a description or statement as to the stamp (*Reg.* v. *Inh. of Keighley*, 1 New Mag. Cas. 527; 8 Q. B. 877; 2 New Sess. Cas. 321).

b. **Name of the Court, &c.**—This section (128) neither directly nor indirectly requires that a summons should name the court or the title of the action; and the form of summons recommended by the commissioners in their first report, contained neither the name of the court nor the title of the cause. Nevertheless, the weight of opinion seems to be in favor of the insertion at least of the name of the court in the summons. Where the summons is annexed to a copy of the complaint, there can exist no necessity for repeating in the summons the name of the court, or the names of the parties; such information is supplied by the complaint. But where the summons is served without any copy of the complaint, as provided by section 130, then it becomes necessary to insert the name of the court, and the names of the parties in the summons; otherwise a defendant would be left in ignorance of where he is to find a complaint filed, who is the plaintiff, and who is his co-defendant (if any); accordingly, in cases *where no copy of the complaint was served* with the summons, the court held that the summons must state the name of the court (Anon. 2 Code R. 75; *Walker* v. *Hubbard*, 4 How. 154). In subsequent cases (from the reports of which, however, it does not clearly appear whether or not any copy of the complaint was served with the summons), the distinction between the cases in which a copy of the complaint is served with the summons, and in which it is not, appears to have been lost sight of; and the courts use language indicative of an opinion that, *in all cases*, the summons must state the name of the court in which the action is brought (*Dix* v. *Palmer*, 5 How. 233; 3 Code R. 214; *James* v. *Kirkpatrick*, 5 How. 241; 3 Code R. 174). A summons is not *void*, but at most merely *voidable*, for omitting to state the name of the court. It is not a statutory requisite of a summons that it shall state the name of the court in which the action is brought. The judiciary act (Laws 1847, p. 335) does not apply (*Tallman* v. *Hinman*, 10 How. 90). It happened in one case that the name of the court in which the action was brought was omitted both in the summons and complaint; and there the supreme court refused a motion for leave to amend by inserting the name of that court (*Ward* v. *Stringham*, 1 Code Rep. 118). In another case the summons was served without a copy of the complaint, and without the name of any court appearing thereon. The defendant demanded a copy of the complaint, and one was served entitled "Sup. Court." On motion to set aside the proceedings, it was held that the name of the court sufficiently appeared; and the plaintiff was allowed to amend by entitling the summons and complaint in the "Supreme Court"; and the court said it was not analogous to a case where all reference to a court was omitted in the complaint (*Walker* v. *Hubbard*, 4 How. 154). In this last case, the place of trial named in the complaint was not the city of New York; had it been, the abbreviation "Sup. Court" would have left it doubtful whether the "supreme" or the "superior" court was intended by the contraction "sup.;" as the place of trial was out of the city of New York, the inference naturally was that the supreme court was meant. Where a summons was served which did not mention the name of any court (and

without any copy of the complaint), the defendant disregarded it, and the plaintiff took judgment for want of an answer, the court set the judgment aside, and without requiring the defendant to put in an affidavit of merits (*James* v. *Kirkpatrick*, 3 Code R. 174; 5 How. 241; *Croden* v. *Drew*, 3 Duer, 654). The court further held that the defendant had not waived the defect in the summons by laying by and permitting the plaintiff to take judgment; because, until judgment was entered, the defendant was not informed in what court the action was commenced, and could not know in what court he was to move to set the summons aside. (*Ib.*) But where, after a summons was served (without any copy of the complaint, and without naming any court), the defendant gave a general notice of appearance, it was held that he thereby waived the defect in the summons (*Dix* v. *Palmer*, 3 Code R. 214; 5 How. 233; *Webb* v. *Mott*, 6 *id.* 439). The 11th of the supreme court rules recognizes, by its very language, a *special or limited retainer*, and which would not be deemed an appearance in the action on the part of the defendant; and if the defendant's attorney was retained, and appeared only for the purpose of moving to set aside the summons for irregularity, he should have given notice of a special or limited retainer and appearance only. The general appearance will be a waiver of such irregularities only as appear on the face of the summons (*Voorhies* v. *Scofield*, 7 How. 51). Where, however, the summons is accompanied with the complaint containing a proper prayer for relief, so that the defendants cannot be misled or prejudiced by the irregularity in the summons, the court will be reluctant to set aside the summons for such a defect; and where a notice of motion to set aside proceedings for such a defect was signed M. & R., attorneys for the defendant, the court construed the notice as a general appearance in the action, and a waiver of the defect in the summons (*Baxter* v. *Arnold*, 9 How. 445).

a. **Amending summons.**—A mistake in the form of a summons has been held not within § 172 (*Dibblee* v. *Mason*, 1 Code R. 37); therefore, where in an action on contract, to recover the price of goods sold and delivered, the summons did not state the amount for which judgment would be demanded, but stated that the plaintiff would apply to the court for the relief demanded in the complaint,—on motion for judgment, it was held that the mistake in the summons could not be disregarded; and the motion was denied. Although the court may have the power to amend the summons, it could only be done on motion to amend it (*McCrane* v. *Moulton*, 3 Sand. 786; *Allen* v. *Allen*, 14 How. 248). In the former case plaintiff's attorney, after service of the summons, discovered a mistake therein; he made the requisite amendment, of course, and reserved the summons. The defendant moved to set aside the amended summons. Mason, J., with the concurrence of all the justices of the superior court, granted the motion, and held that a summons cannot be amended without leave of the court. Section 172 does not apply to a summons; which is not a pleading, but a process. The power of amendment is in terms confined to the court, by § 173.

b. In one case (*Davenport* v. *Russell*, 2 Code R. 82), where a party served a summons which, before any proceedings had been taken thereon, he discovered to be irregular, and thereupon served an amended summons, it was held in a county court, that there was no objection to such a course. The case is not very fully reported; but it seems to have been decided on the express ground that the defendant was not *prejudiced*, and is therefore perhaps not inconsistent with the other decisions.

c. Where, by setting aside a summons and complaint as irregular, the plaintiff would be barred of his right of action by reason of the statute of limitations, the court, instead of setting the proceedings aside, will permit an amendment to be made on payment of costs (*Weare* v. *Slocum*, 1 Code Rep. 105, 3 How. 379). See note to section 142, *Complaint must agree with summons.*

d. **Misnomer.**—It seems that if there is a misnomer of the defendant (except in cases coming within section 175) in the summons, he may take advantage of it by motion to set aside the summons. It is doubtful whether, under the code, the former remedy in such case, of a plea in abatement exists (*Gardner*

v. *Clark*, 6 How. 449; *Elliott* v. *Hart*, 7 *id.* 25). These cases were in the supreme court. After an elaborate review of the question it was held by Woodruff, J., in the superior court, that a motion to set aside for misnomer could not be entertained (*Miller* v. *Stettiner*, 7 Bosw. 692; 22 How. 518; see 20 N. Y. 362).

a. **Subscription.**—With reference to that portion of the section which requires the summons to be subscribed by the plaintiff or his attorney, it was held that the attorney there mentioned meant an attorney-at-law; and where the summons was signed by a person not an attorney-at-law, with the plaintiff's name, "by I. G. Cramer, agent," it was held that the requirements of the statute had not been complied with (*Weare* v. *Slocum*, 1 Code Rep. 105; 3 How. 397). Where an infant was plaintiff, and sued by guardian, it was held that the attorney conducting the suit, although not strictly the attorney of the plaintiff, might nevertheless subscribe the summons (*Hill* v. *Thacter*, 2 Code Rep. 3; 3 How. 407). The original summons should be subscribed by the plaintiff or his attorney; the name of the attorney being printed on the summons is sufficient (*Mut. Life Ins. Co.* v. *Ross*, 10 Abb. 260, *n*; *Saunderson* v. *Jackson*, 3 Esp. 180; 2 B. & P. 238; *Schneider* v. *Norris*, 2 M. & S. 286; *contra*, *Farmers' Loan Co.* v. *Dickson*, 9 Abb. 61; 17 How. 477). Where the summons is signed by the firm name of two attorneys, who are in partnership, and the complaint served with the summons is signed with the individual name of one of such attorneys only, and all subsequent notices and papers in the action are signed by such individual name of such attorney, the court may, after judgment, amend the summons by substituting the individual name of the attorney for such firm name (*Sluyter* v. *Smith*, 2 Bosw. 673).

b. **After answer of title.**—Where, after an answer of title in a justice's court, an action for the same cause of action is commenced in the supreme or a county court, the summons should allude to the suit before the justice by some suitable averment (*Royce* v. *Brown*, 3 How. 391). But its omitting to do so, is not such an irregularity as will entitle the defendant to move to set it aside.

c. **Representative Character.**—It is presumed, that where a party sues or is sued, in a representative character, the character in which he sues should be stated after his name in the summons (1 Arch. Pl. 81); as, whether he sues as trustee, executor, or how otherwise (8 How. 84).

d. **Action against county.**—In an action against a county, the defendants should be described as "*the Board of Supervisors* of the county of ———;" but in an action against the supervisors, the defendants should be described by their individual names, and by their name of office (*Wild* v. *B'd. of Supervisors of Columbia*, 9 How. 315). Where, in an action, the defendants are described as "The Board of Supervisors," the court will intend the action is against the county. (*Ib.*)

e. **Penal actions.**—In action for the recovery of any penalty or forfeiture, the summons should be endorsed with a general reference to the statute by which such penalty is given (2 R. S. 481, § 7; 17 Wend. 86; 4 Denio, 269).

f. The object of this provision is to give the defendant notice of the offence for which he is prosecuted. A reference to the statute, as "of the internal police of the State" held not sufficient (*Avery* v. *Slack*, 17 Wend. 85). An indorsement, "isssued according to the provisions of the statute, concerning the incorporation of turnpike and plank road companies, and the collection of penalties for the demanding and recovering more than lawful toll in passing through toll gates on such roads," held sufficient (*Marselis* v. *Seaman*, 21 Barb. 319); and in an action to recover penalties for the violation of the excise law, it is a sufficient endorsement of the summons if it state that such summons is issued "according to the provisions of tit. 9, p. 1. ch. 20 of the statute of excise and the regulation of taverns and groceries" (*Perry* v. *Tynen*, 22 Barb. 137; and see *Andrews* v. *Harrington*, 10 *id.* 343).

For the form of the summons when served without any copy of the complaint, see section 130; and when served by publication, see section 135.

§ 129. [108.] (Am'd 1849.) *Notice to be inserted in summons.*

The plaintiff shall also insert in the summons a notice, in substance as follows:

1. In an action arising on contract, for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint, in twenty days after the service of the summons.

2. In other actions, that if the defendant shall fail to answer the complaint within twenty days after service of the summons, the plaintiff will apply to the court for the relief demanded in the complaint.

a. **Construction of section.**—The phrase "for the recovery of money only," in subd. 1, means the recovery of a definite sum of money as such, and without calling upon the court to ascertain anything but the existence or terms of the contract by which it accrued due (*Tuttle* v. *Smith*, 14 How. 395; 6 Abb. 329). An action that requires the determination of amounts unliquidated in their nature, requiring other proof, and depending upon other considerations than such as appear in the contract itself, is not to be deemed an action for the recovery of money only, but rather an action to establish and ascertain the plaintiff's right to damages, which are to be paid in money. (*Id.*) The actions referred to in the first division "are actions at law, properly so called, in which, from the nature of the contract, the plaintiff knows and can specify the sum he is entitled to recover" (Oakley, J., *West* v. *Brewster*, 1 Duer, 647). "I suppose subdivision 1 ought only to be applied to those contracts which *in terms* provide for the payment of money" (Barculo, J., *Hyde Park* v. *Teller*, 8 How. 504; and see per Birdseye, J., *The People* v. *Bennett*, 6 Abb. 343; *Durant* v. *Gardner*, 10 Abb. 445; *Munger* v. *Hess*, 28 Barb. 75, and *infra*).

b. **Actions within subdivision 1.**—An action to recover a penalty given by statute (*The People* v. *Bennett*, 5 Abb. 384; 6 *id.* 343).

c. For goods sold and delivered (*Diblee* v. *Mason*, 1 Code Rep. 37).

d. To recover the sum of $200, as liquidated damages on the breach of a contract (*Hyde Park* v. *Teller*, 8 How. 504).

e. Where the complaint set up a contract and breach, and prayed judgment for a specific sum (*Croden* v. *Drew*, 3 Duer, 654).

f. For damages for death of one by wrongful act (*Doedt* v. *Wiswall*, 15 How. 128; and see in note to section 121, *ante*).

g. To recover a penalty under the law of 1857, to suppress intemperance, &c. (*Comm'rs of Albany* v. *Classon*, 17 How. 193).

h. **Actions within subdivision 2.**—An action on the common law-liability of an innkeeper (*The People* v. *Willett*, 6 Abb. 37).

i. Against an attorney for an account of moneys collected by him (*West* v. *Brewster*, 1 Duer, 647).

j. To recover money, where the complaint also seeks to vacate an agreement extending the time of payment, for fraud, and to obtain an immediate judgment for the whole demand (*Travis* v. *Tobias*, 7 How. 90).

k. To recover money where the complaint charges fraud (*Field* v. *Morse*, 7 How. 12).

l. For wrongfully taking, detaining, and converting personal property (*Voorhies* v. *Scofield*, id. 51).

m. To recover unliquidated damages (*Croden* v. *Drew*, 3 Duer, 654; *Tuttle* v. *Smith*, 14 How. 395; 6 Abb. 329; *The People* v. *Bennett*, 6 Abb. 343; *Salters* v. *Ralph*, 15 Abb. 273); as on an undertaking of bail (*Levy* v. *Nicholas*, 15 Abb. 63 note); breaches of covenant in a lease (*Cobb* v. *Dunkin*, 19 How. 164, revers-

ing, 17 How. 97; *Luling* v. *Stanton*, 8 Abb. 373; 2 Hilton, 538); for liquidated and unliquidated damages; as for goods sold, and for not receiving goods on consignment pursuant to contract (*Norton* v. *Cary*, 14 Abb. 364; 23 How. 469).

a. To recover damages for fraud, as for damages for inducing plaintiff by false pretences, to buy a worthless note (*Hartshorne* v. *Newman*, 15 Abb. 63), or to perform services (*Atwell* v. *Le Roy*, 4 Abb. 438).

b. To recover damages for the breach of a contract to convey a farm and personal property (*Johnson* v. *Paul*, 14 How. 454); upon an undertaking of bail (*Kelsey* v. *Covert*, 15 *id.* 92).

c. For the breach of a contract of warranty upon an exchange of horses (*Dunn* v. *Bloomingdale*, 14 How. 474; 6 Abb. 340 *n*).

d. For the breach of a contract to marry (*Davis* v. *Bates*, 6 Abb. 15; *McDonald* v. *Walsh*, 5 *id.* 68; *M'Neff* v. *Short*, 14 How. 463; the cases of *Williams* v. *Miller*, 4 How. 94; 2 Code Rep. 55; *Leopold* v. *Popheuheimer*, 1 Code Rep. 39, to the contrary, are overruled).

e. Against a carrier for the loss of goods entrusted to him to carry (*Flynn* v. *Hudson River R. R. Comp.*, 6 How. 308; *Hyde Park* v. *Teller*, 8 *id.* 504; *Hewitt* v. *Howell*, id. 346; *Oler* v. *Mallory*, 1 Code Rep. 126; *Campbell* v. *Perkins*, 4 Selden, 438, overruling *Trapp* v. *N. Y. & Erie R. R. Comp.*, 6 How. 237); and in *Zabriskie* v. *Smith*, (3 Kernan, 333), Denio, J., says, "Actions for the breach of promise of marriage, for the unskilfulness of medical practitioners, contrary to their implied undertaking, the imprisonment of a party on account of the neglect of his attorney to perform his professional engagement,—fall under the head of actions which die with the person, being considered virtually actions for injuries to the person.

f. **What is a sufficient notice.**—A notice, in a summons under the first subdivision, that the plaintiff will take judgment for a given sum "with interest" thereon from a specified day, is a sufficient compliance with the provisions here contained; and while the legal rate of interest is seven per cent., that will be the rate assumed where not otherwise specified; it leaves nothing to be done but the computation of the legal interest to the day the judgment is entered (*Swift* v. *De Witt*, 3 How. 280, 282; 1 Code Rep. 25). The summons must follow one or the other of the forms prescribed (*Ridder* v. *Whitlock*, 12 How. 208); it cannot follow both, and if it do, it will be irregular; thus, it cannot give notice that the plaintiff will take judgment for a certain sum against one defendant, and for the relief demanded in the complaint against all the defendants (*Baxter* v. *Arnold*, 9 How. 445). As the summons is the first proceeding in the action, and all subsequent proceedings are supposed to be based upon it, if the complaint does not conform to the summons, it is the complaint and not the summons which is irregular (*Boington* v. *Lapham*, 14 How. 360; *Tuttle* v. *Smith*, id. 395; 6 Abb. 329; *Shafer* v. *Humphrey*, 15 How. 564; *Ridder* v. *Whitlock*, 12 *id.* 208; *Davis* v. *Bates*, 6 Abb. 15, overruling on this point *Voorhies* v. *Scofield* 7 How. 51; *Hyde Park* v. *Teller*, 8 *id.* 504). See, in note to section 142, subd. 1, *post*: *Complaint must agree with summons as to the nature of the cause of action.*

§ 130. [109.] (Am'd 1849, 1851.) *Service of complaint.*

A copy of the complaint need not be served with the summons. In such case, the summons must state where the complaint is or will be filed; and if the defendant, within twenty days thereafter, causes notice of appearance to be given, and, in person or by attorney, demands in writing a copy of the complaint, specifying a place within the State where it may be served, a copy thereof must, within twenty days thereafter, be

served accordingly; and after such service, the defendant has twenty days to answer; but only one copy need be served on the same attorney.

a. **Form of Summons.**—A summons served without any copy of the complaint is irregular unless it states the complaint was or will be filed (*Pignolet* v. *Dawsau*, 2 Hilton, 584). If the summons state that a *copy of the complaint* has been filed, instead of stating that *the complaint* had been filed, it is not such an irregularity as will vitiate a judgment entered for default of answer (*Hart* v. *Kremer*, 2 Code Rep. 50). If the complaint is filed, and no copy is served with the summons, and the summons instead of stating where the complaint is filed, states that a copy of the complaint "is annexed," the summons will be irregular, and may be set aside on motion (*Keeler* v. *Belts*, 8 Code Rep. 183); but such a summons is not a nullity, and if the defect can be remedied without doing injustice, and especially if no injury has been occasioned by the omission, it is the duty of the court to disregard it or allow an amendment. (*Ib.*)

b. **In what cases copy Complaint must be served.**—The only cases in which the code authorizes the defendant to demand a copy of the complaint, is where there has been *personal* service of the summons, but *no copy of the complaint has been served with it;* and where a defendant has been served by publication of the summons, and the mailing a copy of the summons and complaint addressed to him, he is not entitled as of course to demand a copy of the complaint to be served on him, and to have twenty days to answer after compliance with the demand (*Mackay* v. *Laidlaw*, 13 How. 129). In such a case, the defendant may obtain an order for further time to answer, and to have a copy of the complaint served on him. As, in such a case the complaint is on file, the defendant need not resort to a motion to obtain a copy. If the defendant does not demand a copy of the complaint within twenty days after service of the summons, the plaintiff is not obliged to serve a copy (*Engs* v. *Overing*, 2 Code R. 79; *Bennett* v. *Delicker*, 8 *ib.* 117). But in such a case, the court, on motion of the defendant, may make an order for a copy to be served; and although it may require the defendant to pay the costs of motion, it will not oblige him to swear to merits. (*Id.*) Where a defendant was served with summons, and subsequently by the sheriff with an order of arrest, and copy complaint, but was discharged from the arrest, because at the time of arrest he was attending court as a witness, no return of the service of the order or complaint was made by the sheriff, and the defendant not having served notice of appearance or an answer—the plaintiff, twenty days after service of the summons, but within twenty days from the service of the complaint, entered judgment as for want of an answer; and it was held he had a right to do so (*Van Pelt* v. *Boyer*, 7 How. 325).

c. **Demand of copy complaint.**—A notice of appearance to which was added, "and I require all papers to be served on me at my office, 11 Wall st." was held a sufficient demand of copy complaint (*Ferris* v. *Soley*, 23 How. 422; *Walsh* v. *Kursheedt*, 8 Abb. 418.)

d. **Within what time copy complaint to be served.**—Where a demand of a copy of the complaint was served for one defendant on 1 November, and by the same attorney for another defendant on 9 November, it was held that the plaintiff was bound to serve a copy of the complaint within twenty days of the first demand (*Luce* v. *Tempert*, 9 How. 212).

e. **Time to serve copy complaint may be enlarged.**—After a demand of a copy of the complaint duly made, the plaintiff may, on showing ground therefor, obtain further time to furnish a copy of the complaint (*Littlefield* v. *Merwin* or *Murin*, 2 Code Rep. 128; 4 How. 306). But such order cannot be granted *ex parte*, after the time for serving the complaint has expired (*Stephens* v. *Moore*, 4 Sand. 674).

As to dismissing complaint for not serving copy, see section 274, *post.*

f. **Time to answer after copy complaint served.**—After the complaint is served pursuant to a demand the defendant must answer in twenty days, or

within such further time as he may obtain by order (*Mandeville* v. *Winn*, 5 How. 461; 1 Code Rep. N. S. 161; *McGown* v. *Leavenworth*, 2 E. D. Smith, 24. See *Dudley* v. *Hubbard*, 2 Code Rep. 70; *Graham* v. *McCoun*, 1 Code Rep. N. S. 45; *Foster* v. *Udell*, 2 Code Rep. 30; *contra*, *Carpenter* v. *New Haven R. R. Co.*, 11 How. 488; and see note to section 148, *post*).

§ 131. [110.] (Am'd 1851.) *Notice of no personal claim.*

In the case of a defendant against whom no personal claim is made, the plaintiff may deliver to such defendant, with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific, real, or personal property, and that no personal claim is made against such defendant, in which case no copy of the complaint need be served on such defendant, unless within the time for answering, he shall, in writing, demand the same. If a defendant on whom such notice is served, unreasonably defend the action, he shall pay costs to the plaintiff.

a. The omission of the plaintiff to serve the notice prescribed by this section does not deprive the court of the power, in equity cases, to award costs against a defendant upon whom a copy of the complaint has been served for unreasonably defending the action (*O'Hara* v. *Brophy*, 24 How. 379).

b. As to the service of the notice of the object of the action, the law provides no fee, and the sheriff stands as to that precisely as any other person. When such service is actually rendered by the sheriff, or by any other person than the party or his attorney, I can see no objection in allowing to the prevailing party a reasonable sum for such service as a disbursement, if separately stated and duly verified. * * * Under no color of pretense can there be any allowance for copy of the notice. The service is the only matter which can be allowed, and for that one half the sum allowed for serving the summons I deem sufficient. The certificate of service should be embodied in the return to the summons, but whether it be or not, no fee is provided for it, and none can be allowed (James, J., *Benedict* v. *Warriner*, 14 How. 570). If the service is by the sheriff, the compensation cannot be allowed as a "sheriff's fee." The superior court allows 37½ cents for the service of such notice, when it is shown to be a necessary and reasonable disbursement (*Gallagher* v. *Egan*, 2 Sand. 745; 3 Code Rep. 203). No charge for certificate of service is allowed. The certificate of service of the notice of the object of the action is usually included in the certificate of the service of the summons. (*Id.*)

* § 132. [111.] (Am'd 1849, 1851, 1857, 1858, 1862.) *Notice of lis pendens. Action, when deemed commenced. Removal of notice.*

In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, or whenever a warrant of attachment, under chapter four of title seven, part second of this Code, shall be issued, or at any time afterwards, the plaintiff, if the same be intended to affect

* *Amended—See Appendix.*

real estate, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, to the same extent as if he were made a party to the action.

For the purposes of this section an action shall be deemed to be pending from the time of the filing of such notice; provided, however, that such notice shall be of no avail, unless it shall be followed by the first publication of the summons on an order therefor, or by the personal service thereof on a defendant within sixty days after such filing.

And the court in which the said action is pending may, in its discretion, at any time after the action shall have become abated, as is provided in section number one hundred and twenty-one, on good cause shown, and on application of any party aggrieved, after the action shall have become abated, as is provided in section one hundred and twenty-one, direct the notice authorized by this section to be removed from record by the clerk of any county in whose office the same may have been filed.

a. The notice under this section applies only to parties to the action and purchasers from them *subsequent* to the notice being filed (*The People* v. *Conolly*, 8 Abb. 128; see *Chapman* v. *West*, 17 N. Y. 125). It is a statute substitute for actual notice (*Hall* v. *Nelson*, 14 How. 32); and is as effectual against any disposition of the property described in it as an injunction (*Stevenson* v. *Fayerweather*, 21 How. 449). A purchaser from the defendant is bound by the decree in the action (*Harrington* v. *Slade*, 22 Barb. 162; and see *Zeiter* v. *Bowman*, 6 *id.* 133; *Griswold* v. *Miller*, 15 *id.* 520). *Perhaps*, for a plaintiff to retain the benefit of the notice filed under this section, he must prosecute his action diligently (see *Myrick* v. *Selden*, 36 Barb. 15).

b. Prior to the amendment of this section in 1862, it was held that the filing a notice under this section did not charge the grantee of an equity of redemption unless prior to the conveyance, the grantor had been served with the summons in the action (*Butler* v. *Tomlinson*, 38 Barb. 641; 15 Abb. 88; *Burroughs* v. *Reigor*, 12 How. 171; *Tate* v. *Jordan*, 3 Abb. 392; *Benson* v. *Sayre*, 7

Abb. 472, *n.*; *Farmers' Loan Co.* v. *Dickson*, 9 Abb. 61; 17 How. 477). It was a general rule independent of statute provision, that one purchasing property pending a suit in regard to it, was bound by the decree in such suit (*Zeiter* v. *Bowman*, 6 Barb. 133; and see *Griswold* v. *Miller*, 15 *id.* 520; *Cleaveland* v. *Boerum*, 23 Barb. 201; 27 *id.* 252; 3 Abb. 294).

a. An action against a non-resident and absent debtor for a money demand on contract commenced by publication and warrant of attachment, is not an action affecting the title to real property within the meaning of this section (*Burkhardt* v. *Sanford*, 7 How. 329; see, also, *Learned* v. *Vandenburgh*, *id.* 379; *The People* v. *Conolly*, 8 Abb. 128).

b. In Kings county, the notices of lis pendens are recorded (Laws 1859, ch. 212).

c. In case of an amendment of the complaint, by adding new parties, in the description of the premises, or in the amount of the claim, a new notice must be filed (*Curtis* v. *Hitchcock*, 10 Paige, 399).

d. As to filing the notice in partition actions, see *Waring* v. *Waring*, 7 Abb. 472, and *post*, § 448, note.

e. The court had no power prior to the amendment of 1862, to order a notice of *lis pendens*, properly filed, to be taken from the files of the court (see *Pratt* v. *Hoag*, 12 How. 215, 5 Duer, 631).

f. **Notice in foreclosure suits.**—The notice must be filed in every case of foreclosure (*Brandon* v. *M'Cann*, 1 Code Rep. 38), and "at or after the time of filing the complaint." (Rule 71.) A decree made without proof of filing the notice would be irregular, but not void (*Potter* v. *Rowland*, 4 Selden, 448). A notice stating every requisite *except* where the mortgage is recorded, would be good as a substantial compliance with the statute. (*Id.*)

§ 133. [112.] *Summons, by whom served.*

The summons may be served by the sheriff of the county where the defendant may be found, or by any other person not a party to the action. The service shall be made, and the summons returned with proof of the service to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons may, at his option, by an endorsement on the summons, fix a time for the service thereof; and the service shall then be made accordingly.

g. Where a plaintiff made a personal service of the summons on the defendant, and the defendant not appearing or answering, the plaintiff made an affidavit of the service, and entered judgment,—it was held that it was too late for the defendant, after judgment, to move to set aside the proceedings; that the service of the summons by the plaintiff was a mere irregularity, of which, if the defendant desired to avail himself, he should have moved promptly and before judgment, to set aside the service (*Myers* v. *Overton*, 2 Abb. 344, 4 E. D. Smith, 428; *Hunter* v. *Lester*, 18 How. 347; 10 Abb. 260). *Semble*, a sheriff who is plaintiff may serve his own summons (*Bennett* v. *Fuller*, 4 Johns. 486.) See rule 8 as to compelling a return.

§ 134. [113.] (Am'd 1849, 1851, 1859.) *Service of summons.*

The summons shall be served by delivering a copy thereof as follows:—

1. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation, only when it has property within this State, or the cause of action arose therein, or where such service shall be made within this State personally upon the president, treasurer, or secretary thereof.

2. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian; or if there be none within the State, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed.

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee has been appointed, to such committee and to the defendant personally.

4. In all other cases to the defendant personally.

a. **Service on railroad corporations.**—By laws 1854, ch. 282, p. 613, §§ 14 and 15, it is enacted: "Every railroad corporation in this State shall, within thirty days after this act shall take effect, designate some person, residing in each of the counties through or into which such railroad may run, on whom process to be issued by a justice of the peace may be served, and shall file such designation in the office of the clerk of the county where the person so designated shall reside; and a copy of such designation, duly certified by such clerk, shall be evidence of such appointment, and the service of any process upon the person so designated or named, to be issued by any justice of the peace in any civil action or matter of which such justice may have jurisdiction, shall be as valid and effectual as if served upon the president or any director of such corporation, as now provided by law." "In all cases where such designation shall not be made as aforesaid, and where no officer of such corporation shall reside in the county, on whom process can be served according to the existing provisions of law, the process mentioned in the next preceding section may be served on any local superintendent of repairs, freight agent, agent to sell tickets, or station-keeper of such corporation, residing in such county; which service shall be as effectual in all respects as if made on the president or any director of such corporation."

b. **Service on foreign corporations.**—By laws 1855, ch. 279, p. 470, it is enacted as follows: (§ 1.) "Every insurance and other corporation created by the laws of any other State, doing business in this State, shall, within thirty days after the passage of this act, designate some person residing in each county where such corporation transacts business, on whom process issued by authority of, or under any law of this State, may be served, and within the time aforesaid shall file such designation in the office of the secretary of state; and a copy of such designation, duly certified by said officer, shall be evidence of such appointment; and it shall be lawful to serve on such person so designated, any process issued as aforesaid; such service shall be made on such person, in such manner as shall be prescribed in case of service required to be made on any resident of this State, and such service shall be deemed a valid service threof. (§ 2.) In all cases where such designation shall not be made as aforesaid, and such foreign corporation cannot be served with such process according to the present provisions of law, it shall be lawful to serve such process on any person who shall be found within this State acting as the agent of

said corporation, or doing business for them. (§ 3.) Service made in accordance with any provision of this act shall be as effectual as if made in the form and manner required by law, and shall be deemed a full compliance with any statute requiring personal or other service to be made. (§ 4.) The term process in this act, shall be held and deemed to include any writ, summons, or order, whereby any action, suit, or proceeding shall be commenced, or which shall be issued in or upon any action, suit, or proceeding, by any court, officer, or magistrate." This statute does not operate to give the court jurisdiction of cases not included in section 134 and 427 of the code (*Cumberland Coal Co.* v. *Sherman*, 8 Abb. 243).

a. **Service on Corporation of New York.**—All process and papers for the commencement of actions and legal proceedings against the corporation of the city of New York, shall be served either on the Mayor, Comptroller, or the counsel to the corporation (Laws 1860, ch. 379, § 4).

b. **Service on supervisors.**—In all legal proceedings against the board of supervisors, the first process, and all other proceedings requiring to be served, shall be served on the chairman or clerk of the board (1 R. S. 384, § 3).

Note to subdivision 1.

c. **Service on corporations.**—A managing agent is one whose agency extends to all the business of the corporation (*Brewster* v. *Michigan Central R. R. Co.*, 5 How. 183). A baggage-master (*Flynn* v. *Hudson River R. R. Co.*, 6 *id.* 308), or one who merely sells tickets is not to be deemed a managing agent on whom service of process may be made (*Doty* v. *Michigan Central R. R. Co.*, 8 Abb. 427). A person acting under a power of attorney for an insurance company, located elsewhere, and authorized to effect insurance, was held to be a managing agent (*Bain* v. *Globe Ins. Co.*, 9 How. 448). Where it is uncertain whether or not the party served is or is not a managing agent of the defendant, the burden is on the defendant to show the relation to it of the party served, and that he is not a managing agent (*Donadi* v. *N. Y. State Mut. Ins. Co.*, 2 E. D. Smith, 519). The provision in this section is a substitute for the service by publication (*Bates* v. *New Orleans, &c; Railroad Co.*, 4 Abb. 77; 13 How. 516). In an action against a foreign corporation, the regularity of the service does not depend upon proof being previously made of the facts, the existence of which is necessary to give the court jurisdiction of the action. The code nowhere requires such proof to be made, or that any evidence shall be given in relation to such facts. But if the defendant objects that it is not within this provision and section 427, then, to sustain the service, the plaintiff must show that the facts exist which render a service as prescribed by this section proper. (*Id.*)

d. In making service on a corporation where there are two parties who make adverse claim to be officers of such corporation, the proper person to be served is the officer *de facto*, the one having possession (*Berrian* v. *Metho. Soc. in New York*, 4 Abb. 424).

e. On a motion to set aside a judgment taken by default against a corporation, on the ground, amongst others, that there was no legal evidence of the service of the summons, the service was, as alleged, on the managing agent of the defendants, the only proof of such service being an alleged admission subscribed by such agent, without anything to verify such signature,—held that it was an irregularity which should have been taken advantage of promptly and at the *first* opportunity; and that, not having been done, the plaintiff was allowed to file, *nunc pro tunc*, an affidavit verifying the signature of the agent to the admission, and the motion to set aside the proceedings was denied (*Jones* v. *U. S. State Comp.*, 16 How. 129). The service must be on some one of the officers named (*Arken* v. *Quartz Rock, &c., Comp.*, 6 Cal. R. 186).

f. **Cause of action—Where it arises.**—Where a railroad company, chartered by the State of Vermont, by its president, drew a bill of exchange in the State of Vermont, payable in New York, and drawn upon J. W. B., the treasurer of the said company in Boston, and accepted and endorsed in Boston by J. W. B. as treasurer of said company, and by the said J. W. B. sold to the Bank of Commerce in Boston; the bill on maturity was presented for pay-

ment in New York, and was there protested for non-payment,—held that the cause of action arose in this State (*Bank of Commerce* v. *Wash. and Rutland R. R. Co.*, 10 How. 1; *Conn. Mut. Ins. Co.* v. *Cleveland R. R. Co.*, 23 How. 180; 26 How. 226). Where a loan is made by one non-resident to another, out of this State, and secured by a draft drawn upon a person residing within this State, the cause of action cannot be said to have arisen within this State (*Western Bank* v. *City Bank of Columbus*, 7 How. 238). Where a contract is made at one place and is to be performed at another, the cause of action upon such contract arises at the latter place (*Durckle* v. *Eckhart*, 3 Coms. 132; see Story, Conflict of Laws, § 317). Where does a cause of action arise discussed (*Cumberland Coal Co.* v. *Sherman*, 8 Abb. 249; *Campbell* v. *Proprietors of Champlain R. R.*, 18 How. 412).

b. A cause of action is the right a party has to institute and carry through a proceeding (*Meyer* v. *Van Collem*, 28 Barb. 231).

Note to subd. 3.

c. **Actions against lunatics.**—The provision for service of the summons on a lunatic, does not dispense with the rule of law forbidding an action against one judicially declared a lunatic, unless by leave of the court (*Soverhill* v. *Dickson*, 5 How. 109; see note to section 113, p. 118 *f*, *ante*.) And where, in July, 1848, A. was judicially declared a lunatic, and a committee of his person and estate duly appointed, and on the 18th of November, 1849, the proceedings in lunacy being still in force, an action for a money demand was brought against the lunatic without any leave of the court for that purpose obtained, and the summons and complaint were served on the defendant, and also on the committee, in pursuance of the 3d subdivision of this section,—the court, on motion of the committee, set the complaint aside (*Sternburg* v. *Schoolcraft*, 2 Barb. 153). The proper course for a party who has a claim against a lunatic or his estate, after office found, is to apply to the supreme court by petition for the payment of the debt, or for leave to bring a suit for the purpose of establishing the claim (*Soverhill* v. *Dixon*, 5 How. 109; *Crippen* v. *Culver*, 13 Barb. 424). If the court is satisfied that the debt is justly due, the committee will be ordered to pay it out of the estate; or, if the claim is doubtful, the court will either have it settled by a reference, or give the claimant permission to establish his claim by an action (*Re Hopper*, 5 Paige, 489; *Williams* v. *Cameron*, 26 Barb. 172). An action against the lunatic, commenced without the permission of the court, would be restrained (*Re Heller*, 3 Paige, 199; but see *Robertson* v. *Lain*, 19 Wend. 650). A judgment in an action commenced without such leave, would be of no avail (*Clark* v. *Dunham*, 4 Denio, 262; Heller's case, 3 Paige, 201). It may be set aside on motion or by an action (*Demilt* v. *Leonard*, 11 Abb. 252; 19 How. 140). Such a judgment is not void (*Sternberg* v. *Schoolcraft*, 2 Barb. 153; and see *Griswold* v. *Miller*, 15 *id.* 650).

d. Service of a summons on an insane person who has no committee, must be by a personal service on such person (*Heller* v. *Heller*, 1 Code Rep. N. S. 309; 6 How. 194).

Note to subd. 4.

e. **What is a sufficient personal service.**—When the summons in an action is not legally served, the court has no jurisdiction of the defendant, and in such case all proceedings based on the pretended service are void. The object of the summons is to give the defendant an authentic and fair notice that an action has been commenced, and to notify him of the time allowed to prepare and interpose a defence; and when so notified, he is entitled, in cases that may require it, to apply to the court for any additional time that may be necessary for that purpose; and any trick or device that deprives the defendant of these just and reasonable provisions, is a fraud upon the spirit and intent of the statute, and on the rights of the party. Putting the defendant in the unknown possession of a summons disguised or enveloped, so as to conceal from him the knowledge which it was the intent of the law should be communicated, is not a good service; and the subsequent discovery by the defendant, upon whom such an attempted service is made, of the contents of the sum-

mons, is not to be deemed a good service, if the defendant is beyond the limits of the State when he makes such discovery. The neglect of the defendant to make such motion immediately on his return to this State, could not be deemed to give the court jurisdiction (*Bulkley* v. *Bulkley*, 6 Abb. 307).

a. In an action in which the defendant was proceeded against as an absconding debtor, by attachment, and in which the publication of the summons had been commenced, the defendant, during the time of publication of the summons, called at the office of the plaintiff's attorney, and inquired the amount of the plaintiff's claim. The plaintiff's attorney handed him copies of the summons and complaint, saying, "There is a copy of the summons and complaint for you, in which is contained the whole amount of the claim." The defendant took the papers and read them, and laid them down on a desk, and started to go away; the plaintiff's attorney requested him to take them with him, but the defendant replied he did not want them, and left without them; held not a sufficient personal service (*Niles* v. *Vanderzee*, 14 How. 547). "Service means, serving the defendant with a copy of the process, and showing him the original if he desires it" (*Alderson B. Goggs* v. *Huntingtower*, 12 M. & W. 502; cited *Williams* v. *Van Valkenburgh*, 16 How. 152). And the copy summons must be delivered to and left with the defendant (Rule 18). And a mere manual delivery of the summons is not good service, unless the summons be left with the defendant. Thus, where a defendant was served with a copy summons, and after reading or examining the same, voluntarily handed it back to the person who had served it, and such person received it back without informing the defendant that he had a right to retain same, and the plaintiff afterwards entered up judgment for default of an answer, the court, on the defendant's motion, set aside the judgment with costs (*Beekman* v. *Cutter*, 2 Code Rep. 51). And see note to section 138. Where the defendant refuses to accept the summons, service may be made on him by "laying it down at any appropriate place in his presence." Effecting a service by forcibly thrusting the paper upon the person of the defendant, is improper, and where service was so effected, the court will set it and all subsequent proceedings aside (*Davison* v. *Baker*, 24 How. 39). Where, however, a defendant refused to receive a process, it was held that laying it on his shoulder was good service (*Bell* v. *Vincent*, 7 D. & R. 233).

b. **Place of service.**—The service of the summons must, except in the cases provided for in § 135, be within the territorial jurisdiction of the court (*Litchfield* v. *Burwell*, 5 How. 341). But in the superior court of the city of New York (*Porter* v. *Lord*, 4 Abb. 43; 4 Duer, 682), Bosworth, J., with the concurrence of all the justices of that court, held that in all actions in which that court has jurisdiction by subd. 1 of § 33 of the code, and in an action against several persons jointly liable on contract, when one of them resides in the city of New York, the summons may be served in any county of the State; and that it is only in those actions of which jurisdiction is acquired by the fact of the personal service of the summons on all the defendants within the city of New York that service of the summons out of the city of New York is unauthorized and invalid. In that case the action was against L. and D. as joint debtors. L. resided in New York city, and was there served with the summons. D. resided in Kings county, and was there served. D. moved to set aside such service. The motion was denied. If this decision is correct, the same rule will hold good as to the court of common pleas for the city and county of New York. Process may be served on board a British man-of-war lying within the jurisdiction of the court (1 Opin. Atty. Gen'l. 87).

c. **Time of service.**—Service of summons on a Sunday would be void (*Field* v. *Park*, 20 Johns. 140; and see 8 Barb. 387); but, *semble*, it may be served at any hour of the day or night. In this respect there is a distinction between services of notices and of process (*Priddes* v. *Cooper*, 1 Bing. 66; *Upton* v. *McKenzie*, 1 D. & R. 172; *Weyburn* v. *Neale*, 2 Burr. 818; see *post*, note to § 408). Process cannot be served on Saturday on persons who observe that day as a sabbath (Laws 1839, ch. 367, repealed Laws 1847, ch. 349; *Hastings* v. *Farmer* 4 Coms. 296). The fact that process was served on Sunday does not render the judgment *void* (*Murks* v. *Wilson*, 11 Abb. 87).

a. **Service on election day.**—Service of a summons on an elector on an election day, is a void service (*Meeks* v. *Noxon*, 1 Abb. 280; S. C. *sub nom. Weeks* v. *Noxon*, 11 How. 189; *Hastings* v. *Farmer*, 4 Coms. 296; *Bierce* v. *Smith*, 2 Abb. 411). It being provided by statute: Whenever an election shall be held in any city or town pursuant to this chapter (Laws 1842, ch. 130), no civil process or proceeding in the nature of civil process, shall be served on any elector entitled to vote in such city or town on the day on which such election shall be held. It was in one case adjudged that the provision forbidding service of civil process on the day of a general or special election did not apply to *charter elections;* nor did the charter of New York, forbidding the service of civil process on any of its electors during the charter election, extend to an injunction or subpœna, but only to process causing duress (*Wheeler* v. *Bartlett*, 1 Edw. Ch. R. 323; but see what is said of that case in *Meeks* v. *Noxon*, *supra;* see, however, *Re Election Law*, 7 Hill, 194).

b. **Service on day of town meeting.**—" Whenever a town meeting shall be held in any town, no civil process shall be served in such town on any elector entitled to vote therein on any day during which such town meeting shall be held" (1 R. S. 342, § 10).

c. **Fraud in service.**—The courts will not sanction any attempt by fraud or misrepresentation to bring a party within the jurisdiction (*Carpenter* v. *Spooner*, 2 Sand. 717; 2 Code R. 140; 3 *id.* 23; *Goupel* v. *Simonson*, 3 Abb. 474); thus, where by a false statement made for the purpose, a defendant was induced to come to the city of New York, and was there served with process, it was held to be irregular. (*Id.*)

d. **Service on husband and wife.**—Where the action is against husband and wife, service on the husband alone will be good service on both, unless relief be asked out of the separate estate of the wife, in which case she must be served (*Eckerson* v. *Vollmer*, 11 How. 42).

e. **Service on the people.**—In a suit against a State, the service of process on the governor, or chief executive magistrate, and on the attorney-general of the State, is a regular service (*Chisholm's Exors.* v. *State of Georgia*, 3 Peters' Cond. Rep. 51; 2 Dallas' Rep. 419).

f. **Service on a witness.**—A resident of another State coming to this State to be examined as a witness in an action to be tried here, and attending in good faith for that purpose only, is exempt from the service of a summons upon him (See *Seaver* v. *Robinson*, 3 Duer, 622); and the exemption extends to a non-resident party to the action, who comes into this State only for the purpose of being a witness in an action to be tried here (*Merrill* v. *George*, 23 How. 331).

g **Defective service.**—A defect in the service is to be cured by motion; it affords no ground for demurrer or answer (*Nones* v. *Hope Mut. Ins. Co.*, 8 Barb. 541).

See note to section 138, *post.*

§ 135. [114.] (Am'd 1849, 1851, 1858, 1860.) *Service by publication. Form of summons.*

Where the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, or of the county judge of the county where the trial is to be had, and it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a proper party to an action relating to real property in this State, such court

or judge may grant an order that the service be made by the publication of a summons, in either of the following cases:—

1. Where the defendant is a foreign corporation, has property within the State, or the cause of action arose therein:

2. Where the defendant, being a resident of this State, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent:

3. Where he is not a resident of this State, but has property therein, and the court has jurisdiction of the subject of the action:

4. Where the subject of the action is real or personal property in this State, and the defendant has, or claims, a lien or interest, actual or contingent, therein, or the relief demaded consists wholly or partly in excluding the defendant from any interest or lien therein:

5. Where the action is for divorce, in the cases prescribed by law:

The order must direct the publication to be made in two newspapers to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge must also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence, unless it appear that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint, out of the State, is equivalent to publication and deposit in the post-office.

The defendant against whom publication is ordered, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just; and if the defence be successful, and the judgment, or any part thereof, have been collected, or otherwise

enforced, such restitution may thereupon be compelled as the court directs; but the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected.

And in all cases where publication is made, the complaint must be first filed, and the summons, as published, must state the time and place of such filing.

In actions for the foreclosure of mortgages on real estate, already instituted, or hereafter to be instituted, if any party, or parties, having any interest in or lien upon such mortgaged premises, are unknown to the plaintiff, and the residence of such party or parties cannot, with reasonable diligence, be ascertained by him, and such fact shall be made to appear, by affidavit, to the court, or to a justice thereof, or to the county judge of the county where the trial is to be had, such court, justice, or county judge, may grant an order that the summons be served on such unknown party or parties by publishing the same for six weeks, once in each week successively, in the State paper, and in a newspaper printed in the county where the premises are situated, which publication shall be equivalent to a personal service on such unknown party or parties.

a. **Other provisions of law as to substituted service.**—By laws 1853, p. 974, it is enacted that "whenever it shall satisfactorily appear to any court, or any judge of the supreme court, or any county judge, by the return or affidavit of any sheriff, deputy sheriff or constable, authorized to serve or execute any process or paper for the commencement or in the prosecution of any action or proceeding, that proper and diligent effort has been made to serve any such process or paper on any defendant in any such action, residing in this State, and that such defendant cannot be found, or if found, avoids, or evades such service, so that the same cannot be made personally, by such proper diligence and effort,—such court or judge may, by order, direct the service of any summons, subpœna, order, notice or other process or paper to be made by leaving a copy thereof at the residence of the person to be served, with some person of proper age, if admittance can be obtained, and such proper person found who will receive the same; and if admittance cannot be obtained, or any such proper person found, who will receive the same, by affixing the same to the outer or other door of said residence, and by putting another copy thereof, properly folded or enveloped, and directed to the person to be served at his place of residence, into the post-office in the town or city where such defendant resides, and paying the postage thereon. On filing with the clerk of the county where such defendant resides, or the county in which the complaint in any such action is by law to be filed, an affidavit showing service according to such order, such summons, subpœna, order, notice, or other process or paper, shall be deemed served, and the same proceedings may be taken thereon as if the same had been served by delivery to such defendant personally, or otherwise, as by law now required; but the court may, upon any application by them deemed reasonable, at any time permit any defendant to appear and defend, or have such other relief in any action or proceeding founded on any such service, as the nature of the case may require."

a. The provisions of this statute only apply to cases where the defendant cannot be found either in or out of the State, or, being found, avoids or evades personal service (*Collins* v. *Campfield*, 9 How. 519; *Foot* v. *Harris*, 2 Abb. 454); therefore where upon an affidavit that the defendant was a resident of this State, but that he was then in the State of Ohio, and not expected back that summer, except on a visit, an order was made for substituted service under this statute, the court on motion set aside such order as not warranted by the statute (*Collins* v. *Campfield*, *supra.*; see *Jones* v. *Derby*, 1 Abb. 458). An order made under this statute should direct the substituted service to be made in manner prescribed; and if it direct any other mode of service, the order will be irregular (*Foot* v. *Harris*, *supra.*)

Note to the section 135.

b. **Statute to be strictly pursued.**—The requirements of the statute must be strictly pursued and fully complied with in order to confer jurisdiction (*Hallett* v. *Righters*, 13 How. 43; *Brisbane* v. *Peabody*, 3 *id.* 109; *Kendall* v. *Washburn*, 14 *id.* 380; *Titus* v. *Reylea*, 16 *id.* 371; *Cook* v. *Farren*, 34 Barb. 95; 12 Abb. 359; 11 *id.* 40; *Wortman* v. *Wortman*, 17 Abb. 66). An order for publication, and all proceedings founded thereupon are absolute nullities, unless the case is *in fact* within one of the five subdivisions of this section. It is not sufficient that the affidavit on which the order is made states the case to be within one of these subdivisions, nor that the judge making the order is satisfied the case is within one of these subdivisions (*Fiske* v. *Anderson*, 33 Barb. 71; 12 Abb. 8). Before a judge can make an order under this statute he must be satisfied that the defendant sought to be served resides in this State and cannot be served, *being satisfied* he makes the order, and that order decides on the sufficiency of the facts shown to confer jurisdiction, and the order cannot be questioned collaterally (*Collins* v. *Ryan*, 32 Barb. 647; *Roche* v. *Ward*, 7 How. 416). But where there is a total absence of proof as to the facts necessary to confer jurisdiction, the order for publication and all proceedings founded upon it are absolutely void (*Towsley* v. *McDonald*, 32 Barb. 604).

c. To obtain an order in a case provided for by subd. 1, it must be proved to the officer who is to make the order that the *person to be served* (not the defendant) cannot, after due diligence, be found in the State (*Hurlbut* v. *Hope Mut. Ins. Co.*, 4 How. 278; *Wortman* v. *Wortman*, 17 Abb. 66; *Irving Savings' Institution* v. *Hardman*, 17 Abb. 67, *note*); and the affidavit should mention the name of the State in which the defendants are incorporated (1 Barb. Ch. Pr. 96).

d. On a motion under subdivision 2, it appeared that although the defendant could be found and was not concealed, yet the sheriff, although he used due diligence, could not serve the summons on the defendant, it was held not within this subdivision (*Van Rensselear* v. *Dunbar*, 4 How. 151). Such a case is now provided for by the law of 1853, *supra.* Property *temporarily* brought into the State, will not satisfy this subdivision; thus, where the only property which the defendant, a non-resident, had within the State, and on which the affidavit for the order of publication was based, consisted of a team, driven into the State merely for the purpose of removing lumber, the plaintiff after obtaining an order for publication, served the summons personally out of the State, and defendant not answering, the plaintiff took judgment for want of an answer,—such judgment was set aside on the ground that defendant had no property within the State within the meaning of the statute, and the court had acquired no jurisdiction of the action (*Haight* v. *Husted*, 4 Abb. 348; affirmed, 5 *id.* 170).

e. The court cannot amend any proceding to confer jurisdiction (*Hallett* v. *Righters*, 13 How. 43); nor acquire jurisdiction by proof of the necessary facts *nunc pro tunc* (*Wortman* v. *Wortman*, 17 Abb. 67).

f. See Supreme Court Rule 25.

g. Where, after an order for service by publication, judgment was entered by the clerk, and it appeared on the face of the record that there had not been a six weeks' publication of the summons, and there was no proof of a deposit

of copies of the summons and complaint in the post-office, nor of personal service out of the State, nor did the record contain the affidavit on which the order for service was granted,—it was held that the record did not show jurisdiction of the person, and the judgment was set aside (*Hallett* v. *Righters*, *supra*). See note to section 246, *post*.

a. **Service out of the State.**—There can be no valid service of a summons out of the State, unless after an order for publication (*Fiske* v. *Anderson*, 33 Barb. 75). Without a valid order for publication, the service out of the State has no effect, and the court has no jurisdiction (*Litchfield* v. *Burwell*, 5 How. 341; 1 Code Rep. N. S. 42; *Morrell* v. *Kimball*, 4 Abb. 352). Acceptance of service out of the State would not confer jurisdiction (*id.*) unless followed by an appearance in the action.

b. **Defendant not found.**—It is supposed that this section does not authorize an order for the publication against a defendant who cannot be found (except in the cases provided for by the amendment of 1860), and whose last known place of residence was within this State, but whose residence cannot at the time be ascertained (*Close* v. *Van Heusen*, 6 How. 157), and that under such circumstances the proceeding may be by petition under the provision of the Revised Statutes (2 R. S. 186, as amended by Laws of 1842, p. 363). The provision referred to is supposed to be retained in force, and made applicable, by the 368th section of the code (*Close* v. *Van Heusen*, *supra*.)

c. **The affidavit.**—An affidavit to obtain an order for service of a summons by publication must show the residence of the defendant or that it is neither known to the plaintiff nor can with reasonable diligence be ascertained by him (*Hyatt* v. *Wagenright*, 18 How. 248; *Cook* v. *Farren*, 34 Barb. 95; 12 Abb. 359; 11 *id.* 40). [The affidavit of ineffectual endeavors to serve a defendant should be made by some person other than the plaintiff.] An affidavit showing that the defendant is a resident of the State, and that deponent is informed he is absent from the State, and that he believes he is absent for the purpose of defrauding his creeditors, without showing grounds for that belief, is insufficient, and an order granted on such an affidavit is irregular, and it and all subsequent proceedings will be set aside on motion (*Warren* v. *Tiffany*, 9 Abb. 66; 17 How. 106). But an affidavit on information and belief of the nonresidence of the defendant, was held sufficient (*Van Wyck* v. *Hardy*, 11 Abb. 474; 20 How. 222).

d. An order under subdivision 3 was made on an affidavit that the defendant had "property within the State of Yew York, *as deponent has been informed and believes.*" The court on motion set aside the order; and per Parker, J.: "The affidavit is defective in not showing that the defendant has property within the State of New York. It is not enough to state this on information and belief. That is no proof of the fact; a person may give such testimony who has no personal knowledge on the subject. Mere hearsay and belief founded on it, are not evidence" (*Everson* v. *Thomas*, 5 How. 46). Where an affidavit states the belief of the deponent that the defendant keeps out of the way to avoid personal service, the facts on which such belief is grounded must be stated, and the court must be satisfied that the belief is well founded (*Godkin* v. *Redgate*, 1 Cr. & J. 401).

e. An affidavit which stated "that G. D. and J. D. reside in the State of California, but their present place of residence therein, deponent is unable to state," is not sufficient; it does not show that the residence could not be ascertained "with reasonable diligence" (*Cook* v. *Farren*, 34 Barb. 95; 12 Abb. 359; 11 *id.* 40).

f. When the application is under subd. 2, the affidavit besides showing the existence of a cause of action, and that the defendant cannot after due diligence be found within the State, must also show that being a resident of the State, the defendant has departed therefrom with intent to defraud his creditors, or to avoid the service of the summons, or keeps himself concealed therein with a like intent (*Towsley* v. *McDonald*, 32 Barb. 604).

g. To establish an intent to defraud creditors, the affidavit must show de-

fendant to have property, of which he is about to make a fraudulent or illegal disposition, or which he unjustly refuses to apply to the payment of his debts, or has secreted or removed, or is about to secret or remove, or has fraudulently encumbered (*Towsley* v. *McDonald*, 32 Barb. 604).

a. To authorize an order on the ground of defendant's departure from the State with an intent to avoid service, the affidavit must furnish proof of such intent (*Towsley* v. *McDonald*, 32 Barb. 604).

b. **Form of Summons.**—Where the service is by publication, the summons need not mention the name of this State in designating the place where it has been or will be filed (*Cook* v. *Kelsey*, 19 N. Y. 412; 8 Abb. 177; overruling *Titus* v. *Relyea*, 16 How. 371; 8 Abb. 177; and *id.* 170; 17 How. 134). The publication of a summons against a non-resident is good where the only statement of the place where it has been filed is contained in a note appended to the copy of the summons declaring that it "has been filed in said clerk's office;" the summons itself, immediately preceding, stating the city and county where such clerk's office is situate. (*Id.*) And where the summons was dated at "New York," and stated that the complaint was filed in the Clerk's office of the City of New York, and required the copy answer to be served at "13 Chambers street, in the city of New York," but the copy summons published had the words "13 Chambers street," only; held not to render the proceedings void (*Van Wyck* v. *Hardy*, 11 Abb. 478; 20 How. 222).

c. **The order.**—The order for publication should recite the summons in the action, or refer to it as being annexed, that it may appear that there was a summons, and for the purpose of identifying it (*Rawdon* v. *Corbin*, 3 How. 416; *Vernam* v. *Holbrook*, 5 *ib.* 3; *Everson* v. *Thomas*, 5 *ib.* 46). An order which does not direct copies of the summons and complaint to be mailed is void (*Towsley* v. *McDonald*, 32 Barb. 609; *Warren* v. *Tiffany*, 9 Abb. 66; 17 How. 106), and where ever a service by mail is proper, if the order omit to direct such service, it will be void (*Towsley* v. *McDonald*, 32 Barb. 609; *Warren* v. *Tiffany*, 9 Abb. 66; 17 How. 106). And an order which directed merely that "a copy of the summons and complaint be deposited in the post office addressed to the defendant," was held insufficient (*Hyatt* v. *Wagenright*, 18 How. 248). It ought to have directed the deposit "*forthwith*," and that the summons and complaint should be directed to the defendant at his residence, naming it, if known. (*Id.*)

d. **Affidavits to be filed.**—The affidavit on which the order is obtained should be left with the judge, or filed within five days (*Vernam* v. *Holbrook*, 5 How. 3; Rule 4). Where two affidavits were filed, which were not sufficient to authorize the order, but on a motion to set aside the order a third affidavit was produced, which the court was satisfied had been used on the application for the order, and which supplied the defects in the affidavits on file, the court denied a motion to set aside the order. (*Ib.*)

e. **Deposit in post-office.**—A copy of the summons and complaint is to be deposited *forthwith* in the post-office; and where the order for publication was made on the 24th of October, and the copy summons, &c., was not deposited in the post-office until the 9th of November following, it was held not to be a deposit forthwith, and that a judgment subsequently entered on default of the defendant to answer, was irregular (*Back* v. *Crussell*, 2 Abb. 386). Where the order was made on the 18th, and the deposit made on the 22d of the same month, held regular (*Van Wyck* v. *Hardy*, 11 Abb. 474; 20 How 222), the delay being accounted for, forthwith held to mean, "reasonable dispatch." (*Id.*)

f. **Publication.**—The complaint need not be published (Anon. 1 Code Rep. 102; 3 How. 298); a publication for seventy days held to be a publication for ten weeks (*The People* v. *Gray*, 10 Abb. 468); a publication for thirty-nine days, held a publication for six weeks (*Olcott* v. *Robinson*,, 21 N. Y. 150; rev'g 20 Barb. 148; and see § 425).

g. All notices required by law to be published in Hamilton county may be published in Fulton county (Laws 1860, ch. 297), and "any notice or adver-

tisement may be printed in any newspaper of the counties of Fulton and Hamilton (Laws 1860, ch. 95).

a. **Filing Complaint.**—It has been held that the service by publication of a summons is insufficient, unless the complaint be filed *before* publication, and that the summons as published *must* state the *time and place* of filing. A judgment entered upon a service thus defective is a nullity. Such a judgment is not aided by the 139th section of the code; and the fact that an attachment was issued (*Kendall* v. *Washburn*, 14 How. 380; *Titus* v. *Relyea*, 16 *id.* 371; 8 Abb. 177), and that an order, subsequent to the judgment, for the filing of the complaint *nunc pro tunc* as of the day the summons was first published, will not avail to give validity to the judgment: the defect in the publication of the summons will still remain. (*Id.*)

b. Where on a motion to set aside a judgment taken for default of an answer on a service by publication, it appeared that the complaint was filed on the 22d of September, and the summons, dated and published on the 23d of September, stated, the complaint has *this day* been filed, the motion was denied, and the court held, that as the complaint was *on file* on the 23d, although actually filed on the 22nd, it was a sufficient compliance with the statute (*Jacquerson* v. *Van Erben*, 2 Abb. 315).

c. **Service, when complete.**—See § 137.

d. **Enforcing judgment.**—A judgment obtained on a service by publication against a defendant out of the State, though it may be enforced against the defendant's property in this State, has no binding force *in personam*, and cannot be sued upon (*Kane* v. *Cook*, 8 Cal. 449; *Force* v. *Gower*, 23 How. 294; *Fiske* v. *Anderson*, 33 Barb. 71; 12 Abb. 8).

e. **Admitting defendant to defend.**—Where a defendant against whom publication is ordered, and against whom judgment has been taken, is allowed to come in to defend after judgment, the mere admitting him to come in to defend does not open the judgment, nor stay the proceedings upon the execution (*Carswell* v. *Neville*, 12 How. 445). When a defendant in a foreclosure suit, proceedeed against as an absentee, applied to be let in to defend after decree and before a sale, and did not swear to merits, he was required to pay the costs already accrued, subsequent to the time for his appearance, and had also to give security to pay the future costs if his defence failed; but where merits were sworn to, and he applied at the first opportunity, he was not required to pay costs, although the plaintiff denied there was any defence (*Hartwell* v. *White*, 9 Paige, 368).

* § 136. [115.] (Am'd 1849, 1851.) *Joint and several debtors.*

Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:—

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct, and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served; or,

2. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

* *Amended—See Appendix.*

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them, or any of them alone.

a. Where the summons has been served on only one of two defendants, who are *severally* as well as *jointly* liable, the plaintiff may proceed against the defendant served, as if he were a sole defendant; otherwise, if the defendants are liable *jointly* and not also severally. In the latter case, the judgment must in form be entered against both defendants (*Stannard* v. *Mattice*, 7 How. 4; *Lahey* v. *Kingon*, 13 Abb. 192). Such a judgment may be enforced by a creditor's bill (*Bilhofer* v. *Heubach*, 15 Abb. 143).

b. Several persons may be named in the summons, and the plaintiff may deliver a complaint against only the one upon whom the process is served, omitting the names of the other defendants mentioned in the summons. Thus, where in an action arising on contract, in the summons three persons were named as defendants, but the summons was served on one defendant only, who appeared, and the plaintiffs served a complaint in which only the party served with the summons was named as defendant,—that defendant moved to set aside the summons, and for judgment dismissing the complaint, on the ground that the parties defendant had been improperly changed, and for neglect of the plaintiffs to serve a complaint against *all* the defendants. Willard, J., denied the motion (*Travis* v. *Tobias*, 7 How. 90). Where an action not founded on contract is brought as against two defendants, and process is served on one only, the defendant not served is not a party to the action (*Robinson* v. *Frost*, 14 Barb. 536; *M'Kenzie* v. *Hackstaff*, 2 E. D. Smith, 75; *East River Bank* v. *Cutting*, 1 Bosw. 636; *Norton* v. *Hayes*, 4 Denio, 245; see however, 5 How. 8; 16 Abb. 1).

c. When one partner colludes with a creditor of the firm without the knowledge of his co-partner, to have a judgment rendered against the property of the firm, by a service on such colluding partner alone, the court will, on motion of the partner who has been deceived, open the judgment (*Griswold* v. *Griswold*, 14 How. 446; *Everson* v. *Gehrman*, 10 *id.* 301); and where the service was on one defendant only, who made default, and judgment was entered in form against all, the court subsequently, upon the application of the defendant not served, permitted him to come in and defend upon condition that the judgment should stand as security (*Ford* v. *Whitridge*, 9 Abb. 416).

d. The several heirs of a person deceased, although they must be sued in one action for the debts of the ancestor to the extent of the real estate descended, are not such joint debtors as that on a service on one a judgment in form can be entered against the others (*Kellogg* v. *Olmstead*, 6 How. 487).

e. "Defendants severally liable," in sub. 2, construed as meaning defendants liable separately from the defendants not served, though jointly as respects each other; so that in an action against three persons, as partners, one not being served with the summons, nor appearing, the plaintiff is entitled to judgment against the other two, upon evidence that they alone constituted the partnership (*Pruyn* v. *Black*, 21 N. Y. 300). In such a case to entitle the plaintiff to a judgment against the defendant not served, it must be shown he was a partner (*Crandall* v. *Beach*, 7 How. 271).

f. One defendant, a joint debtor, served with process, may, by an offer under § 385, bind his co-defendant, and such judgment may be enforced against the joint property of all (*Emery* v. *Emery*, 9 How. 130).

g. The recovery of judgment against one of several joint debtors, although nothing is obtained on it, is a bar to any future action, either against all or either of such joint debtors (*Benson* v. *Paine*, 9 Abb. 28; see, however, *Johnson* v. *Smith*, 23 How. 444; *Betts* v. *Hillman*, 15 Abb. 184).

See notes to sections 120, 289, and 291, and sections 274 and 375.

§ 137. [116.] *When service complete*

In the cases mentioned in section 135, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication.

a. Where an order for publication has been made, and the defendant is personally served with summons out of the State, he has twenty days' time to answer after the expiration of the time prescribed in the order for publication (*Tomlinson* v. *Van Vechten*, 1 Code Rep. N. S. 317; 6 How. 199; *Abrahams* v. *Mitchell*, 8 Abb. 123). In *Dykers* v. *Woodward* (7 How. 313), it was held otherwise, and that the time to answer commences to run from the day of the personal service out of the State. Where the summons has been published, the time to answer does not commence to run until the completion of the six weeks of publication (*Richardson* v. *Bates*, 23 How. 516).

§ 138. [117.] (Am'd 1851.) *Proof of service.*

Proof of the service of the summons and of the complaint or notice, if any, accompanying the same, must be as follows:

1. If served by the sheriff, his certificate thereof; or,

2. If by any other person, his affidavit thereof; or,

3. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, as required by law, if the same shall have been deposited; or,

4. The written admission of the defendant.

In case of service otherwise than by publication, the certificate, affidavit, or admission, must state the time and place of the service.

b. **Sheriff's certificate.**—Where the proof of service is the sheriff's certificate, he should state or refer to the name of the cause, and that the summons served by him was in that cause; and where a sheriff's certificate stated that he served on the defendant a copy of a summons and complaint, but it did not appear that it was the summons and complaint in the action then before the court, it was held not sufficient proof of service (*Litchfield* v. *Burwell*, 5 How. 341; 1 Code Rep. N. S. 42). The certificate of a sheriff of a county in another State, of having made service of a paper, is of no greater effect in this State than the certificate of a private individual. He should make affidavit of the service as any other individual would be required to do (*Thurston* v. *King*, 1 Abb. 126; *Morrell* v. *Kimball*, 4 *id.* 352). A certificate signed "J. C. Butler, under-sheriff," was held to be no proof of service. The courts do not know an under-sheriff, and the return of a deputy-sheriff in his own name is a nullity; the return should be in the name of the sheriff (*Joyce* v. *Joyce*, 5 Cal. R. 449). A sheriff's certificate of the service of a summons, does not lose its force by lapse of time, or by being previously used for any other purpose; and although it may have been used in reference to a judgment which is afterwards vacated, it continues to be proof of the service, and may be used on a subsequent application for judgment (*Brien* v. *Casey*, 2 Abb. 416).

c. Where a sheriff serves the summons out of his own county, the proof of service must be by affidavit, his certificate of service is of no avail (*Farmer's Loan Co.* v. *Dickson*, 9 Abb. 61; 17 How. 477).

d. Where a summons was served in the city of New York, by the sheriff of Westchester county, and the only proof of service was the certificate of

the sheriff, and the judgment was objected to on that ground, held, that the defect might be rectified by the filing *nunc pro tunc*, an affidavit of the service of the summons. (*Id.*)

a. **Disputing the service.**—Although it has been said that, the law making it the duty of the sheriff to serve the summons, "whatever he does and certifies in his official duty is evidence, and as between parties to the process, or privies, conclusive evidence, and not liable to collateral impeachment" (*Wheeler* v. *N. Y. & Harlem R. R. Company*, 24 Barb. 417). Yet it seems to be now well settled that the return of a sheriff, or an affidavit of a person acting in his place, or the affidavit of any other person, of the service of a summons, is not conclusive upon the defendant; he may disprove such alleged service, on motion to set the proceedings aside (*Van Rensselaer* v. *Chadwick*, 7 How. 297; *Litchfield* v. *Burwell*, 5 *id.* 341; *Wallis* v. *Lott*, 15 *id.* 567, and see *Bulkley* v. *Bulkley*, 6 Abb. 307). Where, on a motion to set aside a judgment taken for want of an answer on the ground of a defect in the service of the summons, it appears that the defendant had improperly endeavored to avoid service of the summons, the judgment will not be set aside unless on satisfactory evidence that the summons had not come to the defendant's knowledge (*Southwell* v. *Marryatt.*, 1 Abb. 218). Nor will the court set aside a judgment for non-service of the summons, when it appears that although the defendant knew service had been erroneously made on his foreman for him, and that the plaintiff was proceeding on such service as a regular service, yet did not make his motion to set aside until supplementary procedings were resorted to (*Hilton* v. *Thurston*, ib. 318). The objection that a summons was not properly served is not available in an answer or demurrer; the remedy is by motion to set aside the service and proceedings thereon as irregular (*Norris* v. *Hope Mut. Ins. Comp.*, 8 Barb. 541). Proof of service on conflicting affidavits (see *Hunter* v. *Lester*, 10 Abb. 266).

b. **Publication, how proved.**—In case of publication the affidavit is to be made by the *printer*, his foreman, or principal clerk; but it seems if the affidavit is made by the *publisher* of the paper it is sufficient. Similar language in the statute regulating foreclosures by advertisement, was so construed by Hand, J. (*Bunce* v. *Reed*, 16 Barb. 350).

c. **Defendant's admission.**—Where the proof of service is an admission by the defendant, the admission must be verified and identified, so as to satisfy the court that the admission is indeed signed by the defendant or with his assent; there is no legal fiction by which the court is presumed to know the signature of a party defendant who has not appeared in the cause (2 Hill, 369; *Litchfield* v. *Burwell*, 5 How. 342; 1 Code Rep. N. S. 42; *Re Gibson*, 5 English's [Ark.] R. 572; *Welch* v. *Walker*, 4 Porter, 120; *Norwood* v. *Riddle*, 9 *id.* 426).

d. **Fees for serving summons.**—For serving a summons the sheriff is entitled to fifty cents for each defendant served. He is also entitled to six cents a mile for going only, to be computed from the court-house. But this fee only applies to the process itself, and not to the number of defendants named, or who may be served. But *one* travel-fee can be charged on the same process. For the certificate required by section 138, no compensation is provided by that name * * * but it may be regarded as a substitute for a return, and the officer entitled to the fee allowed for such service (12½ cents) (*Benedict* v. *Warriner*, 14 How. 570).

e. No fee for serving the summons and complaint is taxable, unless the service be made by the sheriff; and then it is taxable as a sheriff's fee (*Whipple* v. *Williams*, 4 How. 30). But where the service is by any person other than the sheriff, then nothing more can be allowed than a reasonable compensation for the labor in making the service, there can be no allowance for *constructive* traveling, and the affidavit should show the reasonableness of the charge. Thus, where $65 were charged for the service of the summons on forty-two defendants, by a person not the sheriff, the charge being in amount equal to what would have been the legal fees of the sheriff for such services—the affidavit in respect to this item, stated the expenses for service on said defendants were necessarily incurred, according to the registry kept by deponent, and ac-

cording to his best knowledge and belief,—the charge was disallowed (*Cass* v. *Price*, 17 How. 348).

See note to section 134, and Rule 18.

§ 139. (Am'd 1851.) *Jurisdiction. Appearance.*

From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

a. **Action, when commenced.**—Where the service of the summons is by publication, the action is not commenced until the expiration of the time prescribed for publication (*Moore* v. *Thayer*, 10 Barb. 258; 6 How. 47; 3 Code R. 176). (See note to section 137.) But where an attachment has been issued against a defendant, and an order made to serve the summons by publication, and before the service was complete the defendant died, the court held, that although the action was not commenced within section 137, or 99, yet the plaintiff had, by virtue of the attachment and this section, acquired a provisional lien on the defendant's property (*Ib.*; and *Buckhardt* v. *Sanford*, 7 How. 329; *Re Griswold*, 13 Barb. 412).

b. Where each of two partners commenced a suit, the one against the other, to close up the partnership, and enjoin interference with the effects, the one, in the superior court, procured a temporary injunction on 14th Sept., which, with the summons, was served on 15th Sept., about 3 o'clock, P. M., and the other, in the supreme court, obtained, on an *ex parte* application, [the report does not state when] an injunction, and an order for a receiver; and the receiver took possession of the property on the 15th Sept., [at what hour not stated,] and afterwards, about 8 o'clock, [P. M., supposed, the report does not state] the summons and injunction were served, it was held that the action in the superior court was first commenced, and that that court had jurisdiction of the whole matter between the parties (*McCarthy* v. *Peake*, 18 How. 138).

c. **Effect of appearance.**—A voluntary and *general* appearance, besides being equivalent to a personal service of the summons, is a waiver of all defects in the summons or previous proceedings (See *Webb* v. *Mott*, 6 How. 440; *Dix* v. *Palmer*, 5 *ib.* 233; 3 Code Rep. 214; *Dole* v. *Manley*, 11 How. 138; and notes to sections 128 and 129; *Hyde* v. *Putterson*, 1 Abb. 248; *Bierce* v. *Smith*, 2 *id.* 411). It does not authorize a judgment for want of an answer without proof of due service (*Macomber* v. *The Mayor*, 17 Abb. 36). Where the defects in the summons or proceedings, prior to appearance, are not made apparent until after the notice of appearance is served, then the appearance is no waiver (*Voorhies* v. *Schofield*, 7 How. 51; *Shafer* v. *Humphrey*, 15 *id.* 564). In the superior court it has been held that one of several defendants jointly liable in a judgment cannot appear under protest to the jurisdiction, and object that it does not appear on the face of the proceedings, either that he resides or was personally served with process within the city of New York. Such an appearance is equal to a personal service (*Mahaney* v. *Penman*, 1 Abb. 34; 4 Duer, 603; see *Hewitt* v. *Howell*, 8 How. 347).

d. **Voluntary appearance, when allowed.**—It is never the case in any court that a party uninvited or unwelcome could intrude himself upon the court and the plaintiff, unless he had some right to protect which rendered such appearance necessary; and where one of several persons named as defendants in the summons, but on whom no copy had been served, gave a notice of appearance and demanded a copy of the complaint, and, no copy of complaint being

served, moved to dismiss the action, it was held he had no right to appear, or move for a dismissal of the action (*Tracy* v. *Reynolds*, 7 How. 327); but the superior court have held that a person named as defendant and against whom a judgment is prayed, but on whom no summons has been served, has a right to appear and answer (*Higgins* v. *Rockwell*, 2 Duer, 650). And per Bosworth, J., "I think the plaintiff is wrong in the position that a person named as defendant, and against whom personally a judgment is prayed, has no right to appear and answer until he has been served with a summons. The code (§ 139) declares the voluntary appearance of a defendant equivalent to personal service of the summons on him. This assumes that he has the right to appear. The practice was settled in chancery in accordance with the view here expressed (1 Barb. Ch. Pr. 81).

a. In an action on contract against two defendants as partners, if the complaint is served on one only, the other may appear *voluntarily* (*Wellington* v. *Classon*, 9 Abb. 175; 18 How. 10). Although it be to interpose a defense of infancy (*id.*): and so of executors.

b. Where a plaintiff, in a suit against partners, misnamed one of the partners *Moritz* Kranse instead of *Henry* Kranse, but served no summons on Henry Kranse, yet a person of that name voluntarily appeared and put in an answer denying that he was a partner of the other defendant named; the court, on the plaintiff's motion, allowed him, without costs, to discontinue as to *Moritz* Kranse, and amend the summons and proceeding by substituting the name of *Henry* for *Moritz* (*Waterbury Leather Manuf. Co.* v. *Kranse*, 9 Abb. 175, *note*). The order allowing such discontinuance and amendment, was not an appealable order. (*Id.*)

c. A defendant may appear at any time before judgment is actually entered (*Abbott* v. *Smith*, 8 How. 463; *Baxter* v. *Arnold*, 9 How. 447).

TITLE VI.

Of the pleadings in Civil Actions.

CHAPTER I. The complaint.
II. The demurrer.
III. The answer.
IV. The reply.
V. General rules of pleading.
VI. Mistakes and amendments.

CHAPTER I.

The Complaint.

SECTION 140. Forms of pleading.
141. Complaint.
142. Complaint, what to contain.

§ 140. [118.] (Am'd 1849, 1852.) *Forms of pleading.*

All the forms of pleading heretofore existing are abolished; and, hereafter, the forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this act.

a. **How far rules dehors the Code apply.**—All forms and rules of pleading are abolished, and the rules for testing the sufficiency of a pleading are those prescribed by the code (*Royce* v. *Brown*, 3 How. 390). But "the prior practice and forms of pleading are abolished only in a qualified manner, for existing statutory provisions relating to actions not inconsistent with the code, and which are in substance applicable to the new actions authorised by that system, are not affected by it (§ 471, *post*). There is no inconsistency or repugnancy in applying the provisions referred to from the revised statutes* under the code. There are the same reasons of convenience for it now which existed under the former system, and it does not conflict with any particular provision of the code. It, therefore, remains in force (*B'k of Genesee* v. *Patchin B'k*, 3 Kernan, 314; *The Park B'k* v. *Tilton*, 15 Abb. 384). So do the provisions of 2 R. S. 482, § 10, relative to the form of declaring for statute penalties (*The People* v. *Bennett*, 5 Abb. 384; overruling in effect *Morehouse* v. *Overseers of Crilly*, 8 How. 431). That pleadings in actions against corporations are unaffected by the code, see *B'k of Waterville* v. *Beltzer*, 13 How. 272; *Johnson* v. *Kemp*, 11 *id.* 186; *Union Mut. Ins. Co.* v. *Osgood*, 1 Duer, 707. And as to pleadings in ejectment and partition, see notes to §§ 448 and 455, *post*.

b. **Election of cause of action.**—The code has not changed the common-law rule that one may waive the tort and sue on the contract. Thus, where the complaint alleged that plaintiff delivered to defendants a quantity of hops, to be taken care of and returned to plaintiff on request, and that defend

* 2 R. S. 458, § 8.—In suits brought by a corporation, created by any statute of *this State*, it shall not be necessary to prove, on the trial, the existence of such corporation, unless the defendant shall have pleaded that the plaintiff is not a corporation.

ants, "without the leave or license of plaintiff, appropriated said hops to their own use, and thereby became indebted to the plaintiff," &c., it was held that the plaintiff might complain in this form (*Hinds* v. *Tweddle*, 7 How. 278; and see 3 *id.* 378; 12 *id.* 531; 4 Barb. 36; 16 Barb. 633). And where vendees have been guilty of a fraud upon a purchase of goods on credit, the vendor may without waiting until the period of credit has expired, reclaim the goods or he may waive the tort and recover the value (*Kayser* v. *Sichel*, 34 Barb. 84; and see *Roth* v. *Palmer*, 27 Barb. 652; and 10 Abb. 206; 37 Barb. 270); and so of goods tortiously taken, (*Henry* v. *Marvin*, 3 E. D. Smith, 71). Whether or not the tort is waived must be determined by the facts stated in the complaint (*Chambers* v. *Lewis*, 2 Hilton, 591; 10 Abb. 206, and see *Edick* v. *Crim*, 10 Barb. 445).

a. A mortgage creditor can, in the lifetime of the mortgagor, either sue upon the bond, or foreclose the mortgage; and he has the right, after the death of the mortgagor, at his option either to sue the heirs of the mortgagor upon the bond, or to foreclose the mortgage (*Roosevelt* v. *Carpenter*, 28 Barb. 428); so, too, an executor can maintain an action either in his own name or as executor, upon a note given to him as executor for a debt due the testator at the time of his decease (*Merritt* v. *Seaman*, 2 Selden, 168; and see *Eagle* v. *Fox*, 28 Barb. 473).

b. There is no authority for extending the right of election of actions so far as to try, under the form of an action for money had and received, a right or claim to real estate or to its possession, or to the rents and profits (*Carpenter* v. *Stillwell*, 3 Abb. 460; and see 15 East. 313; 2 C. & M. 495). Although the forms of action are all merged in one, yet *form of action* must not be confounded with *cause of action*. The same state of facts may, by being differently stated, constitute different causes of action; and a skilful adaptation of the facts, so as to constitute this or that cause of action, will sometimes determine the plaintiff's right to recover. Thus, in *Van Leuven* v. *Lyke*, (1 Coms. 515,) the facts were that the defendants were owners of a sow, which wrongfully went on the plaintiff's land and injured a cow, the property of the plaintiff. Here the plaintiff had his option, either to allege as his cause of action the trespass of the sow on his premises, or to allege as his cause of action the injury to his cow. In one case he had to allege and prove that the sow was unlawfully on his premises, and there injured his cow; in the other case he needed neither to allege or prove that the sow was a trespasser on his land, but he had to allege and prove that the sow was vicious, and that the defendant knew it. The plaintiff elected to state as a cause of action that the sow injured his cow, but omitted to allege or prove that the sow was a trespasser, or that she was vicious and the defendant knew it, and for this omission he failed in his action. Another instance is the case of *Campbell* v. *Stakes*, (2 Wend. 137,) defendant, an infant, hired a horse of plaintiff, and so misused it that it died. Here plaintiff had his option, either to sue for the breach of defendant's implied agreement to use the horse with due care, or to take no notice of the hiring, and allege that defendant wrongfully injured the horse. Had he selected the first alternative, defendant's infancy would have been a complete answer; but, by selecting the other alternative, the infancy was no answer, (see *Fish* v. *Ferris*, 5 Duer, 49).

c. It is said that a plaintiff cannot by varying his remedy [form of action] change the legal rights of the defendant. * * * * Where the substantial ground of action rests on promises, the plaintiff cannot, by changing the form of action, make one liable who would not have been liable on the promise (*Campbell* v. *Perkins*, 4 Selden, 440, 441). And again, "It is a well-settled rule that a matter arising *ex contractu*, though infected with fraud, cannot be changed into a *tort* in order to charge the infant [the defendant] by a change in the remedy" (*The People* v. *Kendall*, 25 Wend. 399; and see *Munger* v. *Huss*, 28 Barb. 79). The vendor, on repudiating a contract of sale, for fraud of the purchaser, may sue either in contract or in tort (*Roth* v. *Palmer*, 27 Barb. 652); and in his complaint, instead of setting out all the facts, he may claim for goods sold and delivered, leaving the facts of the transaction to be introduced at the trial (*id.*); and where the defendant had sold goods as plaintiff's agent,

had mis-applied the proceeds and refused to account, held that plaintiffs might elect either to sue on the contract for refusing to account, or for the breach of duty, and conversion of the money and goods (*Ridder* v. *Whitlock*, 12 How. 208; and see *Chambers* v. *Lewis*, 10 Abb. 206). But under the code there can be no embarrassment as to the form of action, and whether the action be brought upon the agreement express or implied, or in *tort* for the violation of the duty arising from the relation of the parties, is immaterial (*Trull* v. *Granger*, 4 Selden, 119; and see *Scott* v. *Pilkington*, 15 Abb. 280). This dictum must be received with caution. In *Walter* v. *Bennett*, (16 N. Y. 250), plaintiff complained as for a *tort*; on the trial he proved a cause of action on *contract*. It was held a case of failure of proof, and he was nonsuited. And the court said, The *form* of the plaintiff's action is *ex delicto*; and before he can recover, he must show that defendant committed a wrong. The same rule applies to a counter claim (*Mayor of N. York* v. *Parker Vein Steamship Co.*, 12 Abb. 300; 21 How. 289; *Piser* v. *Stearns*, 1 Hilton, 89). And it has been held that where plaintiffs had commenced their action as on contract, purposely in order not only to obtain an attachment against the defendant as a non-resident, but also to procure an order for publication against him, and after having by those means procured the defendant's appearance, they should not be allowed to amend the summons and complaint, to make the action in tort for converting plaintiff's goods (*Lane* v. *Beam*, 19 Barb. 51). There is still a distinction between tort and assumpsit, and on a complaint for converting a promissory note, the plaintiff cannot recover for money received to his use (*Andrews* v. *Bond*, 16 Barb. 633; and see note to § 171; and see *Munger* v. *Huss*, 28 Barb. 79). In *Hess* v. *Buffalo & Niagara Falls R. R. Co.* (29 Barb. 391) the complaint stated facts capable of being used as the basis of either one of two causes of action, and the court said that the defendant might require that the plaintiff be put to his election for which cause of action he would prosecute (see, however, *Scott* v. *Pilkington*, 15 Abb. 280).

a Where money has been collected on a judgment which is subsequently reversed the party aggrieved may resort either to his remedy by an order of restitution, a *scire facias*, or an action (*Lott* v. *Sweezey*, 29 Barb. 87).

b. And where the complaint claimed specific relief purely equitable, and made no demand for debt or damages, and the proof showed the relation of debtor and creditor between the parties, and that the real cause of action was a money demand only, the court refused to allow the plaintiff an order to have the issues tried by a jury, and dismissed the complaint (*Craig* v. *Hyde*, 24 How. 313).

c. Generally whenever a man may have an action on a sealed instrument, he is bound to resort to it (*Young* v. *Preston*, 4 Cranch, 239; *Marine Ins. Co. of Alexandria* v. *Young*, 1 *id.* 322). And at common law there was only one case in which, where there was a contract under seal, the plaintiff could declare generally, and on the trial give his deed in evidence in support of his claim. That case was where there was a sealed lease, under which the lessee had taken and held possession. There the lessor might elect either to sue in covenant on this lease (*i. e.*, make the covenant the cause of action), or else to sue in debt for the rent (*i. e.*, make the use and occupation the cause of action. See the reason for this, (Gould's Pl., ch. 6, part 1, §§ 11, 13); and now a plaintiff, the lessor in a lease under seal, may, without referring to the lease in his complaint, state a cause of action for use and occupation, and, on a denial, may upon the trial give the lease in evidence in support of his right of action, and to show the relation of landlord and tenant, and the value of the use and occupation (*Ten Eyck* v *Houghtaling*, 12 How. 523). It was, however, a well-settled rule, that where there was a special agreement and the plaintiff had performed on his part, the law raised a duty on the part of the defendant to pay the price agreed upon; and the plaintiff might count either on this implied assumpsit, or on the express agreement (Lawes Pl. 5; *Jewell* v. *Schroepell*, 4 Cow. 564; *Feeter* v. *Heath*, 11 Wend. 484; *Mead* v. *Degolyer*, 16 *id.* 637; *Clark* v. *Fairchild*, 22 *id.* 576). This rule is not changed by the code, and the plaintiff may still, in such circumstances, rely on the implied assumpsit (*Farren* v.

Sherwood, 17 N. Y. 227; *Hosley* v. *Black*, 26 How. 97). But to sustain a general count in assumpsit on a special agreement, the special agreement must have been so performed as to leave a mere simple debt or duty between the parties (*Evans* v. *Harris*, 19 Barb. 416; see *Atkinson* v. *Collins*, 30 Barb. 430; 9 Abb. 353). Another instance where the plaintiff has an election of remedy is, where the cause of action originally accrued at a time beyond the term of limitation prescribed by law for bringing such an action, and the plaintiff intends to insist on his right to maintain the action by reason of a "new or continuing acknowledgement or promise." There he may sue on the new promise, or "found his complaint on the original cause of action;" and if, in that case, an answer of the statute of limitations be interposed, the plaintiff in avoidance of it may rely on the new or continuing promise (*Esselstyn* v. *Weeks*, 2 Ker. 635). The reason for this is that the statute of limitations only bars the remedy, and *does not extinguish* the cause of action. But where a cause of action *has been extinguished* by release or otherwise, and there is a subsequent *valid* promise to satisfy such cause of action, such promise is not a revival of the original cause of action, but creates an entirely new cause of action; and such subsequent promise, and not the original cause of action, must be set out in the complaint as the cause of action (*Stearns* v. *Tappin*, 5 Duer, 299; see *Irving* v. *Veicht*, 3 M. & W. 90). Where the original cause of action is modified, it must be sued on as modified (*Holmes* v. *Holmes*, 5 Selden, 528).

a. A party injured by means of an injunction should proceed on the undertaking given on the issuance of the injunction, and not otherwise (*Hall* v. *Fisher*, 20 Barb. 442). And one at whose instance a receiver has been appointed, cannot be allowed to prosecute a claim for which such receiver has already recovered judgment (*Tinkham* v. *Borst*, 24 How. 246).

b. **Splitting cause of action.**—There is no case or dictum which requires a party to join in one action several distict causes of action. The plaintiff may elect to sue upon them separately (*Phillips* v. *Beruk*, 16 Johns. 136; *Secor* v. *Sturgis*, 16 N. Y. 554); and it is no objection that they belong to the same family of causes, provided their identity is not the same (*Staples* v. *Goodrich*, 21 Barb. 317). An *entire and indivisible* demand cannot be split so as to form the basis of two actions (1 Salkeld, 658), and a writ of prohibition might issue to prevent several suits on one demand; see Jacob's Law Dict., courts; and if a party bring an action for part only of an entire and indivisible demand, the judgment in that action is a conclusive bar to a subsequent suit for the other part. There is sometimes a difficulty in discriminating between *entire* and several demands (21 Barb. 317). The distinction between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts (*Secor* v. *Sturgis*, 16 N. Y. 548). Where A, in September, 1853, sold B goods on credit of six months to the amount of $312, and in November, 1853, sold him other goods to the amount of $299 (not on credit); in March, 1854, A commenced separate actions against B to recover these several amounts, and in October, 1854, recovered judgment in the action for the goods first sold, for the amount claimed with interest and costs. Then B set up the recovery of that judgment as a bar to A's right to recover in the action for the goods secondly sold. The court held that not a defence; that the demands were separate and distinct, not in the nature of a current account, but each an entire contract of itself and plainly divisible. The evidence that would prove one would not establish the other. The second transaction was not a part of and did not grow out of the first (and see *Cashman* v. *Bean*, 2 Hilton, 341). The distinction was pointed out in *Phillips* v. *Beruk* (16 Johns. 136), and *Stevens* v. *Lockwood* (13 Wend. 644). The question in *Phillips* v. *Beruk*, was whether a recovery by the plaintiff for work and labor done in March, 1817, was a bar to another claim for work and labor done before that time, each claim being for an entirely disconnected and distinct piece of service (*Staples* v. *Goodrich*, *supra*). In the case of moneys lost in gam ng on several occasions, a separate action may be brought for the amount lost at each sitting (*Betts* v. *Hillman*, 15 Abb. 184).

a. An attorney suing for services, must include his entire demand in one action (*Beekman* v. *Plutner*, 15 Barb. 550).

b. In *Secor* v. *Sturgis* (16 N. Y. 548, affirming S. C., 2 Abb. 69), it appeared that the business of ship-carpenters was carried on in one part of a building, under the direction of two of the partners in a firm, and the business of ship-chandlers in another part of the same building, under the direction of the third partner. Separate books of account were kept by different clerks in the two branches of business, and the partners confined themselves respectively to the management of one of the branches, without personally taking part in the other. Work was done, and materials furnished from the carpentry branch, in repairing and equipping a brig, upon the order of the captain, to the amount of $139, and immediately thereafter, goods and articles of ship-chandlery were furnished to the same brig and on the order of the same captain, at different times through a period of a month, amounting to $521,—held that the two amounts did not constitute an entire claim, but. on the contrary, formed two several causes of action. And it was further held that assuming the accounts formed a single demand, they were severed by the giving of a bond to secure the $521 due for chandlery, for the purpose of discharging an attachment against the brig, the account for carpenter's work remaining a lien on the vessel; so that an action could be obtained on such bond, notwithstanding judgment had been obtained and satisfied by proceedings in admiralty to enforce the lien for the carpenter's work.

c. In *Farrington* v. *Payne* (15 Johns. 432), a bed and bed-quilts were taken at the same time and by the same act, and a recovery in trover for the quilts was held to be a bar to a recovery in trover for the bed. In *Smith* v. *Jones* (15 Johns. 229), actions were brought for goods sold and delivered, the plaintiff in one claiming to recover for one barrel of potatoes, and in the other for two barrels of potatoes, all sold at the same time. The court held that the demand was entire and could not be divided. *Miller* v. *Covert* (1 Wend. 487), was the case of a sale of hay under a contract, delivered in parcels. The demand was held to be entire and indivisible.

d. In *Guernsey* v. *Carver* (8 Wend. 492), the plaintiff declared on a book account, consisting of items of merchandise delivered between the 20th of July and the 27th of August, 1828, amounting to $2 35. The defendant pleaded a former suit for the same identical cause of action. It was proved in the Common Pleas that the plaintiff had an account against the defendant, consisting of twenty different articles of merchandise, delivered on fourteen different days between the 4th of June and the 27th of August, 1828, amounting to between $5 and $6; that he commenced a suit against the defendant, and exhibited an account of items delivered between the first of June and 19th of July, 1828, amounting to $2 74; that the defendant pleaded a tender and had judgment for his costs. The plaintiff then sued for the balance such account, viz.: for items delivered between the 20th of July and the 27th of August. The Common Pleas decided that on a running account, where no special contract was made at the commencement of the account, and where items have been delivered on such account at different times without any intermediate agreement, each separate delivery formed a separate and distinct cause of action. The plaintiff recovered judgment. That judgment was reversed on appeal, in the supreme court. That court holding, "The only just and safe rule is to compel the plaintiff, on an account like the present, to include the whole of it in a single suit." As to this it was said in the court of appeals in *Secor* v. *Sturgis* (supra), that it would make every account consisting of different items, the whole of which is due, an entire demand incapable of division, and excludes the idea that it is necessary the claims should have arisen out of a single transaction, or be connected together by contract. This, in my opinion (T. R. Strong, J.), is carrying the doctrine in question far beyond its just limits. In England the courts have held, as the supreme court held in *Guernsey* v. *Carver* (supra), that a tradesman's bill, for a series of articles delivered continuously, cannot be split (*Bonsay* v. *Wordsworth*,

36 Eng. L. and Eq. R. 283; 18 C. B. 325; *Wood* v. *Perry*, 3 Exch. R. 442). In *Stevens* v. *Lockwood*, (13 Wend. 644), the plaintiff had sued on an account for property sold, work done, and for rent due, and on the trial had withdrawn some items; in the subsequent action for such items,—held the recovery in the first action was a bar. The reasoning in this case was also dissented from by T. R. Strong, J., in *Secor* v. *Sturgis* (supra). In *Colvin* v. *Corwin* (15 Wend. 557), two suits were brought for lottery tickets sold the defendant. On the trial of the first action, the plaintiff had judgment. That judgment was set up as a bar to the second action. On the trial it appeared that the tickets, to recover for which the suits were brought, were delivered to the defendant by two different agents of the plaintiff, at different offices, at different times, yet the supreme court held it an entire contract, and that the previous judgment was a bar. Judge Strong, in *Secor* v. *Sturgis* (supra), says of that case (*Colvin* v. *Corwin*), "It is manifest it rests upon no sound principle, and is not law." A plainer case of distinct, independent causes of action could hardly be presented. Judgment in an action for a breach of one covenant in a lease, or other instrument, is a bar to an action for a breach of another covenant in the same lease, committed before the first suit was commenced (*Bendernagle* v. *Cocks*, 19 Wend. 207; and see *Fish* v. *Folley*, 6 Hill, 54; *Crain* v. *Beach*, 2 Barb. 120; *Stuyvesant* v. *Mayor of N. Y.*, 11 Paige, 414; *Coggins* v. *Bulwinkle*, 1 E. D. Smith, 434). A promissory note cannot be the foundation of two suits, each for a part of the note (*Miller* v. *Covert*, 1 Wend. 487). A letter written by the defendant to G., stating that if W. will let a certain house to G., he, defendant, would become security for the rent, and directing G. to show the letter to W., and to send the papers to him, defendant, for execution,—held to be a contract to execute a security, and not to pay rent—that the contract was an entire one, and one recovery upon it was a bar to any subsequent action (*Waterbury* v. *Graham*, 4 Sand. 220).

a. A joint cause of action vested in two or more, cannot be split up into several at the option of those in whom it is vested (*Coster* v. *N. Y. and Erie R. R. Comp.*, 6 Duer, 46; sec actions by tenants in common in note to § 117). The assignee of part of a claim, should unite with the owners of the other part in an action for its recovery (*Bowdoin* v. *Coleman*, 3 Abb. 431).

b. Of course a demand may be split with the consent or assent of the defendant (*Cornell* v. *Cook*, 7 Cow. 310; and see *Secor* v. *Sturgis*, 16 N. Y. 559); and he probably consents by not objecting when sued by the owner of one part, see 29 Barb. 120.

c. Where a plaintiff sued in one action for a year's rent, and in another action for double value for holding over a quarter after notice to quit,—held that the causes of action were distinct, and it was not a splitting of one demand (*Wickham* v. *Lee*, 11 London Law Times, 240).

d. As to splitting a demand by assignment, see *ante*, p. 111 *d.*

e. Where a party brings an action for a part only of an entire demand, and obtains judgment, he cannot subsequently avail himself of the residue of his demand by way of set-off in an action against him by the opposite party (*Miller* v. *Covert*, 1 Wend. 487). But although a party who has a claim to damages for breach of a warranty, may insist upon such claim in diminution of damages when sued for the price of the article warranted, he is not bound to do so; and his omission to insist upon such defence is no bar to an action subsequently brought by him for the recovery of damages (*Cook* v. *Mosely*, 13 Wend. 277)

§ 141. [119.] *Complaint.*

The first pleading on the part of the plaintiff, is the complaint.

§ 142. [120.] (Am'd 1851.) *Complaint, what to contain.* The complaint shall contain :—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition.

3. A demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

Note to subd. 1.

a. **As to the name of the court.**—If no court is named either in the complaint or in the summons, no action can be said to be commenced in any court, and *semble*, the summons and complaint are nullities (*Ward* v. *Stringham*, 1 Code Rep. 118); and under such circumstances the supreme court will entertain a motion to set aside such a summons and complaint; but where the name of the court is inserted in the summons, but not in the complaint, the court will disregard the omission, and hold the complaint sufficient (*Van Namee* v. *Peoble*, 9 How. 198; *Merrill* v. *Grinnell*, 10 *id.* 32; *Van Benthuysen* v. *Stevens*, 14 *id.* 70).

b. **As to the name of the county in which the plaintiff desires the trial to be had.**—It is essential for many purposes of the action, that the place of trial should be clearly stated in the complaint. That determines where motions are to be made, as well as where the trial is to be had. Both parties must be at a loss where to proceed until that is distinctly settled (*Merrill* v. *Grinnell*, 10 How. 32; *Hotchkiss* v. *Crocker*, 15 *id.* 336). The statement of the name of the county in the summons does not necessarily show that it is put there to indicate where the place of trial is to be. It may be put there to show where the attorney issuing the summons resides (*id.*); and the plaintiff can indicate any county as the place of trial, notwithstanding the name of a county may be mentioned in the summons. (*Id.*) Where the complaint wholly omits to mention the name of the county in which the plaintiff desires the trial to be had, it is irregular (*id.*); and the irregularity is not cured by reference to the summons. (*Id.*) Where in an action commenced by service of a summons, without any copy of the complaint, the summons was entitled "Supreme Court, New York," and stated that the complaint would "be filed in the office of the clerk of the city and county of New York," the defendant demanded a copy of the complaint, one was served, entitled "New York, Supreme Court," indorsed "Supreme Court, city and county of New York," but did not otherwise indicate the name of any county in which the plaintiff desired the trial should be had,—held that the complaint was irregular for not stating any place of trial (*Davison* v. *Powell*, 18 How. 288).

c. It has been said, however, that where the action is in a court of local jurisdiction, as in the New York common pleas, where the trial can only be had in one county (namely New York), the complaint would be sufficient without stating the name of the county in which the plaintiff desires the trial to be. His bringing his action in such court sufficiently indicates his desire to have the trial in the county in which the court has jurisdiction (*Leopold* v. *Poppenheimer*, 1 Code Rep. 39).

d. A defect in the complaint in this respect is not waived by the defendant omitting to raise the objection until after his original time to answer has expired, and by his obtaining orders extending the time to answer (*Merrill* v. *Grinnell*, 10 How. 32). The proper course for the defendant, to take advan-

tage of the omission, is by motion to set aside the complaint for irregularity (*Id.*; *Hall* v. *Huntley*, 1 Code Rep. N. S. 21, *n*). It is not a defect for which the defendant can demur (*Dorman* v. *Kellam*, 14 How. 184; 4 Abb. 202).

a. The motion to set aside for such an irregularity may be made in a judicial district where the action is in fact triable (*Hotchkiss* v. *Crocker*, 15 How. 336); thus, where the plaintiff resided in Cayuga county, and the defendants in Broome county (the nature of the action is not stated in the report), the complaint not stating any county for trial, the defendant moved at a special term in Tioga county to set aside the complaint,—it was held that the action was triable either in the county of Cayuga or Broome; and as the plaintiff had not indicated in which he desired it to be, the motion might properly be made either in the district of the plaintiff's or of the defendant's residence. (*Id.*)

b. The defect that the complaint does not name the county of trial may be amended (*Hotchkiss* v. *Crocker*, 15 How. 336; *Davison* v. *Powell*, 13 *id.* 288).

c. **Names of the parties.**—Properly, the names of all the parties, plaintiff and defendant, should be set forth in the title. If, however, only some of the parties are named in the title, but are all correctly named in the body of the complaint, it will be sufficient (*Hill* v. *Thacter*, 2 Code Rep. 3; 3 How. 407); and after the names of the parties are once stated, it is sufficient afterwards to designate them as "the plaintiff" and "the defendant" (*Davison* v. *Savage*, 6 Taunt. 121; *Stephenson* v. *Hunter*, *id.* 406; see *Stanley* v. *Chappell*, 8 Cow. 235). Except in the cases provided for by § 175 (cases of plaintiff's ignorance of the true name), the name of the defendant should be correctly stated; if it be not, it seems the remedy is by motion (see *Miller* v. *Stettiner*, 22 How. 518; and see 20 N. Y. 362, and 10 How. 275; *Elliott* v. *Hart*, 7 How. 25; *Dole* v. *Manley*, 11 *id.* 158). A mistake in the name of a plaintiff is not a ground for nonsuit; it may be amended before or at the trial, or afterwards (*Barnes* v. *Perine*, 9 Barb. 202; see *B'k of Havana* v. *Magee*, 20 N. Y. 356). Where the true name of the defendant was *Dean S. Manley*, and he was described in the summons and complaint, served together, as *Dennis S. Manley*, it was held that the proceedings were irregular; but as the notice of motion was subscribed "William H. Andrews, attorney for defendant," it was a *general* appearance in the action, and therefore a waiver of the irregularity (*Dole* v. *Manley*, *supra*; and *Baxter* v. *Arnold*, 9 How. 445). In *Walker* v. *Parkins* (9 Jur. 665; 14 Law Jour. Rep. 214 Q. B.; 1 New Prac. Cas. 199; 2 D. & L. 982) the plaintiff was described in the writ as "Walker & Co." A motion to set aside the writ for not setting out the names of the plaintiffs was denied, and held that "*non constat*," but Walker & Co. meant the plaintiff alone, and no more than one person.

d. It is presumed that in stating the names of the parties it is not necessary to add any description, as to say, A. B., executor, &c.; and if such description is inserted, it is mere surplusage, and does not present a fact which can be traversed (*Sheldon* v. *Hoy*, 11 How. 15; *Merritt* v. *Seamen*, 2 Selden, 168); but saying A. B., *as* executor, &c., is very different from merely stating A. B., executor, &c. To say *as* executor, &c., is alleging *the character* in which the plaintiff sues, as to which see *infra*.

e. **The character in which the plaintiff sues should be stated.**—A plaintiff may sue either as an individual for his individual benefit, and as the real party in interest, and in that capacity as the original party, to whom the cause of action accrued, or as the assignee of the party to whom the action accrued. Or the plaintiff may be suing in a representative character, as administrator, committee, executor, guardian, public officer, receiver, or trustee. Where nothing appears to the contrary, it is presumed that the plaintiff has legal capacity to sue, is the real party in interest, suing as an individual for his individual benefit, and therefore in such a case, nothing need be said in the complaint as to the character in which the plaintiff is suing; and it being shown, by the facts stated, that a cause of action accrued to the plaintiff, it is presumed that the cause of action continues in him, and he need not make any allegation as to that. A plaintiff who describes himself as "A. B., president," &c., or "A. B., administrator of," &c., or "A. B., assignee of," &c.,

without further indicating the character in which he sues, will be taken to be suing as an individual (*Sheldon* v. *Hoy*, 11 How. 12; *Root* v. *Price*, 22 *id.* 372. *Butterfield* v. *Macomber*, *id.* 150; *Merritt* v. *Seaman*, 2 Selden, 168; *Forrest* v. *Mayor of N. Y.*, 13 Abb. 350; *Scrantom* v. *Farmers' B'k. of Rochester*, 33 Barb. 527; *Hallett* v. *Harrower*, *id.* 537). The addition of the word "survivor" to the name of a defendant sued upon a joint and several obligation is mere surplusage, the promise being laid as an individual one, the action is to be deemed one on the several contract (*Bogert* v. *Vermilya*, 10 N. Y. 447). As to the effect of the word "*surety*" or "*security*" added to the name of an indorser of a note (*Bradford* v. *Corey*, 5 Barb. 461). The addition of "junior" to a name is mere description, and is no part of the name. Neither is the middle letter between the Christian and surname any part of the name; the law knows only one Christian name (*The People* v. *Cook*, 14 Barb. 261). Where the complaint alleged that "the plaintiff is sheriff of the city and county of New York" it was held a sufficient allegation of his official character (*Kelly* v. *Breusing*, 32 Barb. 601, affirmed 33 Barb. 123). If the plaintiff has not capacity to sue, as being an infant, or if he has divested himself of the right of action which had accrued to him, it is matter of defence coming from the defendant. But if it appears that the cause of action accrued to some other body than the plaintiff, then the defendant has a right to be informed by the complaint how the plaintiff became the owner of the demand, whether by purchase, assignment, operation of law, or how otherwise; and the facts should be stated by which the plaintiff became such owner (*Russel* v. *Clapp*, 7 Barb. 482; *Bentley* v. *Jones*, 4 How. 202; *M'Murray* v. *Thomas*, 5 *id.* 14; *Parker* v. *Totten*, 10 *id.* 233; *Thomas* v. *Desmond*, 12 *id.* 321; *Freeman* v. *Fulton Fire Ins. Co.*, 14 Abb. 407). In other words, the plaintiff must show *title* (see *infra*). The capacity of the plaintiff to sue is independent of the cause of action (*B'k. of Lowville* v. *Edwards*, 11 How. 216; *Johnson* v. *Kemp*, 11 *id.* 186; *B'k. of Havana* v. *Wickham*, 16 *id.* 97). Where the plaintiff, a trustee for the benefit of creditors, sued on a note for the benefit of the estate, but without alluding in the complaint to his representative character, he, having failed in the action, was held to be personally liable for the costs (*Murray* v. *Hendrickson*, 6 Abb. 96; 1 Bosw. 635).

a. Where the plaintiff is an assignee, the complaint should allege the fact of the assignment. In so doing, he need not state that there was any consideration for the assignment, nor whether it was in writing or by parol (*Vogel* v. *Badcock*, 1 Abb. 177; *Horner* v. *Wood*, 15 Barb. 372; *Martin* v. *Kanouse*, 2 Abb. 331; and see *Gregory* v. *Freeman*, 2 Zab. R. 405; *Artcher* v. *Zeh*, 5 Hill, 200; see *ante*, pp. 112 *q*; 113 *d*). And if the assignment be by a corporation, and the transfer is *prima facie* lawful, the complaint need not aver that the directors were authorized to make the assignment (*Nelson* v. *Eaton*, 16 Abb. 113); where the complaint showed on its face that another person than the plaintiff was the owner of the subject of the action, it was held insufficient (*Palmer* v. *Smedley*, 6 Abb. 205). An allegation "that Cobb duly assigned and transferred all his interest in the contract to the plaintiff Grant, and the plaintiff Ludlam became interested by a sale and assignment to him of a part of Grant's interest" was held sufficient (*Horner* v. *Wood*, *supra*; *Fowler* v. *N. Y. Indem. Ins. Co.*, 23 Barb. 151; *Morange* v. *Mudge*, 6 Abb. 243); and an allegation that A. assigned, sold, and transferred, and set over to the plaintiff the said judgment, will be construed to mean that the judgment, or whatever may have been the subject-matter, was assigned absolutely. If the assignment was subject to any material condition affecting the plaintiff's right to recover, it is matter to come from the defendant by way of defence (*Martin* v. *Kanouse*, 2 Abb. 331); and where the complaint showed that the alleged cause of action accrued to a third party, and the only manner in which the plaintiff showed title in himself was an allegation that "the plaintiff is now the sole owner of the said demand" on demurrer (the report does not say on what ground)—it was held that the allegation was of a conclusion of law and not of a fact, and showed no title in the plaintiff (*Thomas* v. *Desmond*, 12 How. 321). An allegation that plaintiff became the owner of the cause of action by purchase was held sufficient allegation of title as assignee of the party to whom the cause of action accrued (*Prindle* v. *Caruthers*, 15 N. Y. 427).

a. **Executor or administrator.**—In an action by an executor or administrator, as such, the complaint should, by some appropriate averment, show that the action is by the party in his representative character, and not as an individual. It is not necessary that he should make profert of the letters testamentary or of administration; it is sufficient if he aver that he sustains the character either of executor or administrator, as the case may be; and if the averment is denied, he produces on the trial the letter granted to him as evidence of his title (*Bright* v. *Currie*, 5 Sand. 433; *Wells* v. *Webster*, 9 How. 251). Where the complaint alleged that "plaintiff is the executor of the last will and testament of J. W., deceased, and that he had been duly and legally authorized to act as such executor," and further stated that the defendant was indedted to the plaintiff as such executor, and on demurrer that plaintiff had not capacity to sue, the complaint was held sufficient (Welles, J., *Wells* v. *Webster*, *supra.*) In an action commenced prior to the code taking effect, it was held that merely describing the plaintiff in the commencement of the declaration, as "C. H. M., executor of the last will and testament of J. S., deceased, plaintiff," that being the only allegation indicating that the action was brought by the plaintiff in any other than his individual character, and followed by a statement of a cause of action accruing to himself personally, did not make the action one by the plaintiff *as executor*, so as to admit a defence of set-off against the plaintiff's testator, or to warrant a judgment against the plaintiff as executor, to be levied of the testator's goods in his hands (*Merritt* v. *Seaman*, 2 Selden, 168; and see *Renard* v. *Conselyea*, 4 Abb. 280). The word *executor*, &c., following the name of the plaintiff, was regarded only as descriptive of the person (*id.*); and since the code it has has been held that a complaint commencing "A. B., administrator of the goods, &c., of C. D., deceased plaintiff, complains,&c.," or A. B., president, &c., was insufficient to show that the plaintiff sued in a representative capacity, and there being nothing further in the complaint to indicate in what capacity the plaintiff sued, the action was to be regarded as brought by the plaintiff in his own right (*Sheldon* v. *Hoy*, 11 How. 12; *Root* v. *Price*, 22 How. 373; *Butterfield* v. *Macomber*, *id.* 150; *Hallett* v. *Harrower*, 33 Barb. 537). The word *as* is essential and cannot be replaced by any other word (*Henshall* v. *Roberts*, 5 East, 154). The fact that the plaintiff is administrator, and had been regularly appointed by the surrogate of some county in the State, is a material and traversable fact, and should be stated in such form as to tender an issue to the adverse party, and the complaint should contain a particular statement of the time and place of granting, and the functionary by whom administration was granted (*Sheldon* v. *Hoy*, 11 How. 12). So where a plaintiff, suing as administrator, alleged that he had been "*duly* appointed" administrator. without any fact as to when, or how, or by whom he had been appointed, it was held insufficient (*Beach* v. *King*, 17 Wend. 197; *Gillett* v. *Fairchild*, 4 Denio, 80; *White* v. *Joy*, 3 Kernan, 80; *Chautauque Co. B'k.* v. *White*, 2 Selden, 236). And a complaint which alleged that the plaintiffs "have been duly appointed and qualified by the surrogate of the county of New York, to act as sole executors of D. F., deceased," was held insufficient (*Forrest* v. *The Mayor of N. Y.*, 13 Abb. 350). But where the complaint stated the cause of action was due the plaintiff *as executor*, it was held sufficient to show the plaintiff sued in his representative character (*Scranton* v. *Farmers B'k. of Rochester*, 33 Barb. 527). See Index, *Duly*.

b. The fact that the appointment is by a surrogate of this State is material to be stated; because the courts of this State cannot take notice of letters testamentary or of administration granted abroad, and they give no authority to sue here (*Morrell* v. *Dickey*, 1 Johns. Ch. R. 156; *Williams* v. *Storrs*, 6 *id.* 353; *Campbell* v. *Tousey*, 7 Cow. 68; *Vroom* v. *Van Horn*, 10 Paige, 550). For it is a general rule that executors and administrators can sue or be sued *as such* only in the State in which they are appointed (*Vermilyea* v. *Beatty*, 6 Barb. 429; *Smith* v. *Webb*, 1 *id.* 230; and see *Sers* v. *Coit*, 5 Abb. 482; *Warren* v. *Eddy*, 13 Abb. 23; *Gulick* v. *Gulick*, 21 How. 22; *Robins* v. *Wells*, 26 How. 15). And it seems a foreign executor may foreclose a mortgage in this State without taking out letters testamentary here (*Averell* v. *Taylor*, 5 How. 476). An action may be maintained against an executor as an executor *de son tort*, in

any State in which he may render himself liable to be so sued (*Campbell* v. *Tousey*, 7 Cow. 64; *McNamara* v. *Dwyer*, 7 Paige, 239; *Montalvan* v. *Clover*, 32 Barb. 190,. The *place*, *i. e.*, the State or county in which an executor or administrator was appointed, is a material and traversable averment, and should be truly stated (Steph. Pl. 288; *Rightmyer* v. *Raymond*, 12 Wend. 51; *Morgan* v. *Lyon*, *id.* 265); and the time of appointment should be stated. See *King* v. *Roxbrough*, 2 Cr. & J. 418.

a. A complaint against administrators for goods sold, describing the plaintiffs as administrators making a profert of the letters, and charging that the defendant's intestate, in his lifetime, was indebted *to the plaintiffs*, and concluding to the damage of plaintiffs as administrators, &c., but not stating that the promises were made in the lifetime of the plaintiff's intestate, nor to him, nor even to the plaintiffs *as administrators*, would be deemed a complaint by the plaintiffs in their individual and not in their representative character (*Worden* v. *Worthington*, 2 Barb. 368).

b. **Plaintiff suing by guardian.**—Where the plaintiff is an infant, suing by guardian, the complaint should contain an allegation of the appointment of the guardian by the court or a judge, and as this allegation is traversable it should be stated in a traversable form (*Hulbert* v. *Young*, 18 How. 414); and an allegation commencing the complaint "Nathaniel Hulbert, an infant plaintiff by Jesse Hulbert, his guardian, complains," &c., is not a sufficient statement (*id.*); and where the statement was in that form, a demurrer on the ground that it appeared on the face of the complaint that the plaintiff had not legal capacity to sue, was sustained at general term (*id.*; see, however, *Sere* v. *Coit*, 5 Abb. 481).

c. **Public officer.**—When an action is brought by public officers in their official character, and in the names of the individuals with the addition of their name of office, the complaint should by proper averment show that the claim is made by the officer and not by the individual (*Guthries* v. *Fisher*, 3 Stark. 151); and where in an action by commissioners of highways, to recover a penalty, the complaint was as follows,—Calvin H. Gould and John Sheldon, commissioners of highways of the town of Lisbon, against John Glass. The plaintiffs above-named complain of the above-named defendant, and say that on, &c., he wrongfully obstructed a certain highway at, &c., by, &c.,—answer a general denial and new matter,—on the trial the plaintiffs proved, they were the commissioners of highways, and the obstructions by the defendant. The defendant moved for a nonsuit on the ground that the plaintiffs had sued as individuals and not in their official capacity as commissioners, and as individuals had shown no right to recover. The motion was denied, and the plaintiffs had judgment. On appeal to the supreme court, held that the motion for a nonsuit should have been granted for the reasons alleged (*Gould* v. *Glass*, 19 Barb. 179). And by James, J., "The complaint in this action, tested by the principles laid down in *Merritt* v. *Seaman* (2 Selden, 168), *Ogdensburg Bank* v. *Van Rensselaer* (6 Hill, 240), *Delafield* v. *Kinny* (24 Wend. 345), and *Hunt* v. *Van Alstyne* (25 *id.* 605), and numerous other cases of like character, is an action in favor of plaintiffs as individuals, and not one 'in their name of office.' The affix to their names in the title is a mere *descriptio personæ*." Justice Cowen, in *Hunt* v. *Van Alstyne* (*supra*), said, "The declaration is one by the defendant Hunt in his own right, calling himself president of a certain company, is a mere *descriptio personæ*"). In the case of *Ogdensburg Bank* v. *Van Rensselaer* (*supra*), Justice Bronson said, "This is an action against Henry Van Rensselaer, and the words which follow his name, President of the St. Lawrence Bank, can only be regarded as *descriptio personæ*." The question has been decided in *Delafield* v. *Kinny*. It was also decided at the last term, on the argument of a cause where the declaration was framed in the same way against an executor; and it is so decided in all the precedents in the books. In the present action the title is the only part of the complaint which contains any intimation that the suit is brought by the plaintiffs in any other than their individual character. They nowhere aver that they are commissioners of the town of Lisbon, or complain as such. It is the *plaintiffs* that complain of the

defendant, it is the *plaintiffs* that demand judgment, it is Calvin H. Gould and John Sheldon, *plaintiffs*, that have obtained the judgment, and not the commissioners of highways, nor Gould and Sheldon as commissioners of highways. The word *plaintiffs* as used in the complaint and in the judgment can only be held to mean the individuals, and not the officers. The plaintiffs should have averred that they were commissioners, that *as* such they complained of the defendant; and the judgment should have been entered in their favor as commissioners."

a. Where the complaint was entitled S. S. S., Supervisor of the Town of North Hempstead against J. L., and commenced, "The complaint of the plaintiff above-named as supervisor as aforesaid, shows," the defendant demurred on the ground that the complaint did not show the plaintiff had legal capacity to sue, and it was contended that he did not allege that he was the supervisor of the town of North Hempstead. The demurrer was overruled; and in sustaining that decision the court of appeals said, It is a sufficient answer that he describes himself in the title of the complaint as supervisor of North Hempstead, and then commences it by saying, "The complaint of the plaintiff above-named as supervisor as aforesaid, shows," &c. This is a very plain statement of the capacity in which he sues, and would not mislead any person of common understanding (*Smith* v. *Levinus*, 4 Selden, 474). Where the complaint was entitled F. H. & J., Commissioners of Highways, and commenced, "The plaintiffs, commissioners of highways, complain"—held sufficient to show they sued as commissioners (*Fowler* v. *Westervelt*, 17 Abb. 59; 40 Barb. 374). A plea concluding the plaintiffs "so being and being duly nominated public officers as aforesaid," held a sufficient averment that they were such public officers (*Steward* v. *Greaves*, 2 Dowl. N. S. 405; 10 M. & W. 711; and see *Davidson* v. *Bower*, 5 Scott, N. R. 539).

b. **Officer of joint-stock Companies.**—In an action by an officer of a joint-stock company, under the act of 1849, the complaint must allege that the company is a joint-stock company or association, consisting of more than seven stockholders or associates (*Tiffany* v. *Williams*, 10 Abb. 204).

c. **Bank president.**—One suing as president of a Bank sufficiently indicates the character in which he sues by describing himself as A. B., President of, &c., naming the Bank, and then alleging that he prosecutes for the benefit of said Bank (*Root* v. *Price*, 22 How. 372).

b. **Trustee or agent.**—One suing as trustee or agent should make a positive and issuable averment of his trust or agency in his complaint (*Freeman* v. *Fulton Fire Ins. Co.*, 14 Abb. 407).

e. **Receiver.**—Where a receiver would make title in pleading to a *chose in action* or other property which had belonged to the party he represents, he must set out the facts showing his appointment. In such a case it will not answer merely to describe himself as receiver or even to aver that he was *duly appointed* (*Gillet* v. *Fairchild*, 4 Denio, 80). He must set out the proceeding so that the court may see that the appointment was legal. In such a case the appointment of a receiver is a part of the plaintiff's title. It is like the granting of administration or of letters testamentary in a suit by executors or administrators; unless the fact is stated the plaintiff does not show any right to sue (*White* v. *Joy*, 3 Kernan, 86; see *Chautauque County Bank* v. *White*, 2 Selden, 236; *Bangs* v. *McIntosh*, 23 Barb. 591; and *Tuckerman* v. *Brown*, 11 Abb. 389). But it is not necessary for the complaint to set out all the proceedings by which he was appointed. A complaint was held sufficient on demurrer which stated "that by an order of the supreme court of the State of New York, made at the city hall, at the city of New York, on the 5th day of November, 1857, the plaintiff was duly appointed receiver of the Bowery Bank, of the city of New York, upon filing certain security therein mentioned, which said security was duly filed on the 6th day of November, 1857; and that the plaintiff thereupon entered upon the duties of his appointment, and is now in the lawful possession of the property and effects of said bank as receiver thereof" (*Stuart* v. *Beebe*, 28 Barb. 34).

f. A demurrer to a complaint which described the plaintiff as having been

duly appointed receiver of John W. Crane, and bringing this suit by order of the supreme court, was sustained on the ground that it was necessary to state the time and mode of appointment so that the adverse party might take issue on such facts (*Dayton* v. *Connah*, 18 How. 326); query, was not the allegation that he was "*duly appointed*" sufficient? Thus where it was alleged in terms that the plaintiff has been duly appointed receiver, and the objection was that the complaint did not state with sufficient precision how he became such receiver, the defect was held to be not insufficiency, but indefiniteness (*Cheney* v. *Fisk*, 22 How. 238; see *The People* v. *Walker*, 28 Barb. 305; 2 Abb. 422; *Cruger* v. *Halliday*, 3 Edw. Ch. R. 570; *The People* v. *Ryder*, 2 Kernan, 433; *Fowler* v. *N. Y. Indem. Ins. Co.*, 23 Barb. 143; *Morange* v. *Mudge*, 6 Abb. 243; *Woodbury* v. *Sackrider*, 2 Abb. 405; *Sere* v. *Coit*, 5 Abb. 482; *Farmer's Bank* v. *Empire Stone Dressing Co.*, 10 Abb. 47; *French* v. *Willet*, *id.* 102; *Hoyt* v. *Thompson's Exrs.* 19 N. Y. 208).

a. **As to the character in which the defendant is sought to be charged.**—As in the case of a plaintiff so in the case of a defendant, the presumption is that he is suing in his individual capacity, unless the contrary be made to appear; if, therefore, the plaintiff seeks to charge him in any other than his individual capacity, it should appear by the complaint that such is the object of the action. It seems this object would be sufficiently indicated by a simple allegation that the defendant is executor, &c., and that the plaintiff need not state how, or when, or where, or by whom he was invested with the character in which the plaintiff seeks to charge him. If the defendant has ever become invested with the character in which the plaintiff seeks to charge him, the manner, and time and place of such investiture are supposed to be better known to the defendant than the plaintiff; and if he never was invested with the character in which he is sued, he has simply to deny that he is executor, or whatever may be the character attributed to him by the complaint. In one case, however, where an action was brought against a defendant as committee of Tolbert, an habitual drunkard, and the complaint alleged that the plaintiffs recovered a judgment against said Tolbert on &c., and that said Tolbert had been declared an habitual drunkard, and that the custody of his person and estate had been awarded to the defendant, and concluding by demanding judgment against the defendant to be satisfied out of the estate of said Tolbert. The complaint did not state in what court proceedings were had to declare the said Tolbert an habitual drunkard, nor that such proceedings were in any court, nor that the defendant had any estate of the said Tolbert in his custody or control. The defendant demurred. The demurrer was sustained, as well on the ground that no such action could be maintained, as because the complaint did not state facts sufficient to constitute a cause of action against the defendant, in this, that it did not show that Tolbert was declared an habitual drunkard by any court or officer having jurisdiction in the premises (*Hall* v. *Taylor*, 8 How. 428). [That case probably is not an exception to the general rule; and an examination of the entire grounds for the decision, will show that it proceeded chiefly on the want of an order authorizing the action to be brought.]

b. **Permission to sue, when to be alleged.**—There are some cases in which, by reason of some special character, either of the plaintiff or of the defendant, he cannot sue or be sued unless by permission of the court. Such is the case of a receiver (1 Ves. jun. 165; 9 *id.* 335, 3 Bro. C. C. 88; 16 Wend. 410; 19 N. Y. 376); a committee of an habitual drunkard (*Hall* v. *Taylor*, 8 How. 428; and see *Person* v. *Warren*, 14 Barb. 488); action on injunction bond filed under 31st Rule of the late court of chancery (*Higgins* v. *Allen*, 6 How. 30); action on judgment (*Graham* v. *Scripture*, 26 How. 501); action on sheriff's bond (*Rhinelander* v. *Mather*, 5 Wend. 102; *N. Y. Cent Ins. Co.* v. *Safford* 10 How. 347); or a lunatic (*Williams* v. *Cameron*, 26 Barb. 172). In such cases the obtaining permission to sue should be alleged, stating, how, when, and from whom obtained, in the same manner as in an action by a guardian for an infant he sets out the order appointing him guardian (*Graham* v. *Scripture*, 17 How. 501).

c. It cannot be set up as a defence to an action upon a bond or undertaking

on file, either by demurrer or otherwise, that the action has been instituted without an order directing the bond or undertaking to be prosecuted (*Cuddeback* v. *Kent*, 5 Paige, 96). If such bond or undertaking is improperly put in suit, the court in which it is filed, may, on motion, restrain the prosecution (*id.*); or set aside the proceedings (*Harris* v. *Hardy*, 8 Hill, 393; *Higgins* v. *Allen*, 6 How. 31). Permission is not required to sue on undertaking given pursuant to § 335 (*N. Y. Cent. Ins. Co.* v. *Nat. Pro. Ins. Co.*, 10 How. 344); nor for an action by a sheriff to recover property levied upon by him under an attachment (*Kelly* v. *Breusing*, 33 Barb. 123). Permission of the court to continue an action by or against the representatives of a deceased party is necessary in every case (*Johnson* v. *Williams*, 2 Abb. 229). See *Action on Constable's Bond.*

See note to §§ 71, 222, and p. 119, *a*, *ante*.

a. **Modification of rule that declaration must agree with writ.**—The rule that formerly prevailed, that the declaration [complaint] must agree with the writ [summons], has been modified (*Kerrigan* v. *Ray*, 10 How. 218); and in an action for the recovery of specific personal property in which a delivery has been claimed under § 206, it is not necessary that the complaint should correspond with the affidavit on which the requisition to the sheriff was founded, as to the number and value of the articles to be delivered. (*Id.*)

b. **The complaint, except in the cases mentioned, ante, p. 174 b, must agree with the summons in the description of the parties.**—In contemplation of law the complaint, although served with the summons, is a subsequent step in the procedure. If, therefore, the complaint differs from the summons, it is the complaint and not the summons which is irregular (*Tuttle* v. *Smith*, 14 How. 395; 6 Abb. 336). To take advantage of such an irregularity, the motion should be to set aside the complaint, not the summons (*id.*; see, however, *Voorhies* v. *Scofield*, 7 How. 51; *Morse* v. *Field*, *id.* 12). Where a plaintiff in a summons described himself as "*Administrator*," *&c.*, and in the complaint did not so describe himself, and set forth a cause of action accruing to him in his own right, it was held that the complaint was irregular (*Blanchard*, *Admor.* v. *Strait*, 8 How. 83); nor can a plaintiff, commencing his action as on his individual behalf, afterwards change it into one for a claim held by him in a representative character (*McMahon* v. *Allen*, 12 How. 46; and see *Eagle* v. *Fox*, 28 Barb. 475). Where in an action against two defendants whose true names were Isaac N. Hart and Simon Spear, the copy summons and the complaint served on the defendant Hart, stated the names of the defendants as *Isaiah* N. Hart and *Samuel* Spear, and the copy summons served on the defendant Spear stated the names of the defendants as *Israel* N. Hart and Samuel Spear, but in the copy complaint served on Spear the defendants' names were stated as Isaiah N. Hart and Samuel Spear—the summons and complaint were set aside as irregular (*Elliott* v. *Hart & Spear*, 7 How. 25); and where the summons served without the complaint was entitled *Hannah* Allen v. Ebenezer Allen, and the complaint afterwards served was entitled *Fanny* Allen v. Ebenezer Allen, the plaintiff's name being Fanny Allen, the defendant moved to set aside all the proceedings for irregularity on the ground of the difference in the title of the action in the summons and complaint—it was held that the defendant asked for too much, and was not entitled to have the summons set aside. That the complaint was irregular because the title of the action did not correspond with the summons, and that the defendant should have confined his motion to setting aside the complaint. That the summons could not be amended without leave of the court, and that the plaintiff should, before serving her complaint, have moved for leave to amend the summons (*Allen* v. *Allen*, 14 How. 248).

c. **The complaint should agree with the summons as to the nature of the cause of action.**—The only reason that can be assigned for the notice required by section 129 to be inserted in the summons is, to apprise the defendant within which of the two classes stated in that section is the cause of action of which the plaintiff complains; unless, therefore, the cause of action set forth in the complaint is within the class indicated, the defendant has been, in

theory at least, misled. No doubt the section 129 was framed, principally, in view of a service of the summons without any copy of the complaint, in which case it was highly proper to inform the defendant of the nature of the complaint, but of little importance where a copy of the complaint was served with the summons. If not in all cases, yet certainly where the summons alone is served, the defendant is justified in relying on its stating truly the nature of the action; and it must result, therefore, as a rule, that the complaint should agree with the summons, as to the statement of the cause of action (*Ridder* v. *Whitlock*, 12 How. 208); and if it does not so agree, it is the complaint and not the summons that is to be deemed irregular (*Ridder* v. *Whitlock*, 12 How. 208; *Boington* v. *Lapham*, 14 *id.* 360; *Johnson* v. *Paul*, 14 *id.* 454; *Tuttle* v. *Smith*, 6 Abb. 330; 14 How. 395; *Shafer* v. *Humphrey*, 15 How. 564; *Davis* v. *Bates*, 6 Abb. 15; *Campbell* v. *Wright*, 21 How. 13). The appearance admits the regularity of the summons and its service, but not the identity of the cause of action indicated by the summons with that set out in the complaint; therefore a general appearance is not a waiver of the irregularity in the complaint, even when both summons and complaint are served together. (*Id.*) Although the motion should be to set aside the complaint, yet where it was to set aside the summons, specifying the irregularity complained of and for such other or further relief, &c., it was held that under the demand of other relief the defendant might have an order setting aside the complaint (*Boington* v. *Lapham*, 14 How. 360).

a. Where the summons in the form prescribed by subd. 1 of section 129, indicating an action on contract, was served without any complaint, and the defendant not appearing, the plaintiff entered judgment as for want of an answer, his complaint however set forth a cause of action calling for a summons in the form prescribed by subd. 2 of section 129, for this variance between the summons and complaint the judgment was set aside (*Field* v. *Morse*, 7 How. 12).

b. By demurring to the complaint the defendant waives the objection, that the complaint does not agree with the summons as to the nature of the cause of action (*Campbell* v. *Wright*, 21 How 9). On a motion to set aside the complaint for not agreeing with the summons as to the nature of the cause of action, the court may allow plaintiff to amend the summons on terms (*Norton* v. *Cary*, 14 Abb. 364; 23 How. 469; *Campbell* v. *Wright*, 21 How. 9; *McDonald* v. *Walsh*, 5 Abb. 69; and see *Dunn* v. *Bloomingdale*, 14 How. 474); and the amendment may be allowed on appeal from the order setting aside the complaint, where the statute of limitations would be a bar to a new action (*Tuttle* v. *Smith*, 14 How. 405; 6 Abb. 336).

c. **Amount claimed**—Complaint should agree with summons as to amount claimed (see *Johnson* v. *Paul*, 14 How. 454).

d. **Date.**—The complaint need not be dated, nor state the time when the action was commenced (*Maynard* v. *Talcott*, 11 Barb. 569).

Note to subd. 2

STATEMENT OF THE FACTS CONSTITUTING A CAUSE OF ACTION.

1. What are facts?
2. How the facts are to be stated.
3. What are the facts to be stated?
4. The facts necessary in particular actions.
5. Some miscellaneous rules.
6. For one cause of action only one statement allowed.

1. *What are facts?*

a. **Facts.**—The word facts means precisely what the term has always meant when applied to the subject of legal pleading (*Dows* v. *Hotchiss*, 10 N. Y. Leg. Obs. 281; *Carter* v. *Keesley*, 14 Abb. 150). The words "facts constituting a cause of action," mean those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of

the facts (*Wooden* v. *Strew*, 10 How. 50). The facts required to be set forth are "physical facts" (*Lawrence* v. *Wright*, 2 Duer, 674); real traversable facts (*Mann* v. *Morewood*, 5 Sand. 566).

a. **Questions of fact.**—Negligence (*Tobin* v. *Murison*, 5 Moore's P. C. Cas. 110; *Bernhardt* v. *Rensselaer R. R. Co.*, 19 How. 199; 32 Barb. 165; aff'd., 23 How. 166; *Buckingham* v. *Payne*, 36 Barb. 81; but see *Purvis* v. *Coleman*, 1 Bosw. 321; *Mangam* v. *Brooklyn, R. R. Co.*, 36 Barb. 237; *Foot* v. *Wiswall*, 14 Johns. 304).

b. Diligent inquiry (*Carroll* v. *Upton*, 3 Coms. 274).

c. Election or intention is a fact, and if material must be expressly found (*Clift* v. *White*, 2 Kernan, 538; and see *Moss* v. *Riddle*, 5 Cranch, 351; *Griffin* v. *Cranston*, 1 Bosw. 281; *Miller* v. *The People*, 5 Barb. 203; and 18 N. Y. 297; 20 Barb. 549; 21 N. Y. 12).

d. Unlawfully converted (*Covell* v. *Hill*, 2 Selden, 381; *Decker* v. *Matthews*, 2 Kernan, 324).

e. Instigation and request (*Ives* v. *Humphries*, 1 E. D. Smith, 200).

f. Reorganization (*Hyatt* v. *McMahon*, 25 Barb. 458).

g. That indorsements on notes were made "as surety" (*Dow* v. *Platner*, 16 N. Y. 567).

h. Necessity (*McCullough* v. *Moss*, 5 Denio, 507).

i. Possession (*Parsons* v. *Brown*, 15 Barb. 593).

j. That a vessel "was not engaged in any *illicit trade*" (*Ocean Ins. Co.* v. *Francis*, 2 Wend. 72).

k. That "a bill was presented for payment and payment demanded" (*Graham* v. *Machado*, 6 Duer, 514).

l. That plaintiff became the owner by purchase (*Prindle* v. *Caruthers*, 15 N. Y. 427).

m. That plaintiff was seized as of fee (*Vigers* v. *Dean of St. Paul's*, 14 Jur 1017).

n. That a woman is the *widow* of a particular man, naming him, or that a person is the son of another man, naming him (*Semble*, *Reg.* v. *Inh. of Aberdaron*, 1 New Mag. Cas. 51).

o. Reputed ownership (*Edwards* v. *Scott*, 1 M. & G. 962; 2 Sc. N. R. 266).

p. Sound or unsound (*Lewis* v. *Peake*, 7 Taunt. 153).

q. What is actual and what constructive possession (*O'Callaghan* v. *Booth*, 6 Cal. 63).

r. Reasonable time (*Fry* v. *Hill*, 7 Taunt. 397; *Pitt* v. *Shew*, 4 B. & Ald. 206; *Facey* v. *Hurdom*, 3 B. & C., 213; *Tenant* v. *Bell*, 16 Law Jour. Rep. M. C. 31; *Burton* v. *Griffiths*, 11 M. & W. 817; *Sage* v. *Hazard*, 6 Barb. 179; *Conger* v. *Hudson River R. R.*, 6 Duer, 375; *Serle* v. *Norton*, 2 M. &. Rob. 401; see *Van Trot* v. *McCulloch*, 2 Hilton, 272; *Gallagher* v. *White*, 31 Barb. 92; *Green* v. *Haines*, 1 Hilton, 254; *Lawrence* v. *Ocean Ins. Co.*, 11 Johns. 241; and see 9 Abb. 124; 116).

s. Whether a sale was *completed* or not (*De Ridder* v. *McKnight*, 13 Johns. 294).

t. Whether or not *reasonable* search has been made for a lost document to authorize secondary evidence of its contents (*Clarke* v. *Owens*, 18 N. Y. 435).

u. When an undated instrument was made (*Coons* v. *Chambers*, 1 Abb. 165).

v. Usual covenants (*Bennett* v. *Wornack*, 3 Car & P. 96).

w. Whether an abandonment was or was not accepted (*Bell* v. *Smith*, 2 Johns. 98).

x. Ordinary care (*Aymar* v. *Astor*, 6 Cow. 267).

y. Seaworthy or not (*Sherwood* v. *Ruggles*, 2 Sand. 55; *Patrick* v. *Hallett*, 1 Johns. 241; *Clifford* v. *Hunter*, 3 Car. & P. 16).

z. Deviation (*Child* v. *Sun Mut. Ins. Co.*, 3 Sand. 26).

a. Necessary furniture (*Wilson* v. *Ellis*, 1 Denio, 462; *Whitmarsh* v. *Angle*, 3 Code Rep. 53).

b. Fraud (*Erwin* v. *Voorhies*, 26 Barb. 127; but see Question of Law, Fraud).

c. Usual length of a voyage (*Mackay* v. *Rhinelander*, 1 Johns. Cas. 408).

d. **Questions of law.**—What constitutes an account stated? (*Lockwood* v. *Thorn*, 1 Kernan, 170).

e. The sufficiency of the notice of the dishonor of a note, where there is no dispute about the facts (*The Cayuga Co. Bank* v. *Warden*, 2 Selden, 29; *Dole* v. *Gold*, 2 Barb. 490; *Farmers' B'k.* v. *Vail*, 21 N. Y. 487).

f. Probable cause; reasonable cause (*Bulkley* v. *Keteltas*, 1 Hilton, 45; 2 Selden, 384; *Ransford* v. *Copeland*, 6 Adol & El. 482).

g. That a written instrument is or is not a mortgage (*Fairbanks* v. *Bloomfield*, 2 Duer, 353).

h. Seasonable times (*Bell* v. *Wardell*, 2 Willes, 204).

i. Reasonable notice (*Tindall* v. *Brown*, 1 T. R. 167; *Williams* v. *Smith*, 2 B. & Ald. 496; *Schiebel* v. *Fairbairn*, 1 Bos. & Pul. 388).

j. Whether a receipt is a bailment or sale (*Wadsworth* v. *Allcott*, 6 N. Y. 64).

k. Whether a contract has been rescinded or not (*Healey* v. *Utly*, 1 Cow. 345).

l. Fraud (*Sturtevant* v. *Ballard*, 9 Johns. 337; *Jennings* v. *Carter*, 2 Wend. 446; *Gage* v. *Parker*, 25 Barb. 141; *Erwin* v. *Voorhies*, 26 Barb. 127; *Edgell* v. *Hart*, 9 N. Y. 213).

m. **Questions mixed of law and fact.**—Necessaries or not necessaries may be a mixed question of law and fact (*Wharton* v. *M'Kensie*, 5 Q. B. 606).

n. Due diligence (*Carroll* v. *Upton*, 3 Coms. 272).

o. That the company was illegally associated (*Ransford* v. *Copeland*, 6 Adol. & El. 482).

p. Duly (*Gillett* v. *Fairchild*, 4 Denio, 83; *Beach* v. *King*, 17 Wend. 17; *White* v. *Joy*, 3 Kernan, 86).

q. "Duly convened" implies regularly convened (*The People* v. *Walker*, 2 Abb. 422).

r. Flagrant nuisance (*Hartz* v. *Long Island R. R. Co.*, 13 Barb. 647, 657).

s. Negligence (*Purvis* v. *Coleman*, 1 Bosw. 321; but see *Tobin* v. *Murison*, 5 Moore's P. C. Cas. 110).

t. Whether or not defects in articles sold were visible (*Birdseye* v. *Frost*, 34 Barb. 367).

u. Due course of law (*Backus* v. *Shepherd*, 11 Wend. 629; *Penniman* v. *Hudson*, 14 Barb. 579; *Thomas* v. *Woods*, 4 Cow. 173; *Cumpston* v. *McNair*, 1 Wend. 457).

v. **Conclusions of law.**—"An allegation of a legal conclusion merely, is one which gives no fact, but matter of law only. It is not easy always in practice, to determine what allegations are of that character, on account of the difficulty in deciding when facts will be held to be implied from and therefore embraced in an allegation in pleading." (By the court, T. R. Strong, J., *Hatch* v. *Peet*, 23 Barb. 583.) The following have been held to be conclusions of law:

w. That an act is *unlawful* (*Ensign* v. *Sherman*, 13 How. 37).

x. Unlawfully (*Fletcher* v. *Calthrop*, 1 New Mag. Cas. 541)

y. That a party is *owner* (*Adams* v. *Holley*, 12 How. 330; *Thomas* v. *Desmond*, *id.* 321; see, however, *contra*, *Davis* v. *Hoppock*, 6 Duer, 256; *Walter* v. *Lockwood*, 23 Barb. 233; 4 Abb. 307; and *infra*).

z. That a party is "holder and owner" (*Brown* v. *Ryckman*, 12 How. 313; *Witherspoon* v. *Van Dolar*, 15 *id.* 266).

aa. That goods are the *property* of a party (*id.*).

bb. That a party is *indebted* or *remains indebted* (*Chamberlain* v. *Kaylor*, 2 E. D. Smith, 139; *Hall* v. *Southmayd*, 15 Barb. 32).

cc. That it was or is the *duty* of a party to do or forbear an act (*City of Buffalo* v. *Holloway*, 3 Selden, 493; *Rex* v. *Everett*, 8 B. & C. 114).

a. That a settlement had "no *reference* to this claim, nor was the same in any way *released* or *affected*" (*Jones* v. *Phœnix Bank*, 4 Selden, 235).

b. That "he had fully determined to proceed" (*id.*).

c. That he had failed to fulfill his obligations" (*Van Schaack* v. *Winne*, 16 Barb. 95).

d. "Lawful title," and unlawfully withholds (*Lawrence* v. *Wright*, 2 Duer, 674; see, however, *Walter* v. *Lockwood*, 23 Barb. 233; 4 Abb. 307; *Ensign* v. *Sherman*, 14 How. 439, overruling S. C. 13 *id.* 85).

e. "In violation" (*Schenk* v. *Naylor*, 2 Duer, 678).

f. "Duly authorized" (*Myers* v. *Machado*, 6 Abb. 198; 14 How. 149).

g. That one is "liable" (*Rex* v. *Upton-on-Severn*, 6 C. & P. 136).

h. "Repeated acknowledgments" (*Bloodgood* v. *Bruen*, 4 Selden, 366).

i. That a note "had no validity" (*Burrall* v. *Bowen*, 21 How. 378).

j. "That he did not by his agreement undertake to convey the land free from all encumbrances" (*Warner* v. *Hatfield*, 4 Blackf. 394).

k. That actions "were discontinued" (*Hatch* v. *Peet*, 23 Barb. 583).

l. That the defendants have acted contrary to the act [statute] (*Smith* v. *Lockwood*, 13 *id.* 209).

m. That the defendant "was *bound* to repair" (*Casey* v. *Mann*, 5 Abb. 91).

n. That one is the "lawful holder" (*Beach* v. *Gallup*, 2 Code R. 66; but see *Taylor* v. *Corbiere*, 8 How. 387).

o. "*Bona-fide* holder and owner" (*White* v. *Brown*, 14 *id.* 282).

p. "Sole owner" (*Thomas* v. *Desmond*, 12 *id.* 321; see, however, *Holstein* v. *Rice*, 15 *id.* 1).

q. "As such attorney" (*ex parte Webb*, 1 New Prac. Cas. 213).

r. That a party "did execute a release in full" (*Hatch* v. *Peet*, 23 Barb. 575).

s. That one party is "nearer of kin" than another (*Public Adm.* v. *Watts*, 1 Paige, 348).

t. That an act is "unjust" (*Re Prime*, 1 Barb. 352).

u. That a certain sum is "*due*" (*McKyring* v. *Bull*, 16 N. Y. 303; and see *Allen* v. *Patterson*, 3 Selden, 480).

v. That a sum is "due and owing" (*Keteltas* v. *Meyers*, 3 E. D. Smith, 83; reversed, 19 N. Y. 230).

w. That a note never had any validity (*Burrall* v. *Bowen*, 21 How. 378).

x. Adverse possession (*Monroe* v. *Merchant*, 26 Barb. 383; *Bowie* v. *Brahe*, 3 Duer, 35).

y. Assent (*Moore* v. *Westervelt*, 2 Duer, 59; 1 Bosw. 357; 21 N. Y. 103; and see *Keneys* v. *Richards*, 11 Barb. 312).

z. Whether a carrier is bound to know the contents of packages (*Berley* v. *Newton*, 10 Abb. 490).

aa. What is the meaning, validity, and effect of a contract (*Latham* v. *Westervelt*, 26 Barb. 256; *Chapin* v. *Potter*, 1 Hilton, 366).

bb. That an indebtedness "arose out of the transaction" *Brown* v. *Buckingham*, 11 Abb. 387; 21 How. 190).

cc. Alleging facts occurring in a foreign State, and then alleging that "by the laws of that State a trust was created (*Throop* v. *Hatch*, 3 Abb. 25).

dd. The statement of a conclusion of law is usually preceded by the word *whereby* or *thereby*, or *therefore;* but the use of either of these words does not necessarily make what follows the less a statement of fact. As to the word whereby, see *Pryce* v. *Belcher* (15 Law Journal Rep. 305, C. P.; 3 C. B. 91); and where it was alleged that the defendant wrongfully locked, &c., a certain gate standing in and across a certain way of the plaintiff, and *thereby* obstructed the way, to the injury of the plaintiff's reversion, it was held after verdict to disclose a good cause of action; to the objection that the injury was stated

as an inference of law from the facts previously alleged, the court said, "The prefix *thereby* does not make what follows the less an allegation of fact. It is not like a statement that A. died seized in fee, leaving B. his heir at law, whereby B. became entitled; but it is an allegation of fact, not of law,;" as was held in *Brown* v. *Mallett* (17 Law Jour. R., C. P., 272; 3 C. B., 614); and the word therefore in the allegation "the plaintiffs *therefore* charge," was held not to detract from the force of the allegation (*Borrowe* v. *Milbank*, 5 Abb. 38).

a. **A statement of the partial evidence of a fact is not an averment of the fact.**—The averment in a pleading that a vessel foundered at sea on the day of leaving the port, without any collision, or any storm, or any visible cause, is not equivalent to an averment that the vessel was unseaworthy when she commenced her voyage, although the facts averred, when proved, might warrant a jury in inferring that the vessel was unseaworthy (*Page* v. *Boyd*, 11 How. 417). In an action for a breach of promise of marriage, the complaint did not directly allege any promise, but alleged that in a conversation between the parties the plaintiff asserted among other things that he, defendant, had promised to marry her, and that defendant acknowledged that he had done wrong in promising her as he did, and hoped she would forgive him, but that if he should marry her as they had talked, and she go to his home, it would make both miserable for life. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was allowed, on the ground that the complaint did not show the making any promise by the defendant (*Buzzard* v. *Knapp*, 12 How. 504). So, where a complaint, after alleging that the plaintiff had expended, at the request of the defendant, in the purchase of merchandise, $9,075, that the defendant had since paid $7,500 on account; it was said, the proof that the defendant paid $7,500 of the plaintiff's claim would be partial proof of his admission of his liability for the money expended by the plaintiff; but when stated in a pleading it is not equivalent to an averment of the fact that the defendant was so liable, and is not evidence of such liability; for if it were received as such evidence, then it would be proper for the defendant to answer in the same way, and instead of taking issue on the issuable fact whether or not the goods were purchased at his request, he might set forth evidence to show why he paid the said sum of $7,500, and any other evidence in his defence (*Page* v. *Boyd*, 11 How. 417). It is not sufficient to give such a statement as if submitted to a jury they might *infer* a fact or facts constituting a cause of action or defence, but the statement should be such an one as that the *law* alone, without the aid of a jury, draws a conclusion of the existence of a cause of action or defence. (*Id.*)

b. **Allegation of duty.**—A complaint which stated in effect that the plaintiffs, the city of Buffalo, having determined to construct a sewer in said city, contracted with the defendant to construct said sewer, and that the defendant in constructing said sewer dug a pit in a street in said city; and "*that it then became, and was and continued to be the duty of the defendant, while the said pit remained open, to use due care, and to erect, maintain, and keep lights in and about the said pit, to protect persons lawfully passing along said street from unavoidably falling into said pit;*" that defendant neglected to maintain such lights, and in consequence of neglect, one Tripp, lawfully passing along said street, unavoidably fell into said pit and was injured, and sued the plaintiffs therefor, and recovered judgment against them; and demanded judgment against defendant for the amount the plaintiffs had paid said Tripp. The defendant demurred, and his demurrer was allowed. (*City of Buffalo* v. *Holloway*, 3 Selden, 493.) And by Jewett, J.: An allegation of the duty is of no avail, unless from the rest of the complaint the facts necessary to raise the duty can be collected. See note to section 160, *post*. To aver that *by* a certain judgment recovered in the courts of this or any other State, or *by reason* of a certain bond executed by the defendant, he was indebted to the plaintiff in a given sum, or owed any other duty (*Throop* v. *Hatch*, 3 Abb. 25), would not constitute any fact of which a court could take notice. And see *Boorman* v. *Brown*, 4 Perr. & D. 401.

c. **Allegation that act unlawful.**—An allegation that an act is *unlawful*, is

not the statement of a fact, but of a conclusion of law. If there are no other facts stated, showing that the particular act or refusal of the party which is complained of, is in violation of his own duty, or of the rights of others, the mere adding to a statement of any such act or refusal the epithet of *unlawful*, will not be a sufficient averment of its wrongfulness or illegality, where the act is indifferent in its nature, and not evidently or essentially wrong or criminal in itself. An act which may or may not be right and lawful according to the circumstances under which it is done, is not properly averred to be *unlawful* by merely calling it such. The facts which make it [unlawful] must be pleaded as they are to be proved, and from them the conclusion follows that the party is acting unlawfully in what he does. (*Ensign* v. *Sherman*, 13 How. 37; 14 How. 422).

a. **Duly.**—An allegation that a meeting "was *duly* convened," would imply that the meeting was regularly convened, and if necessary to its regularity, that it was an adjourned meeting. (*The People* v. *Walker*, 23 Barb. 305; 2 Abb. 422.) Under an allegation that the trustees were duly appointed, it will be inferred that every thing has been done to constitute them trustees *de jure* until the contrary appears. (*Cruger* v. *Halliday*, 3 Edw. Ch. R. 570.) An allegation that an election "*was duly and legally held* pursuant to the statute," was held a sufficient allegation as to the time when the election took place, and that it was on the day prescribed by law. (*The People* v. *Ryder*, 2 Kernan, 433.) An allegation that a policy was "duly assigned and transferred" indicates that the assignment was by a sealed instrument, and a consideration is inferred. (*Fowler* v. *N. Y. Indem. Ins. Co.*, 23 Barb. 143, and see *Morange* v. *Mudge*, 6 Abb. 243). An allegation that the plaintiff was "duly authorized" to bring the action, is not the allegation of a fact. (*Myers* v. *Machado*, 6 Abb. 198; 14 How. 149.) If "duly" has any clear legal signification, whether an act is duly done is a question of law to be determined on the facts. (*Graham* v. *Machado*, 6 Duer, 517.) The allegation that the bill was "duly protested at maturity" is sufficient to admit evidence of demand, neglect to pay, and notice of non-payment. (*Woodbury* v. *Sackrider*, 2 Abb. 405.) Where the allegation was, that the plaintiff sued by a "guardian duly appointed," it was said if the statement was deemed too general, the proper course is to move to make it definite (*Sere* v. *Coit*, 5 Abb. 482). And where the allegation was, that plaintiff was "duly appointed chamberlain," it was held sufficient on demurrer. (*Platt* v. *Stout*, 14 Abb. 178.) The finding by a referee that a corporation "duly accepted" a bill, construed as importing, that their officer who signed the acceptance had authority to do so (*Farmer's B'k.* v. *Empire Stone Dressing Co.*, 10 Abb. 47). An allegation that an execution was "duly issued" held sufficient. (*French* v. *Willett*, 10 Abb. 102.) See § 162.

b. **What are the facts to be stated.**—The principle of pleading is to present the cause of action on one side, and the defence on the other. (*Buddington* v. *Davis*, 6 How. 402.) The complaint should show on its face that the debt was due at the time the action was commenced. (*Maynard* v. *Talcott*, 11 Barb. 569; *Hare* v. *Van Deusen*, 32 Barb. 92; *Smith* v. *Holmes*, 19 N. Y. 271; *McCullough* v. *Colby*, 4 Bos. 603; *Watson* v. *Thibou*, 17 Abb. 184.) It should state every fact which the plaintiff must prove to enable him to maintain his suit, and which the defendant has a right to controvert in his answer." (*Allen* v. *Patterson*, 3 Selden, 478; *Bailey* v. *Ryder*, 10 N. Y. 363; *Safford* v. *Drew*, 3 Duer, 632; *McMillan* v. *Saratoga R. R. Co.*, 20 Barb. 455; *Bristol* v. *Penns. R. R. Co.*, 9 *id.* 158.) Whatever it would be unnecessary to prove on the trial is unnecessary to allege in the complaint. (*Decker* v. *Matthews*, 2 Kernan, 320; *Bank of U. S.* v. *Smith*, 11 Wheat. 171.) It is not necessary to make it appear on the face of the complaint that the court has jurisdiction of the person of the defendant or the subject matter of the action. (*Koenig* v. *Nott*, 8 Abb. 304.) Facts on which the plaintiff relies independently of the cause of action to entitle him to an order of arrest, or an injunction until the trial, need not and should not be stated in the complaint, but in the affidavits. (*Sellar* v. *Sage*; 12 How. 531; 13 How. 230; *Union Bank* v. *Mott*, 6 Abb. 315; *Corwin* v. *Freeland*, 2 Selden, 560; overruling S. C. 6 How. 241; and *Barker*

v. *Russell*, 11 Barb. 303; 1 Code Rep. N. S. 57; and see *Field* v. *Morse*, 7 How. 12; *Lee* v. *Elias*, id. 116; *Cheney* v. *Garbutt*, id. 166; 2 Code Rep. 1; 3 *id.* 150, 169, 211; 3 Sand. 736; *Putnam* v. *Putnam*, 2 Code Rep. 64; *Atocha* v. *Garcia*, 15 Abb. 304; *Minor* v. *Terry*, 6 How. 208. [Of course, in those cases in which the object of the action is the obtaining of an injunction, there it becomes the cause of action, and the facts on which the plaintiff relies, as entitling him to the injunction must be stated.] In actions in the superior court of New York the complaint need not allege facts to show the court has jurisdiction of the parties. (*Spencer* v. *Rogers Locom. Works*, 17 Abb. 110).

a. **What is necessarily implied need not be alleged.**—Thus, in an action on a bond conditioned to perform the award of A., the defendant pleaded that A. made no award; reply, that the defendant revoked the authority of A. This was held good without alleging notice of the revocation of A., because notice was implied in the words "revoked the authority;" there could be no revocation unless there was notice (Steph. Pl. 354; *Marsh* v. *Bulteel*, 5 Barn. & Ald. 507; *Frets* v. *Frets*, 1 Cow. 335; *Allen* v. *Watson*, 16 Johns. 205). So, it is laid down in the text books (Steph. Pl. 354, &c.), that if one plead he is heir to A., he need not allege that A. is dead: it is implied in the allegation heir; for *nemo est hæres viventis* (Broom's Legal Maxims, 393). Yet in *Lockwood* v. *Jessup*, 9 Conn. R. 272, and *Cox* v. *Beltzhoover*, 11 Mo. R. 142, it is said that the term heir, is not always used in law as denoting a person whose ancestor is dead, but is often used to denote the heir apparent. In charging a defendant as an acceptor of a bill of exchange or promissory note, it is sufficient to allege that he accepted the bill or note, without stating that the acceptance was in writing. There can be no valid acceptance except in writing, and an averment of acceptance implies that it was in writing (*Bank of Lowville* v. *Edwards*, 11 How. 216). And a complaint by one surety against another need not state what proportion the defendant has to pay (*Van Demark* v. *Van Demark*, 13 How. 372). Where from the facts stated a promise may be implied, a promise need not be alleged (*Cropsey* v. *Sweeney*, 27 Barb. 310; *Hull* v. *Southmayd*, 15 Barb. 34; *Farron* v. *Sherwood*, 17 N. Y. 230; *Berry* v. *Fernandez*, 1 Bing. 338; *Durnford* v. *Messiter*, 5 Mau. & S. 446); and in an action on a note, the complaint need not allege that the plaintiff is the holder or owner (*Keteltas* v. *Meyer*, 19 N. Y. 231; see *Holder and Owner*).

b. **The complaint need not anticipate and avoid what would constitute a defence** (*Van Nest* v. *Talmage*, 17 Abb. 99); but it has been allowed to do so in certain cases (*see infra*). The statute 32 Hen. VIII. c. 1, provided that wills made by femes covert or infants should have no effect; yet in pleading a devise, it was not necessary to allege that the devisor was not a feme covert and not an infant (*Stowell* v. *Zouch*, Plow. 376). And in an action on a bond it is not necessary to allege the defendant was of full age when he executed it (*Walsingham's case*, Plow. 564; *Bovy's case*, 1 Vent. 217). So where there was a covenant in a charter-party that no allowance should be made for short tonnage, unless made to appear by a survey, in an action on such covenant for short tonnage, it was objected in arrest of judgment, that there was no allegation of a survey, the court held that if there was no survey, it was matter of defence, and refused to arrest the judgment (*Hotham* v. *E. I. Comp.*, 1 T. R. 638). And in an action on a cause of action which accrued more than six years prior to the commencement of the action, the complaint should not by way of anticipating and avoiding a defence of the statute of limitations, state the facts which prevent the application of the statute (*Butler* v. *Mason*, 5 Abb. 40; 16 How. 546; *Sands* v. *St. John*, 23 How. 140; 36 Barb. 628). In complaining on a promissory note, absolute on its face, and in the ordinary form, it is not necessary to notice a cotemporaneous agreement in writing, varying the terms of the note, contained in a separate paper; such agreement is matter of defence only (*Smalley* v. *Bristol*, 1 Manning, Mich. R. 153).

c. Where the plaintiff *being prevented by sickness* from completing his contract to serve for a stipulated time, sues upon a *quantum meruit* for the services actually rendered, he need not set up in his complaint the excuse for not

performing the contract (*Wolfe* v. *Howes*, 20 N. Y. 197); and in an action to charge heirs on a promise to pay the debt of their ancestor, assets need not be alleged (*Elting* v. *Vanderlyn*, 4 Johns. 237). So in an action to recover for damages to person or property, it is not necessary to allege that the plaintiff was without fault (*Wolfe* v. *Supervs. of Richmond*, 11 Abb. 270; 19 How. 370). The same rule applies to actions against a city or county for injuries by a mob. (*Id.*)

a. In a complaint showing an indebtedness by defendant to plaintiff, it need not be alleged that defendant has not paid; if he has paid, it is matter of defence (*Keteltas* v. *Myers*, 19 N. Y. 233; *Holsman* v. *De Gray*, 6 Abb. 79.) And in a suit by one surety against another for contribution, the complaint need not negative any repayment to plaintiff (*Van Demark* v. *Van Demark*, 13 How. 372). Where a statute declares that a deed or contract is void if, or provided, it is made in a particular manner, or upon a specific consideration (*e. g.* upon usury), it is not necessary for the plaintiff to negative the condition; he may leave it to the defendant to set up the facts which bring it within the condition upon which, and upon which alone, it is void. But where a statute makes a deed or agreement or other act void, unless made upon a specified consideration, or under specified circumstances, the rule is reversed; the plaintiff must show that the circumstances exist under which alone it can have validity; the defendant in such a case may rest upon the general prohibition (*Williams* v. *The Ins. Co. of N. Amer.*, 9 How. 373). Thus, the statute of "betting and gaming" provides, § 8, that all wagers are void, and § 10, provides that section 8 shall not extend to an insurance in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law; and it was held that a complaint on a policy of insurance for account of whom it may concern, must state facts showing the assured had an interest to be protected, in such a sense that the insurance operated as a security or in-indemnity to protect him from loss by the perils insured against (*id.*; *Freeman* v. *Fulton Fire Ins. Co.*, 38 Barb. 247). It was provided, 1 R. S. 710, § 6 (now repealed, Laws 1858, p. 251), that all contracts for the sale of certificates of stocks should be *absolutely void*, unless the party contracting to sell was, at the time of making the contract, in the actual possession of such certificates, or otherwise entitled in his own right, or duly authorized by some person so entitled, to sell said certificate, &c.; yet it was held that in an action on a stock contract, it was not necessary to aver that the plaintiff was the owner of the stock at the time of the sale, or that the certificate was in writing, or any of the other circumstances to take the contract out of the statute (*Washburn* v. *Franklin*, 28 Barb. 27; 7 Abb. 8; see *Merwin* v. *Hamilton*, 6 Duer, 248).

b. Where a clause or section of a statute giving an action for any offence, contains a proviso or exception which is against the plaintiff, or is matter of defence or justification for the defendant, the plaintiff need not negative the proviso in the declaration (*Peel* v. *Yellis*, 4 Johns. 304). The inaccuracy in the rule on this subject as laid down, 1 Saund. 262, consists in restricting the rule to provisoes contained in a subsequent section or statute which was not warranted by the cases. (*Id.*) See *Actions for penalties.*

c. It has been held that the plaintiff may state *all* the material facts out of which the cause of action arises, and those are the material allegations of fact which anticipate and explain what might otherwise be set up by the defendant as a *prima facie* good defence. Thus, where a defendant purchased goods of the plaintiff, and gave his note therefor, that when the note became due it was not paid otherwise than by the defendant giving the plaintiff a check of a third party for the amount, representing the same to be good, when in fact the drawer of the check was insolvent, and had no funds in the bank on which the check was drawn, at the time the check was drawn,—on motion to strike out part of the complaint, it was held that the plaintiff might properly set forth all these facts in his complaint, and that he was not bound to complain merely for the goods sold, or on the check (*Bracket* v. *Wilkinson*, 13 How. 102; and see *Thompson* v. *Minford*, 11 *id.* 275; *Van Nest* v. *Talmage*, 17 Abb. 99; *Wade* v. *Rusher*, 4 Bosw. 537).

a. **Matters of which the court takes judicial notice need not be alleged.**—Thus a statute relied on in pleading need not be referred to. (*Goulett* v. *Cowdry*, 1 Duer, 139. See *Action for Penalties.*) It may be here mentioned that the court cannot judicially notice the ordinances of a municipal corporation, but they must be set forth in pleading. (*Harker* v. *Mayor of N. Y.*, 17 Wend, 199.)

b. **Evidence of facts not to be stated.**—"It is an elementary rule in pleading, that when a state of facts is relied on, it is enough to allege it [the state of facts] simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation." (*Williams* v. *Wilson*, 8 Ad & El. 314.). In alleging a fact, it is not necessary to state such other facts as tend to prove the allegation. (*Hyatt* v. *McMahon*, 25 Barb. 458.)

How the facts are to be stated.

c. **Should the facts be stated, according to their legal effect, or as they actually occurred or exist?**—[The decisions are both ways, and probably in most cases either mode of statment may, at the option of the pleader, be adopted.] That the facts *should* be stated according to their legal effect, was held in *Boyce* v. *Brown* (7 Barb. 85), *Patterson* v. *Taylor* (1 Code R. N. S. 175; 8 Barb. 250), *Dolner* v. *Gibson* (3 Code R. 153), *Coggil* v. *Am. Ex. B'k.* (1 Coms. 117), *Stewart* v. *Travis* (10 How. 153); and that they may be so stated see *Bennett* v. *Judson*, 21 N. Y., 240. That the facts may be stated as they actually occurred or as they exist, was held in *Ives* v. *Humphreys*, (1 E. D. Smith, 201); *Manning* v. *Whitbeck*, (1 Law Reform Tracts); and other cases, as 4 Abb., 467; 2 Duer. 509; 4 How. 99; 1 Abb. 39; 7 Abb. 131; 17 N. Y. 230; 14 N. Y. 85; 28 Barb. 441; 1 Bosw. 419; 10 How. 153; 1 Code Rep. N. S. 99, 174; 3 Sand. 695; 22 Barb. 395; 15 Barb. 34.

d. Thus, in stating an act done by an agent, the pleader may either allege it to be the act of the principal, which is the legal effect of the fact, or state the act done by A. (the agent), then that he was the agent of B., and that the act was done as the agent of B. (*Bennet* v. *Judson*, 21 N. Y. 238.) The first method has the recommendation of being more concise; and the opposite party cannot object to it unless by showing that "the precise nature of the charge or defence is not apparent" to him. Of the second method, the opposite party has no right to complain; for it shows him the precise facts he has to meet, and each allegation is so material that the establishment of the converse of either would defeat the pleader. There is no reported decision that lays down the rule as we give it; but we consider the rule fairly deducible from the current of the decisions reported and unreported (*Dolner* v. *Gibson*, 3 Code Rep. 153, and *St. John* v. *Griffith*, 1 Abb. 39; *Sherman* v. *N. Y. Cent. R. R. Co.* 22 Barb. 239; *Ives* v. *Humphreys*, 1 E. D. Smith, 201).

e. **Allegations to be positively made.**—The allegations should be positively made, in order to prevent immaterial issues and confusion; so doing does not indicate that the pleader has personal knowledge of the facts alleged (*Truscott* v. *Dole*, 7 How. 221); and in that case the words "as the plaintiff is informed and believes," following allegations of the complaint, were struck out as redundant. Generally, however, the courts indulge pleaders to the extent of allowing them to make the allegations on information and belief (*Radway* v. *Mather*, 5 Sand. 654). Thus, in an action on a note by an assignee thereof, it was held the plaintiff might allege an information and belief that defendant made the note, and in a complaint for goods sold, the plaintiff may allege the sale on information and belief (*St John* v. *Beers*, 24 How. 377). So an allegation on belief, as thus, "the plaintiff *believes* the note was presented," was held sufficient (*Radway* v. *Mather*, 5 Sand. 654; *Howell* v. *Fraser*, 1 Code Rep. N. S. 270; 6 How. 221). So, an allegation that "the facts are true, as defendant has been informed and believes," was held sufficient, as equivalent to an averment "upon information and belief of the existence of the facts" (*Fry* v. *Bennett*, 1 Code Rep. N. S. 249). But the allegations must be positively made to entitle the plaintiff to an injunction founded on the allegations in the complaint (*Crocker* v. *Baker*, 8 Abb. 182; *Levy* v. *Lay*, 6 *id.* 90; *Rateau* v. *Bernard*, 12 How. 464). In *Ricketts* v. *Green*, (6 Abb. 82), the allegations

were all made positively; the plaintiff afterwards amended by making the allegations "on information and belief;" it was held they were unnecessary —and in *N. Y. Marbled Iron Works* v. *Smith* (4 Duer, 374), it is said, whether the facts are stated upon information or knowledge, it is equally the existence of the fact that is averred; hence the form of averment is a matter of indifference.

a. To state, in a pleading, the nature and source of the information upon which the party relies in making an averment of facts on information and belief, does not vitiate an independent averment of such facts (*Borrowe* v. *Millbank*, 5 Abb. 28).

b. **Pleading a written instrument.**—Justice Duer, in *Fairbanks* v. *Bloomfield*, 2 Duer, 358, said, The safest course, where the action is founded on a written instrument, is to annex a copy, and refer to it as part of the complaint. (See section 162, *post.*) And where that is done any facts recited in the instrument are to be considered as alleged in the complaint (*Slack* v. *Heath*, 1 Abb. 331; 4 E. D. Smith, 95; affirmed, Court of Appeals, June 1860; and see *Haggart* v. *Morgan*, 1 Selden, 422, and note to § 160). An allegation that a party did "execute a release," held not sufficient (*Hatch* v. *Peet*, 23 Barb. 575). A complaint on a special contract should set out its provisions either in form or legal effect, and allege performance or excuse for non-performance (*Brown* v. *Colie*, 1 E. D. Smith, 265). An objection to a pleading, that the legal effect of a written instrument is given instead of the instrument itself, can be taken only by demurrer (*Kellogg* v. *Baker*, 15 Abb. 287); and a party will not be required to set out a written instrument if it appear that the instrument is lost (*Kellogg* v. *Baker*, 15 Abb. 287). In a complaint on a written instrument in a foreign language, it is sufficient to give a copy of the instrument, although it would be better to set out the legal effect of the instrument (*Nourny* v. *Duboety*, 12 Abb. 128).

c. Where it is necessary in pleading to allege the consideration for making an instrument in writing, it is sufficient to say that it was for value received (*Prindle* v. *Caruthers*, 15 N. Y. 426; *Benson* v. *Couchman*, 1 Code Rep. 119; *Appleby* v. *Elkins*, 2 Code Rep. 80; 2 Sand. 673; and see *Brown* v. *So. Michigan R. R. Co.*, 6 Abb. 273). But pleading a bargain and sale of land, it should be alleged to be for a *valuable* consideration, and not "for the consideration therein mentioned" (*Sargeant* v. *Reed*, 2 Str. 1229). The presumption is that a note was given upon a sufficient consideration (*Tibbetts* v. *Blood*, 21 Barb. 655).

d. Where a statute prescribes the giving an instrument and its purport, it is consideration enough to support the instrument that it was given pursuant to the statute (*Slack* v. *Heath*, 1 Abb. 331; 4 E. D. Smith, 95; affirmed, Co't. of App's., 1860; *Morange* v. *Mudge*, 6 Abb. 244). It need not be alleged that it was taken pursuant to the statute (*Shaw* v. *Tobias*, 3 Coms. 190).

e. No delivery need be alleged in terms, the averment of the making of an instrument in writing is equivalent to alleging a delivery (*Prindle* v. *Caruthers*, 15 N. Y. 426; *Keteltas* v. *Myers*, 19 N. Y. 231; *La Fayette Ins. Co.* v. *Rogers*, 30 Barb. 491); so the averment of indorsement of a negotiable instrument implies a delivery (*B'k. of Louville* v. *Edwards*, 11 How. 217; *Griswold* v. *Laverty*, 3 Duer, 691; *N. Y. Marbled Iron Works* v. *Smith*, 4 Duer, 362; *Taylor* v. *Corbiere*, 8 How. 388); and that the plaintiffs are holders and owners (*Conn. B'k.* v. *Smith*, 9 Abb. 118; 17 How. 487).

f. Where, in an instrument for payment of money the name of the payee is left blank, with intent that such instrument may be transferred by delivery, the holder may, in a complaint on such instrument, allege that it was delivered to some person unknown, and afterwards came to his, plaintiff's, possession (*Hubbard* v. *N. Y. & Harlem R. R. Co.*, 14 Abb. 275).

g. Where the plaintiff claims *as the indorsee* of a negotiable instrument, he should allege that the instrument was indorsed to him. But where he claims *as the assignee*, whether of a negotiable or non-negotiable instrument, he should allege that the instrument was assigned to him (*Billings* v. *Jane*, 11 Barb. 620; *White* v. *Brown*, 14 How. 282). An allegation of indorsement of a non-negotiable instrument coupled with an allegation that the plaintiff was

holder and owner, was held sufficient (*Brown* v. *Richardson*, 20 N. Y. 472; 1 Bosw. 402). See *ante*, in note to section 111, p. 107 *g*, *h*.

a. **Holder and Owner.**—An allegation that plaintiff is holder and owner is unnecessary (*Keteltas* v. *Myers*, 19 N. Y. 231; *Conn. B'k.* v. *Smith*, 9 Abb. 118; 17 How. 487); and embarrassing (*Chadwick* v. *Booth*, 13 Abb. 249; 22 How. 28). An allegation that the instrument was delivered, indorsed, or assigned to the plaintiff, implies that he is owner and holder (*Mitchell* v. *Hyde*, 12 How. 460; 24 N. Y. 547; *Billings* v. *Jane*, 11 Barb. 620; *B'k. of Louville* v. *Edwards*, 11 How. 217; *Grinwold* v. *Laverty*, 3 Duer, 691; *N. Y. Marbled Iron Works* v. *Smith*, 4 Duer, 362).

b. A plaintiff may recover without being in fact the holder of the instrument sued upon, as where the instrument is destroyed or lost (2 R. S. 406; *Super. of Livingston* v. *White*, 30 Barb. 70; *Desmond* v. *Rice*, 1 Hilton, 530; *Des Artes* v. *Leggett*, 16 N. Y. 582), or in possession of the defendant (*Smith* v. *McClure*, 5 East. 476; *Selden* v. *Pringle*, 17 Barb. 468). The question is, whether he is the real party in interest, or trustee of an express trust, or person authorized to sue by statute; if he is, he may recover (*Root* v. *Price*, 22 How. 372; *Butterfield* v. *Macomber*, *id.* 150).

c. The plaintiff is certainly not required to aver negatively that since the instrument was transferred to him, he has not transferred it to another (*Taylor* v. *Corbiere*, 8 How. 388; see p. 204 *c*).

d. Where the defence is that the plaintiff is not the holder and owner, *i. e.*, not the real party in interest, it should be set up as new matter, *showing* how or why the plaintiff is not the real party in interest (*Arthur* v. *Beales*, 1 Ex. 608; *Fraser* v. *Welsh*, 8 M. & W. 609; *Barber* v. *Lemon*, 12 Jur. 246; *Rogers* v. *Chilton*, 17 Law. Jour. Ex. 8-345; *De Santes* v. *Searle*, 11 How. 477). But it has been held that where it is alleged in terms, that the plaintiff is the holder and owner, under a mere general denial of that allegation, the defendant may, on the trial, show the plaintiff not to be the real party in interest (*Hull* v. *Wheeler*, 7 Abb. 412; *Butterfield* v. *Macomber*, 22 How. 150; *Taylor* v. *Corbiere*, 8 How. 388; *Holstein* v. *Rice*, 15 How. 1; see *contra*, *Hatch* v. *Peet*, 28 Barb. 582; *Witherspoon* v. *Van Dolar*, 15 How. 266; *Brown* v. *Ryckman*, 12 How. 313; *Fleuret* v. *Roget*, 5 Sand. 646; *Seeley* v. *Eagle*, 17 Barb. 530; reversed, 3 Kernan, 542).

e. Perhaps the true rule is as thus: Where the instrument never was delivered, indorsed, or assigned to the plaintiff, where he *never was* the real party in interest, that fact may be shown on a general denial of the allegation of delivery, indorsement or assignment, but where the plaintiff has once been the real party in interest, and has ceased to be so, then to entitle the defendant to show the determination of the plaintiff's title, he must plead the facts as new matter.

f. **Plaintiff must show title.**—Thus, where it appears on the face of the complaint that although the note in suit is in the possession of the plaintiff, it is nevertheless the property of another, the complaint does not state a cause of action in the plaintiff (*Palmer* v. *Smedley*, 6 Abb. 205; 28 Barb. 468). And so, where it appeared on the face of the complaint that the plaintiff held the note as trustee, as a collateral security only, under a trust instrument which expressly authorized him to sell it, but did not expressly authorize him to sue upon it, the complaint was on demurrer held insufficient (*Nelson* v. *Eaton*, 7 Abb. 305, reversing S. C., 15 How. 305). An allegation that the plaintiff, the officer of a bank, was duly authorized to sue on behalf of the bank, is not sufficient (*Myers* v. *Machado*, 14 How. 149; 6 Abb. 198).

g. An allegation that the note in suit "for value received lawfully came to possession of these plaintiffs," held a sufficient allegation of title in plaintiffs (*Lee* v. *Ainslie*, 4 Abb. 463; 1 Hilton, 277; and see *Taylor* v. *Corbiere*, 8 How. 388); and an allegation that the plaintiff is now the bona fide holder and owner without showing how he acquired such ownership, was held sufficient (*Holstein* v. *Rice*, 15 How. 1).

h. In an action by the assignee of a chattel note, an allegation of the in-

dorsement of the note by the payee to the plaintiff, and that he, plaintiff, is the holder and owner, is sufficient averment of assignment to plaintiff (*Brown* v. *Richardson*, 20 N. Y. 472).

a. *Semble*, that in alleging an assignment of a note payable in merchanize, it should be averred that it was for consideration (*Landau* v. *Levy*, 1 Abb. 376).

b. Ownership of a note is sufficiently shown by alleging its making, indorsement, and delivery to the plaintiff, though coupled with the statement "that it was by the Bank of Commerce which then held the same, presented for payment." Such statement only imports a holding for collection (*Farmers Bank, &c.*, v. *Wadsworth*, 24 N. Y. 547). And where the complaint alleged that the note in suit was delivered to W. B. S. *for said Bank* (the plaintiff), and that said note was held and owned by plaintiff, it was held to be a sufficient averment of ownership (*Camden Bank* v. *Rodgers*, 4 How. 63; see *Peets* v. *Bratt*, 6 Barb. 662; *Parker* v. *Totten*, 10 How. 234; *White* v. *Brown*, 14 How. 282; *Thomas* v. *Desmond*, 12 How. 321).

c. Where title is once shown in plaintiff, its continuance is presumed, and need not be alleged (*Van Rensselaer* v. *Bonesteel*, 24 Barb. 365; see p. 203 *c*).

d. **With respect to acts valid at common law, but regulated as to the mode of performance by statute,** it is sufficient to use such certainty of allegation as was sufficient before the statute. Thus, in pleading in complaint, a promise to pay the debt of another (*Stern* v. *Drinker*, 2 E. D. Smith, 406; *Hilliard* v. *Austin*, 17 Barb. 141; *Elting* v. *Vanderlyn*, 4 Johns. 237) *or*, a contract relating to real estate (*Livingston* v. *Smith*, 14 How. 492; *Reynolds* v. *Dunkirk, &c., R. R. Co.*, 17 Barb. 617; *Champlin* v. *Parish*, 11 Paige, 408), *or*, an acceptance of a bill of exchange, it need not be alleged to be in writing (and see *Dewey* v. *Hoag*, 15 Barb. 368; *Horner* v. *Wood*, *id.* 371; *Williams* v. *Ins. Co. of N. Amer.*, 9 How. 373; and *Bank of Louisville* v. *Edwards*, 11 *id.* 216; *Fowler* v. *N. Y. Indem. Ins. Co.*, 23 Barb. 150; *Gibbs* v. *Nash*, 4 Barb. 449; *Murison* v. *Jones*, 13 Barb. 466; *Haight* v. *Child*, 34 Barb. 191; *Washburn* v. *Franklin*, 28 Barb. 27; 7 Abb. 8; and see *dicta*, *contra*, *Thurman* v. *Stevens*, 2 Duer, 609; *Le Roy* v. *Shaw*, 2 Duer, 628; *Merwin* v. *Hamilton*, 6 Duer, 248; and 5 Sand. 68; also *Williams* v. *Ins. Co. of N. Amer.*, 9 How. 373). In an answer it is otherwise: if a defendant sets up a contract which is required to be in writing, he must so state, or his answer is insufficient (*Taylor* v. *Hillary*, 1 Gale, 22; 11 Law Jour. Ex. 72; but see 15 Barb. 368; *Case* v. *Barber*, 1 Raym. 451).

e. **Matter in aggravation.**—Matters intended in aggravation of damages, so far as they can be distinguished from averments essential to the statement of the cause of action, may always be given in evidence to show the *quo animo*, without being pleaded (*Russell* v. *MacQuister*, 1 Camp. 49, *n.*; *Slack* v. *McCheney*, 2 Yates, 473; *Wallis* v. *Mase*, 3 Binney, 546; *Kan* v. *McLaughlin*, 2 Serg. & R. 469; 2 Star. N. P. 56); aggravating circumstances should not be pleaded (*Warne* v. *Crowell*, 2 Stark. R. 457; *Molony* v. *Dows*, 15 How. 265; see, however, *Root* v. *Foster*, 9 How. 37; *Brewer* v. *Temple*, 15 How. 286, Index, Assault); and when alleged in the complaint are not traversable (*Bates* v. *Loomis*, 5 Wend. 134; *Gilbert* v. *Rounds*, 14 How. 49).

f. **Special Damages.**—Damages which necessarily result from the injuries complained of are called general damages, and may be proved under a general demand of relief; but such damages as are the *natural*, although not the *necessary* result of the injury, are termed special damages, and must be stated in the complaint (*Vanderslice* v. *Newton*, 4 Coms. 133; *Bogart* v. *Burkhalter*, 2 Barb. 525; *Laraway* v. *Perkins*, 10 N. Y. 371; *Solms* v. *Lias*, 16 Abb. 311,) or the plaintiff cannot prove them on the trial. (*Low* v. *Archer*, 2 Kern. 282; *Moloney* v. *Dows*, 15 How. 265; *Spence* v. *Meynell*, 2 New Mag. Cas. 19.) An averment of special damage is required to be inserted to prevent a surprise upon the defendant, and it is not traversable (*Moloney* v. *Dows*, 15 How. 265); except where the special damage is the foundation of the cause of action, in that case it is a material allegation, and if not controverted, is admitted. (*Perring* v. *Harris*, 2 M & Rob. 5; see 14 N. Y. 526; 1 E. D. Smith, 460.)

g. In an action against a sheriff for neglecting to return an execution, it is

not necessary, to enable the plaintiff to recover more than nominal damages, either to allege or prove special damage. (*Ledyard* v. *Jones*, 3 Selden, 550.)

a. In an action for a breach of contract the plaintiff is confined in his recovery to the breach alleged, and cannot recover on any other grounds. Thus, where a complaint set forth a contract by the defendants to transport the plaintiff in a particular steamer, and alleged a breach in not conveying the plaintiff in that vessel, without either averring an obligation upon the defendants to provide a substitute in the event of the vessel's loss, or claiming any damage by reason of their neglect or refusal to forward him in some other vessel, held that the only damages the plaintiff was entitled to was the return of his passage money and interest. (*Briggs* v. *Vanderbilt*, 19 Barb. 222.) That was all the damage necessarily arising from the breach complained of or implied by law. If the plaintiff was actually damnified beyond that, he should have specified in his complaint the particular damage he had sustained. (*Bogart* v. *Burkhalter*, 2 Barb. 525.) In an action on a contract to indemnify and save harmless one party from any claim or demand of another, the complaint must allege *actual* damage; but on an indemnity to save from legal *liability*, there the complaint need only allege a liability, and the plaintiff may recover without alleging actual damage (*McGee* v. *Roen*, 4 Abb. 8; *Crippen* v. *Thompson*, 6 Barb. 534.)

b. An allegation of special damage that by reason of the negligence of defendants, "plaintiff was and would be compelled to pay $100 for medical attendance, funeral expenses," held sufficient on demurrer. (*Roeder* v. *Ormsby*, 13 Abb. 335.)

c. As to the damages in an action for causing death, see *Althof* v. *Wolf*, 2 Hilton, 344; 22 N. Y. 355; *Curtis* v. *Rochester & Syracuse R. R.* 20 Barb. 282; *Tilley* v. *Hudson R. R. R. Co.*, 24 N. Y. 471; as to damages for death of wife, see *Lucas* v. *New York Cent. R. R.* 21 Barb. 245.

See *post*, *Covenant*, *False Imprisonment*, *Libel*, *Promise to Marry*, *Bonds*.

d. Where the complaint omitted to allege any special damage, the plaintiff was allowed to amend his complaint on the trial, without terms, by inserting a claim for special damage, the defendant not showing that he had any absent witness whose testimony was material as to such damages. (*Miller* v. *Garling*, 12 How. 203.)

Facts necessary to be stated in particular actions.

e. **Account stated.**—[The material allegations are,—(1) that plaintiff and defendant came to an accounting together; (2) on such accounting defendant found indebted to plaintiff; (3) which defendant promised to pay; (4) and has not paid.]

f. What constitutes an account stated is a question of law. (*Lockwood* v. *Thorn*, 1 Kernan, 170, and see *Bruen* v. *Hone*, 2 Barb. 586; *Toland* v. *Sprague* 12 Peters, 330; *Learmouth* v. *Grandine*, 4 M. & W., 658). A complaint stated that the defendant, on, &c., was indebted to the plaintiff in $446 upon a balance of an account stated and then due to this plaintiff, which the defendant then and there promised to pay, but he has neglected to pay the same, except a payment of $150 on account, and he remains indebted to the plaintiff in the sum of $296, with interest. The defendant demurred, on the ground that facts sufficient to constitute a cause of action were not stated. The superior court at general term held that the complaint, although loosely drawn, was sufficient, and the demurrer was overruled (*Graham* v. *Camman*, 13 How. 360; and see *Mittenbeyer* v. *Atwood*, 18 How. 330; *Emery* v. *Pease*, 20 N. Y. 62). The giving a promissory note is *prima-facie* evidence of an accounting (*Lake* v. *Tysen*, 2 Selden, 461). The *time* when the account was stated need not be alleged (*Leaf* v. *Lees*, 1 Horn & Hurl. 478; 7 Dowl. P. C. 189; 4 M. & W. 579; *Bingley* v. *Durham*, 1 Per. & D. 58; 4 Dowl. 521).

g. **Adverse claim** to real estate, complaint in action to determine (*Hager* v. *Hager*, 38 Barb. 92), and complaint for that and other relief (see *Woodgate* v. *Fleet*, 9 Abb. 223).

a. **Assault and battery.**—[The material allegation is, that defendant assaulted and beat plaintiff.]

b. The complaint may state the business and employment of the parties, and the object and intent of the assault, together with the statement that it caused the plaintiff to be ridiculed, &c., and this held not to be immaterial or irrelevant. Although not essential to entitle the plaintiff to sustain his action, these allegations are material on the question of damages, and may be proved (*Root* v. *Foster*, 9 How. 37; and see *Gilbert* v. *Rounds*, 14 How. 46). So where the complaint alleged that on, &c., the defendant, with loud, boisterous, and abusive language,, made an assault on plaintiff, and seized him by the body, &c., and then and there, in the presence of divers persons published of and concerning the plaintiff the words, "You perjured yourself, and I will send you to the State prison;" and then and there pushed and jammed about the plaintiff. The defendant demurred, alleging that two causes of action were improperly united: The demurrer was overruled, and by the court, "The complaint in fact contains but one cause of action. The allegations relate to a single transaction, and no more; they state what was done and said on the occasion referred to. Each constitutes a part of the *res gesta*. What is alleged to have been done, would sustain an action for personal injury. What is alleged to have been said, would sustain an action for an injury to the reputation. The whole together constituting, as it does, but a single transaction, makes but a single cause of action" (*Brewer* v. *Temple*, 15 How. 286). In an action for an assault and battery, the plaintiff was allowed to amend his complaint on the trial by inserting an allegation that the defendant "wounded the plaintiff and bit off both his ears" (*Hagins* v. *De Hart*, 12 How. 322). A woman upon whom a rape has been committed may maintain an action for the injury. The gist of the action is the force and violence, and it should appear from the complaint that the connection was against the will of the plaintiff. In stating her cause of action, it is sufficient if the complaint conforms to what was formerly essential in the way of averment in actions of trespass for injuries to the person (*Kœnig* v. *Nott*, 8 Abb. 384; 2 Hilton, 323).

c. **Award.**—A complaint upon an award which directs one party to pay to the other a sum named, on demand, and provides that on payment by the one of that sum and the receipt of it by the other, each shall execute and deliver to the other a release in full of all demands, unless it avers the delivery or tender of such release, or an offer to deliver the same on payment of the sum so awarded, does not state facts sufficient to constitute a cause of action, notwithstanding it avers a demand of payment and a neglect and refusal by the defendant to pay the sum awarded (*Cole* v. *Blunt*, 2 Bosw. 11). The objection can be taken on an appeal from the judgment if the tender or offer was not proved on the trial. (*Id.*)

d. As to a complainnt to set aside an award for defects not appearing on its face, see *Borrowe* v. *Milbank*, 5 Abb. 28; *Allen* v. *Galpin*, 9 Barb. 246.

e. **Banking associations.**—Banking associations *may* sue or be sued by or in the name of their president (*Gillett* v. *Moody*, 3 Coms. 479; *Case* v. *Mechanics' B'king Asso.*, 1 Sand. 693; *East River B'k.* v. *Judah*, 10 How. 135); in which case the allegation must be that *the corporation* and not *the plaintiff* or *the defendant*, did this or that (*Delafield* v. *Kinney*, 24 Wend. 345; *Christopher* v. *Stockholm*, 5 id. 36; *Thomas* v. *Dakin*, 22 *id.* 9; *Worden* v. *Worthington*, 2 Barb. 368; *Merritt* v. *Seaman*, 2 Selden, 168); for the action is by or against the corporation, not by the president in right thereof (*Lowerre* v. *Vail*, 5 Abb. 229).

f. In an action on a bill of exchange, the complaint alleged that the plaintiff was one of the public registered officers of the Royal Bank of Liverpool, which was a banking company duly constituted and existing under the laws of the kingdom of Great Britain, and as such officer was duly authorized and empowered to commence any and all proceedings at law and in equity, on behalf of said bank, and that the suit was brought for the benefit and on behalf of the said bank. The complaint, in other respects, was in the usual form, and contained all the necessary averments to charge the defendant. The defendant demurred on the ground, among others, (1) that the complaint did

not state facts sufficient to constitute a cause of action; (2) that the action was not prosecuted in the name of the real party in interest; held that the demurrer could not be sustained on the first ground, but could on the second—the averment that the plaintiff was *duly authorized* to bring the action on behalf of the bank was not an averment of a fact, but a conclusion of law; and that the complaint was defective in not setting forth the existence and terms of the act of parliament, if any, under which the bank was organized and an authority given to the plaintiff, as one of its registered officers, to sue on its behalf (*Myers* v. *Machado*, 14 How. 149; 6 Abb. 198).

a. **Bond.**—(See *Undertaking.*) A complaint which alleges that "defendant *made* his certain bond or obligation, sealed with his seal, and in the words and figures following" setting out a copy of the bond, and alleging that defendant has not paid the sum therein mentioned, or any part thereof, and that the whole amount *is* due is sufficient; it need not allege any delivery (*La Fayette Ins. Co.* v. *Rogers*, 30 Barb. 491).

b. In actions on bonds for the breach of any condition, other than for the payment of money, or for any penal sum for the non-performance of any covenant or written agreement, the plaintiff is required to state in his complaint the specific breaches for which the action is brought (2 R. S. 378, § 5; 7 Wend. 345; 6 *Ib.*, 454; 4 *Ib.*, 570; *Western B'k.* v. *Sherwood*, 29 Barb. 383). This rule has been held to apply to actions on bonds given by non-resident plaintiffs to secure defendants' costs (5 Hill, 37). But that it did not apply to actions on bonds for payment of money by installments (17 Wend. 331; *Harman* v. *Dedrick*, 3 Barb. 192); nor to actions on bonds for the payment of an annuity (3 Wend. 454; 5 Hill, 37). The several breaches alleged are in the nature of distinct causes of action (*Beach* v. *Barons*, 13 Barb. 306).

c. In actions on bonds the judgment is for the penalty (*Western B'k.* v. *Sherwood*, 29 Barb. 383).

d. **Attachment bonds.**—In an action on an attachment bond, the plaintiff is bound to show that he has sustained some damage by reason of the attachment. He cannot recover on the mere fact that the plaintiff in the attachment did not succeed (*Winsor* v. *Orcutt*, 11 Paige, 578). In an action on a bond given for the appearance of a judgment debtor under attachment, in proceedings supplementary to execution, it is not necessary to set forth in the complaint, the issuing or return of an execution unsatisfied, nor that an order was made for the attachment (*Kelly* v. *McCormick*, 2 E. D. Smith, 503); but in an action upon a bond given on the arrest of a party upon an attachment issued for a contempt, the plaintiff should state in the complaint his connection with the attachment, and how he was aggrieved by the acts of the defendant (*Raynor* v. *Clark*, 3 Code Rep. 230).

e. In a complaint on a bond given to secure the discharge of a warrant of attachment issued under the act for the collection of demands against ships, the plaintiff should, to sustain the bond as a statute security, not only aver the facts showing that such warrant of attachment was duly issued, and that the bond was duly executed by the defendants, and that the claim of the creditor has not been paid, but also the bond was delivered to the officer by whom the warrant of attachment was issued in such wise that it became his duty to grant a discharge of the warrant (*Clark* v. *Thorp*, 2 Bosw. 680). If such averments be made it will be presumed the officer did his duty, that the applicant for the discharge obtained the benefit thereof, and that so the bond became operative in the plaintiff's favor as a statute security, although it is not averred that the officer approved the security nor that the discharge was granted, nor that the vessel was released from the custody of the sheriff. The acceptance of the bond by the officer would import that he approved of the security; and if the warrant was not in fact discharged nor the vessel released, the defendant must set up such facts as a defence. (*Id.*)

f. But when the complaint does not aver that the bond was delivered to the officer, nor that he approved the security, nor that an order for the dis-

charge of the warrant was granted, nor that the vessel has been released from custody, said complaint cannot be sustained upon the bond, regarded merely as a statutory security. (*Id.* see *Palmer* v. *Meloni*, 6 Cal. 651). But such a bond is nevertheless a valid security and not merely a voluntary obligation; the seals import consideration, and the condition being the payment to the plaintiff of the claims, &c., exhibited which should be established to have been subsisting liens upon the vessel, and a breach of the condition being alleged, the complaint is sufficient notwithstanding it does not show the full compliance with the statute. (*Id.*)

a. **Bond of a Railroad.**—For the form of a complaint on a railroad bond, see *Miller* v. *N. Y. & Erie R. R. Co.*, 8 Abb. 431; *Hubbard* v. *N. Y. & Harlem R. R. Co.*, 14 Abb. 275; 36 Barb. 286.

b. **Executors' bonds.**—An action may be maintained on an executor's or administrator's bond, when forfeited by the non-payment of a sum decreed by the surrogate to be paid to a legatee or creditor pursuant to 2 R. S. 72, § 19, though the decree has not been docketed, nor an execution issued and returned, and though the bond has not been assigned as authorized by Laws 1837, p. 135, §§ 63 to 65; Laws 1844, p. 90, §§ 1, 2 (*The People* v. *Guild*, 4 Denio, 551). The complaint must show the surrogate had jurisdiction (*Mahoney* v. *Gunter*, 10 Abb. 431).

c. **Replevin bonds.**—In an action on a replevin bond, the complaint need not state that the bond was executed *on behalf* of the plaintiffs in the replevin. (*Shaw* v. *Tobias*, 3 Coms. 190.) And when the action is on a bond executed to a coroner, the complaint need not state that the writ of replevin was directed to the coroner. That fact will be presumed from giving the bond to him. (*Id.*)

d. **Constable's bonds.**—An action on a constable's bond in the city of New York could only be prosecuted after judgment against the constable, and after leave to put the bond in suit obtained from the court of Common Pleas (*Davis* v. *Kruger*, 4 E. D. Smith, 350; see *Carpenter* v. *Doody*, 1 Hilton, 465; *Mayor of N. Y.* v. *Brett*, 2 Hilton, 560; see *Mayor of N. Y.* v. *Lyons*, 24 How. 280, as to entry of judgment in such actions).

e. **Lost bond.**—In an action on a lost bond, it is not necessary to allege the loss in the complaint (*Super. of Livingston* v. *White*, 30 Barb. 72).

See, *Pleading a Written Instrument.*

f. **Bills of exchange.**—(See *Promissory notes*, and sect. 162, *post.*)

g. **Indorsee against acceptor and maker.**—The complaint alleged the making and acceptance of two drafts, and then alleged that "payment of both of said drafts was duly demanded at maturity, and that the same were thereupon duly protested for non-payment, and that notice thereof was duly given to the said indorsers." A demurrer, that the complaint did not state facts sufficient, &c., was overruled (*Woodbury* v. *Sackrider*, 2 Abb. 405; *Price* v. *McClave*, 3 Abb. 254; *Pahquioque B'k.* v. *Martin*, 11 Abb. 291; *Ferner* v. *Williams*, 14 Abb. 215).

h. Where the complaint alleged that the defendants made a certain acceptance, a copy of which was set out, that the payee indorsed it, that the defendants were indebted to the plaintiff thereon in an amount specified,—this, on motion to continue an injunction, was held a sufficient statement of a cause of action (*Levy* v. *Ley*, 6 Abb. 89).

i. A complaint which alleged the drawing of the bill, describing it, a delivery of it to the payee, who then and there indorsed it and delivered it so indorsed, and thereafter and before maturity the same came lawfully into the possession of plaintiffs for value, that said bill is past due and unpaid, and the defendants are now jointly indebted to plaintiffs thereon in the sum of $1,200, is sufficient (*Phelps* v. *Ferguson*, 19 How. 143).

j. **Checks.**—(See sect. 162, *post.*) A complaint in an action by the payee against the drawer of a check, must allege notice to the maker, of a demand and non-payment of the check; and where in such an action the complaint averred that the check had been delivered to the plaintiff for value, and that its payment had been demanded at the bank, but it had not been paid, with-

out any averment of notice of this demand and non-payment to the plaintiff, or of any fact excusing notice, it was on demurrer held insufficient (*Shultz* v. *Depuy*, 3 Abb. 252). Where the plaintiff in an action on a check relies on facts which excuse notice of presentment and non-payment, he must state such facts in his complaint. An averment of due notice will not be sustained by evidence of facts excusing notice (*Garvey* v. *Fowler*, 4 Sand. 665, and see *Oakley* v. *Morton*, 1 Kernan, 26; *Holmes* v. *Holmes*, 5 Selden, 525).

a. **Promissory notes.**—(*See Bill of Exchange*, and section 162, *post.*)—*By receiver.*—Where a plaintiff claims title to a note, by virtue of his appointment as receiver of an insurance company styled A., and the note is payable to a company styled B., the complaint should contain averments to show that the note in suit does in fact form part of the assets of the A. company. Thus, if after the making of the note the style of the company had been changed, the complaint should allege, that the company was originally incorporated in the name A., and transacted business in that name, and so transacted business at the time the note was made, and that afterwards, by virtue of the act of &c., it was reorganized in the name of B.,—and then set out the proceedings by which he was appointed receiver, &c. (*Hyatt* v. *McMahon*, 25 Barb. 457).

b. **Note signed in a firm name.**—In an action against J. M., H. M. & J. C., the complaint set out a note signed "J. M. & Co., and indorsed H. M. & J. C." The plaintiff claimed as indorsee. Defendant demurred for not stating facts sufficient, &c., and the objection was that a note made by J. M. & Co. was not the note of J. M. The objection was held good, and that it was an objection which might be taken under that ground of demurrer. To have made the complaint sufficient, it should have been alleged that J. M. made the note in the name of J. M. & Co. (*Price* v. *McClave*, 6 Duer, 544; see *Ball* v. *Gordon*, 9 M. & W. 345; *Tigar* v. *Gordon*, *id.* 347).

c. **Against maker.**—A complaint that defendant, on, &c., for value received, made and delivered to plaintiff his promissory note in writing, payable to the order of the plaintiff, and endorsed by him, of which the following is a copy: New York, July 1, 1853. Sixty days after date, I promise to pay to the order of E. K. $204 for value received.—J. M. That there is due and owing the said plaintiff, the said sum of $204, with interest thereon, from, &c., wherefore the plaintiff demands judgment for, &c., was on demurrer that it did not state facts sufficient, &c.; held sufficient (*Keteltas* v. *Myers*, 19 N. Y. 231; reversing S. C. 3 E. D. Smith, 83). Where the complaint stated that on, &c., defendant made his promissory note, dated on the day last named, whereby, on demand, he promised to pay to the plaintiff, or his order $2,500, for value received, and then and there delivered said note to the plaintiff. And defendant, though often requested, has not paid said note or any part thereof, and the whole amount thereof is now remaining due and unpaid. The defendant demurred for not stating sufficient facts to constitute a cause of action. The complaint held sufficient (*Niblo* v. *Harrison*, 7 Abb. 447, and note).

d. In *Genet* v. *Sayre*, 12 Abb. 347, a complaint as follows was on demurrer held to be sufficient: that defendant at, &c., made his promissory note in writing, dated, &c., whereby he promised to pay, two months after the date thereof, to the order of the Hanover Bank $400 for value received, and although said note became due before the commencement of this action, yet defendant has not paid same, and plaintiff says he is the lawful holder and owner of said note, and defendant is justly indebted to him thereon in $400 principal with interest from, &c.

e. Where the complaint alleged that on, &c., "the defendant by his promissory note in writing, for value received, promised to pay to P. [the plaintiff], or bearer, the sum of $839 with interest, and he has not paid the same, but is justly indebted to the plaintiff therefor, wherefore the plaintiff demands judgment, &c., on demurrer it was held sufficient (*Peets* v. *Bratt*, 6 Barb. 662). But by the court, "This complaint is very loose."

f. A complaint alleged the making of the note by the defendant John Totten, payable to the order of the defendant William Totten; that John Totten delivered the note to William Totten, "who thereupon indorsed the same and

duly delivered it; and said note, before it became due, was duly delivered to, and came into the possession of the plaintiffs." The defendant demurred on the ground that the complaint did not state facts sufficient, &c. The plaintiff moved for judgment on the demurrer as frivolous. The motion was denied, and the complaint held insufficient in not alleging how the note was indorsed, whether in blank or otherwise, nor by whom it was delivered to the plaintiff (*Parker* v. *Totten*, 10 How. 234). And where a complaint alleged that the defendant on, &c., made his promissory note in writing, dated on that day, whereby, for value received, he promised to pay to W. Rork or order $132, six months after date, for value received, with use, and then and there delivered the said note to the said W. Rork; this was followed by a copy of the note, purporting to be signed by the defendant; and then followed an allegation that the plaintiff was the *bona fide* holder and owner of the said note, that the defendant had not paid the same or any part thereof, but was justly indebted to the plaintiff therefor. On demurrer that the complaint did not state facts sufficient, &c., it was held that the complaint was insufficient, as it did not show that W. Rork had ever indorsed the note or otherwise passed his interest therein (*White* v. *Brown*, 14 How. 282; and see *Thomas* v. *Desmond*, 12 *id.* 321). But where the complaint, after alleging (it is presumed; the report does not say so) the making of the note, also alleged that the note "was duly endorsed by the payee, and transferred to the plaintiff for a good and valuable consideration, and that the defendant had not paid the same, but was justly indebted to the plaintiff therefor,"—the defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, and it was contended that it was not shown that the plaintiff was the holder and owner of the note. The demurrer was adjudged frivolous (*Taylor* v. *Corbiere*, 8 How. 388). And where a complaint on a promissory note alleged that he defendant made the note payable to his own order, and indorsed it to *J. M.*, and "*the plaintiff is now the bona fide holder and owner of the note*," the defendant demurred on the ground "that no facts were stated showing *how* the plaintiff became the holder and owner of the note." On motion for udgment, Harris, J., held the demurrer frivolous; that the complaint stated enough to entitle the plaintiff to recover (*Holstein* v. *Rice*, 15 How. 1). And where the complaint averred that the defendant made his note to the Atlas Mutual Ins. Co. or order, and that the company indorsed it and transferred and delivered it to the plaintiffs, but did not expressly aver that the transfer was made pursuant to a resolution of the board of directors—*Held*, on demurrer, that if such resolution was necessary, it was implied and provable under the allegation that the company transferred the note (*Nelson* v. *Eaton*, 15 How. 305; 7 Abb. 305; see *Mechanics' B'k'g Asso.* v. *Spring Valley Shot Co.*, 25 Barb. 419; rev's'g, 13 How. 227; *N. Y. Floating Derrick Co.* v. *N. J. Ore Co.*, 3 Duer, 648).

a. The complaint set forth that the defendant made his promissory note in these words: (date) On, &c., I promise to pay to V. C. (the plaintiff), agent of the company, B. G. & Co., $5,000, for which I am to receive stock of said company to the amount of $5,000, value received; A. Brisbane (the defendant). It then alleged the delivery of said note to plaintiff, its non-payment, and that defendant was indebted thereon $5,000. The defendant demurred that the complaint did not state facts, &c. The demurrer was sustained, principally on the grounds that the instrument set out was not a promissory note, and that there was no allegation that the plaintiff had ever tendered the stock to the defendant (*Considerant* v. *Brisbane*, 14 How. 487; 2 Bosw. 471).

b. Query.—Where a note is made by A, payable to B or his order, and indorsed in blank by C, can B sue C as maker or guarantor of the note (See *Waterbury* v. *Sinclair*, 16 How. 329; 7 Abb. 399; 6 *id.* 20; *Murphy* v. *Merchant*, 14 How. 189; *Hahn* v. *Hull*, 4 E. D. Smith, 664; *Hauck* v. *Hund*, 1 Bosw. 431)? He can (*Moore* v. *Cross*, 19 N. Y. 227; 17 How. 385; *Spies* v. *Gilmore*, 1 Coms. 321; *Cottrell* v. *Conklin*, 4 Duer, 45).

c. **Against indorser or indorser and maker.**—As against an indorser, the complaint must allege presentment at the place where made payable, and non-payment, and notice to the indorser of such presentment and non-payment

(*Spellman* v. *Weider*, 5 How. 7; *Price* v. *McClave*, 6 Duer, 544; *Spencer* v. *Rogers Locom. Works*, 17 Abb. 110). An allegation that the note was *protested* is not an averment, nor equivalent to an averment, that the note had been duly presented for payment to the maker, and that payment had been refused (*Price* v. *McClave*, 3 Abb. 254; and 6 Duer, 547).

a. In an action against two, one as maker and the other as endorser of a promissory note, payable to the order of the plaintiff and endorsed by him, the complaint averred that the note was made by the defendant, G. F. M., and "for a further inducement to the plaintiff to accept the same, was endorsed by the defendant M. I. M., and was then delivered and endorsed by the plaintiff," and then set out the note and alleged demand and refusal of payment and notice thereof. The defendant, the alleged maker of the note, demurred that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was allowed, and 3 Sand. 647; 2 Duer, 40, were referred to (*Murphy* v. *Merchants*, 14 How. 190).

b. In *Pahquioque Bank* v. *Martin*, 11 Abb. 291, it was held that a complaint against an endorser which alleged that the note was duly presented and payment demanded, but it was not paid, and it was thereupon duly protested for non-payment, "and due notice of such non-payment was given to defendants" was held insufficient on the ground that notice of *non-payment* was not notice of *dishonor* (see, however, *Ferner* v. *Williams*, 14 Abb. 215).

c. To charge the *endorser* on a note payable at a particular place, the note must be presented at that place, and in a complaint against such endorser, presentment at that place must be alleged, but an allegation that the note at maturity was *duly* presented to the maker for payment, was held, by force of section 162, a sufficient averment of presentment at the place named (*Ferner* v. *Williams*, 14 Abb. 215; see, however, *Pahquioque Bank* v. *Martin*, 11 Abb. 291).

d. Where the complaint alleges the making of the note, its endorsement by the payee W. D., to plaintiff, and that payment of the note was duly demanded at maturity, and it was thereupon duly protested for non-payment, and notice thereof duly given to the endorser—held sufficient by virtue of section 162 (*Adams* v. *Sherrill*, 14 How. 297).

e. A complaint on several promissory notes, only one of which is due, but payment of all of which is claimed under an agreement in writing made contemporaneously with the notes, that in case of any default in payment of the notes the whole amount should forthwith become due and payable, is sufficiently definite and certain, if it alleges the making of the notes in consideration of an indebtedness in their amount, and the making of the agreement, without stating when, where, or how the indebtedness arose (*Brown* v. *So. Mich. R. R. Co.*, 6 Abb. 237).

f. A complaint which alleged that S. W. W., and W. W. as his surety, on, &c., at, &c., made their promissory note in writing, whereby they promised to pay to F. W. or order, ninety days after date, $100 for value received; that said F. W. endorsed said note to plaintiff, and that when said note became due, it was duly presented for payment to defendant S. W. W. and payment duly demanded, but was not paid, and due notice given to defendants W. W. and F. W. that plaintiff is the lawful owner and holder of said note, that same is not paid, and that defendants are indebted to plaintiff thereon in $100,—was held sufficient (*Osgood* v. *Whittlesey*, 10 Abb. 134).

g. **Premium note.**—In an action on a premium note to recover an assessment, a demand of payment before action brought should be alleged, *semble* (*Hurlbut* v. *Root*, 12 How. 511).

h. **Lost note—Destroyed note.**—A plaintiff cannot recover on a lost note without giving the bond required by 2 R. S. 406 (*Desmond* v. *Rice*, 1 Hilton, 530; and see *Smith* v. *Young*, 2 Barb. 545); but where the note has been destroyed, the owner may maintain an action for the amount without giving a bond (*Des Artes* v. *Leggett*, 16 N. Y. 382).

a. **Dishonoring note.**—Complaint against banker for dishonoring note (*Marzetti* v. *Williams*, 1 B. & A. 415).

b. **Carriers—for non-delivery or loss of goods.**—[The material allegations are, (1) defendants were common carriers; (2) received plaintiff's goods; (3) for reward paid [or to be paid] them; (4) undertook to carry and deliver; (5) the non-delivery.]

c. Unless the plaintiff alleges in the complaint that the defendants were common carriers, they cannot be held responsible in that character; and unless it is alleged that the defendants received or were to receive compensation, their promise to carry will be regarded as made without consideration (*Bristol* v. *Rensselaer R. R. Co.*, 9 Barb. 158). It is not necessary to allege what was the reward paid or to be paid (2 New Rep. 458; 13 East, 114, note *a*; 2 Ld. Raym. 115); and perhaps stating that the defendants received implies that they were to be paid therefor (*Nolton* v. *West. R. R. Corp.*, 15 N. Y. 446). It seems no previous demand of the goods is necessary (*Schroeder* v. *Hudson R. R. Co.*, 5 Duer, 55). It is not necessary to allege that the loss was without any fault on the part of the plaintiff (*Richards* v. *Westcott*, 2 Bosw. 590).

d. What must be alleged in a complaint to recover for goods received by one railroad to be transported over its line, and over a line connected therewith, and lost on the road (*Hempstead* v. *N. Y. Cent. R. R. Co.*, 28 Barb. 502).

e. In an action against a carrier by water for the loss of goods, it is unnecessary to allege that the defendant was the owner of the vessel in which the goods were shipped; and if an allegation of ownership is made it is immaterial (*Bennion* v. *Davidson*, 1 Horn & H. 46).

f. **For injury to passengers.**—Where a railroad company undertakes gratuitously to convey a passenger, and he receives an injury by the negligence of the company's agent, the company is liable; in such case a complaint which stated that defendants received plaintiff as a passenger, and while he was a passenger, he, by the negligence of the defendants was injured, was held to state a cause of action (*Nolton* v. *West. R. R. Corp.* 15 N. Y. 444).

g. **For refusing to carry goods.**—In an action against a common carrier for refusing to carry goods, it is only necessary to aver that the plaintiff was ready and willing to pay what the defendant was legally entitled to receive for the receipt and carriage of the goods; it is not necessary to aver an actual tender of the amount (*Pickford* v. *Grand Junc. Railway Co.*, 8 M. & W. 372; 9 D. P. C. 766).

h. **Against a constable for not returning an execution.**—In order to maintain an action against a constable and his sureties, for not collecting an execution issued by a justice of the peace, the plaintiff must show a valid judgment in an action in which the justice had jurisdiction both of the subject-matter of the action and of the person of the defendant (*Westbrook* v. *Douglass*, 21 Barb. 602). See as to liability of constable for not returning executions from district courts in the city of New York, Laws 1857, vol. 1, p. 722, § 57.

i. **For surplus money.**—In an action against a constable for surplus money collected by him on an execution, the complaint must show that the return day of the execution is past, a demand of such surplus money, and a refusal or neglect to pay the same (*Bortel* v. *Astrander*, 15 How. 572). And the same was held of a sheriff (*Ainslie* v. *Rapelje*, 3 Up. Can. Q. R. Rep. 275; see, however, 9 Iredell's R. 307, 496).

j. **For refusing to receive a bond and deliver goods taken under an attachment.**—See *Kamena* v. *Warner*, (6 Abb. 198; 4 Duer, 698; overruling S. C. 15 How. 5); see *Bond, Money Received.*

k. **By or against corporations.**—The code contains no new enactments in respect to pleadings in suits by corporations; and the provisions of art. 1, tit. 10, ch. 8, pt. 3 of the revised statutes are expressly retained (Code, § 471); so that the rules of pleading in these actions are the same as they were at common law, with only the modifications introduced by the revised statutes.

At common law it was well settled that when an action was brought by a corporation they need not show how they were incorporated. * * * * * By the revised statutes two changes were introduced; the first, that it should no longer be necessary for a corporation plaintiff to prove itself a corporation, unless its corporate existence was denied by a plea averring that it was not a corporation. * * * * The other was, that in stating or averring an act of incorporation, or the corporate character of a party plaintiff or defendant, it should not be necessary to recite the character or the proceedings creating the corporation, or to set forth the substance of such act of incorporation, but it should be enough to state the act under which the corporation was created, by its title and the date of its passage (*B'k. of Waterville* v. *Beltser*, 13 How. 272); and where the act of incorporation has been amended it is sufficient, after designating the act of incorporation, to say, "together with the several acts amendatory thereof" (*Sun Mut. Ins. Co.* v. *Dwight*, 1 Hilton, 50; and see *Oswego & Syracuse Plank Road Co.* v. *Rust*, 5 How. 390). Since the code, as before, a domestic corporation plaintiff needs not in the complaint in any manner show how it was created (*id.; La Fayette Ins. Co.* v. *Rogers*, 30 Barb. 491; *Elizabethport Manuf. Co.* v. *Campbell*, 13 Abb. 86); nor recite the title or the date of the act of incorporation (*Shoe & Leather B'k.* v. *Brown*, 9 Abb. 218; 18 How. 308; *Kennedy* v. *Cotton*, 28 Barb. 59); and where plaintiffs sue in a name which is appropriate to a corporate body, for example, as The Union Mutual Insurance Company, the plaintiff will be intended for all the purposes of the suit to be a corporation, unless the contrary be averred in the answer (Laws of 1845, ch. 345); and the plaintiffs need not aver it in their complaint, because it is a general rule that it is unnecessary to aver anything in the complaint that is not required to be proved; and a corporation plaintiff created by the laws of this State, need not prove its existence on the trial of the cause unless the defendant shall have pleaded that the plaintiffs are not a corporation (*Mut. Ins. Co.* v. *Osgood*, 1 Duer, 708; *Holyoke B'k.* v. *Haskins*, 4 Sand. 675; *Metrop. B'k.* v. *Lord*, 1 Abb. 185; *La Fayette Ins. Co.* v. *Rogers*, 30 Barb. 491; *Light* v. *Everett Fire Ins. Co.*, 5 Bosw. 716); and a mere general denial will not call for this proof (*B'k. of Genesee* v. *Patchin B'k.*, 3 Kernan, 314; *contra, Johnson, Pres't., &c.*, v. *Kemp*, 11 How. 186; *B'k. of Havana* v. *Wickham*, 16 How. 97; 7 Abb. 134; and see *B'k. of Lowville* v. *Edwards*, 11 How. 216).

a. In an action by a *foreign* corporation, the complaint must state that the plaintiffs are a corporation, except in the cases where the defendant is estopped from denying the incorporation, as by having contracted with the plaintiffs by their corporate name (*Connecticut Bank* v. *Smith*, 9 Abb. 168; 17 How. 487). Thus, where the plaintiffs sued as The President, Directors and Company of the Connecticut Bank, claiming to recover as the endorsees of notes made by the defendants, but did not aver that they were a corporation, held on demurrer that the complaint was insufficient (*id.*); and subscribers to a stock subscription cannot question the right of the corporation to sue (*Owego Plank Road Co.* v. *Rust*, 5 How. 390).

b. In an action brought by a religious society, the plaintiffs must prove their corporate existence, if that fact is denied by the answer (*Methodist Epis. Union Church* v. *Picket*, 23 Barb. 436; aff'd 19 N. Y. 484).

c. In an action by the officer of a joint-stock company, the allegation in the complaint that that the company is a joint-stock company or association, consisting of more than seven shareholders or associates, is, under the act of 1849 relating to such suits, a material and issuable allegation (*Tiffany* v. *Williams*, 10 Abb. 204).

d. A plaintiff by suing a defendant by a corporate name, admits the corporate existence of the defendant, and must be held to have admitted the performance by it of all such acts as by its charter were conditions precedent to its entering upon a state of legal existence (*The People* v. *Ravenswood Turnpike Co.*, 20 Barb. 524).

e. In suing a corporation by its corporate name, the plaintiff need not set out the act of incorporation (*Stoddard* v. *Onondaga Ann. Conf.*, 12 Barb. 573), nor allege that defendants are a corporation (*Lighte* v. *Everett Ins. Co.*, 5 Bosw

716). If the defendants use a corporate name, and as such contract the obligation, they cannot, when sued by such corporate name, set up that they are not a corporation (*id.*); and where the complaint alleged that "the defendant is an incorporated company, doing business at Moriah, in the county of Essex," it was held sufficient, and that the court would not intend that the defendant was a foreign corporation (*Acome* v. *Amer. Mineral Co.*, 11 How. 26). In *Hunter* v. *Hud. Riv. Iron and Machine Co.* (20 Barb. 493), the complaint commenced by stating that the defendants were a manufacturing company, formed under the act of March 22, 1811; and nothing more was said as to the corporate character of the plaintiff. No objection was made. See *Foreign Corporation, Stockholder.*

a. In actions in the local courts of cities mentioned in section 33 of the Code of Procedure against domestic corporations transacting their business, or keeping an office within such cities, it is not necessary for the complaint to show that the defendants transact their general business or keep an office within such city (*Corn Ex. Bank* v. *Western Transp. Co.*, 15 Abb. 319, *note*).

b. The title to the rights of action against a corporation on its dissolution, as to the personal estate, passes either at common law to the people, or under the statute to a receiver. A creditor of a dissolved corporation (in another State, with judgment and execution returned unsatisfied) cannot sustain an action against such corporation, unless he shows that the right of action does not pass to the people, or to a receiver, or that the receiver colludes with the defendants, or that no receiver can be appointed (*Tinkham* v. *Borst*, 15 How. 204).

c. A promissory note made by a corporation incorporated by the laws of a foreign State, will be deemed to be valid and authorized by the charter of the corporation until the contrary appears; and therefore in an action on such a note, in the courts of this State, the complaint need not show that the making the note sued upon was an act within the corporate power of the company defendant, or pursuant to a resolution of the board; if in fact the note was made in violation of the defendant's charter of incorporation, that is matter of defence (*N. Y. Floating Derrick Co.* v. *N. J. Ore Co.*, 3 Duer, 648; *Halstead* v. *Mayor of N. Y.*, 5 Barb. 218; see *Nelson* v. *Eaton*, 15 How. 305; 7 Abb. 305; *Ogden* v. *Raymond*, 5 Bosw. 62; *Mechanics' B'k'g Asso.* v. *Spring Valley Shot Co.*, 25 Barb. 419; rev's'g 13 How. 227; *Moss* v. *Averell*, 10 N. Y. 449; see *post* in note to § 149; *What may be denied*).

As to foreign corporations, see sect. 427, *post.*

d. A corporation, or the receiver of a dissolved corporation, cannot maintain an action for usurious premiums paid on loans (*Butterworth* v. *O'Brien*, 7 Abb. 456; 28 Barb. 187; 16 How. 503).

e. **Covenant.**—In assigning a breach of covenant, "it must distinctly appear, by express words, or by a necessary implication, that, admitting the truth of the facts stated in the complaint, the defendant has broken the covenant in its true sense and meaning. The words of the covenant need not be literally, but must in all cases be substantially followed" (*Schenk* v. *Naylor*, 2 Duer, 678). Therefore, where the complaint alleged a lease of a basement, containing a covenant "that the defendant should not let or underlet any other part of the building as a restaurant or porter house," and then alleged a breach as follows: "Plaintiffs show that on, &c., a porter-house was opened on the first floor above the basement so let by plaintiff to defendant, which porter-house is still occupied as such, to the great damage of plaintiffs, and in violation of defendant's agreement as above stated,"—a demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, was sustained, because the complaint did not show any breach of the covenant; the covenant is not general, and is limited to the personal acts of the defendant; and the breach does not allege, that any of the acts supposed to constitute the breach, were done by the defendant. The words "in violation of the defendant's agreement" are added, but these words aver only a conclusion of law; and as the averment is not justified by any facts stated in the complaint, the averment is irrevelant and nugatory; and see *Lynch* v. *Murray*, 21 How. 154.

a. Where a covenant was that *they* (the defendants) would not carry on any trade, a breach alleging that *one* had carried on trade was held insufficient (*Lawrence* v. *Kidder*, 10 Barb. 642).

b. An averment that a boat has been greatly damaged, and is constantly depreciating in value, by reason of being withdrawn from navigation and laid up at the dock, and from want of care to her safe-keeping, and from the defendant's neglect to keep her in good order and repair, and in a state fit for navigation, is not a proper form of averring a breach of the agreement to keep the boat in repair (*Coster* v. *N. Y. and Erie R. R. Co.*, 6 Duer, 44). To allege that defendants covenanted without stating or showing how they covenanted, is not sufficient (*Austin* v. *Searing*, 16 N. Y. 122; *Laraway* v. *Perkins*, 10 N. Y. 371).

c. In an action by a landlord against an assignee of the lease, for a breach of a covenant to pay rent, if the complaint alleges a demand and refusal of the rent, it need not also allege that the rent remained unpaid at the commencement of the action (*Holsman* v. *De Gray*, 6 Abb. 79). In an action to recover the possession of demised premises for non-payment of the rent, the complaint need not allege a demand of payment of the rent (*Mayor of N. Y.* v. *Campbell*, 18 Barb. 156). Whether it must aver that there is not a sufficiency of goods on the demised premises to satisfy the rent. Query. (*Id.*)

d. Where in an action for rent accrued upon a lease in fee, the complaint alleged that the grantor and covenantee V. R. died on, &c., seized of the rent in question, that by his will he devised said rent to W., and that on, &c., W. conveyed said rent to A., and that A. conveyed it to the plaintiff, held sufficient to show title in plaintiff, and that it was unnecessary to allege that plaintiff had continued owner; that would be presumed (*Van Rensselaer* v. *Bonesteel*, 24 Barb. 365).

e. In an action for a breach of covenant the alleged damages must be averred in the complaint (*Neary* v. *Bostwick*, 2 Hilton, 514).

See *Rent.*

f. **Cloud on title.**—Complaint to remove (*Johnson* v. *Stevens*, 13 How. 132).

g. **Commissioners of Highways.**—Requisites of complaint against commissioners of highways for not repairing bridges (*Smith* v. *Wright*, 27 Barb. 621).

h. **Compromise.**—Requisites of complaint to recover amount agreed to be paid to compromise a doubtful claim (*Dolcher* v. *Fry*, 37 Barb. 152).

i. **Creditor's bill.**—The remedy formerly known as a creditor's bill, was one given by statute (2 R. S. 174; § 38). The statute is unrepealed, except that portion that authorizes a discovery, and the remedy remains as before; but the mode of pursuing the remedy must be by action commenced by summons and complaint (*Catlin* v. *Doughty*, 12 How. 457; *Hammond* v. *Hudson River Iron & M. Co.*, 20 Barb. 378; *Rogers* v. *Hern*, 2 Code Rep. 79). Such an action is not an action on the judgment (*Dunham* v. *Nicholson*, 2 Sand. 636; *Catlin* v. *Doughty*, 12 How. 45 . Upon a judgment taken against joint debtors, of whom some only have been served with process, a creditor's action can be maintained to reach the separate property of the defendants served, but not to reach the property of those not served (*Billhofer* v. *Heubach*, 15 Abb. 143; *Field* v. *Chapman*, 13 Abb. 320; *Field* v. *Hunt*, 22 How. 329; affirmed, 24 How. 463; see, however, *Field* v. *Hunt*, 23 How. 80; *Field* v. *Chapman*, 14 Abb. 133). A creditor's bill cannot be maintained on a judgment in a foreign State (*McCartney* v. *Bostwick*, 31 Barb. 390). The plaintiff is not entitled to this remedy until he has made a *bona-fide* effort to collect his debt by execution, and the execution has been returned unsatisfied (*Parshall* v. *Tillou*, 13 How. 7); and the execution must have been against the property of all the judgment debtors, and the remedy thereon pursued to every available extent (*Field* v. *Chapman*, 13 Abb. 320; *Field* v. *Hunt*, 22 How. 329; affirmed, 24 How. 463; see, however, *Field* v. *Hunt*, 23 How. 80). The action may be commenced immediately after the execution has been returned unsatisfied, although sixty days

have not elapsed since it issued (*Forbes* v. *Waller*, 25 N. Y. 430; *Forbes* v. *Logan*, 4 Bosw. 475; *Knauth* v. *Bassett*, 34 Barb. 31; *Field* v. *Hunt*, 24 How. 463; *Field* v. *Chapman*, 14 Abb. 133; 15 Abb. 434; *Billhofer* v. *Heubach*, 15 Abb. 143; overruling *Field* v. *Chapman*, 13 Abb. 320; *Renaud* v. *O'Brien*, 25 How. 67). It should appear on the face of the complaint that execution has issued to the county where defendant resided, and has been returned unsatisfied (*Cooper* v. *Clason*, 1 Code Rep. N. S. 347; *Campbell* v. *Foster*, 16 How. 275); but unless it appears on the face of the complaint that the defendant has real property in the county in which he resides, the complaint need not show that the judgment has been docketed in such county (*Millard* v. *Shaw*, 4 How. 137). The remedy on a judgment of a justice's court is not exhausted until the judgment has been docketed in the county clerk's office, and an execution against real estate has been issued (*Dix* v. *Briggs*, 9 Paige, 595); and the necessity for docketing the judgment in the office of the county clerk will not be dispensed with by an averment that the defendant has no real estate (*Coe* v. *Whitbeck*, 11 *id.* 42); therefore an action in the nature of a creditor's bill cannot be sustained by a judgment of a justice's court, where the only execution returned unsatisfied was that issued by the justice (*Crippen* v. *Hudson*, 3 Kernan, 161). But if the judgment was in the supreme court, the allegation of docketing was not necessary (*Youngs* v. *Morrison*, 10 Paige, 325). The rules of the late court of chancery required that in a creditor's bill it should be alleged that it was not preferred and prosecuted by collusion, for the purpose of protecting the property and effects of the debtor against the claims of other creditors; and further, that the defendant had equitable interests or property to the value of $100 or more. These rules are supposed to be no longer in force, and it is sufficient if the plaintiff comply with the code and set forth all that, by the revised statutes, is made requisite to the filing a creditor's bill (*Quick* v. *Keeler*, 2 Sand. 231; *Hammond* v. *Hudson River Iron and Machine Co.*, 20 Barb. 386; *Mallory* v. *Norton*, 21 *id.* 436; *Batterson* v. *Ferguson*, 1 Barb. 490). And now a creditor's bill may be maintained although less than $50 are due (*Sarsfield* v. *Van Vaughner*, 15 Abb. 65; 38 Barb. 444; reversing, 14 Abb. 297; and dictum, *Butts* v. *Dickinson*, 20 How. 235; *Shepherd* v. *Walker*, 7 How. 46; *Cobine* v. *St. John*, 12 How. 337; and see *Dix* v. *Briggs*, 9 Paige, 595).

a. If defendant has property liable to execution, that fact may be set up in the answer, and if established by proof, will entitle the defendant to a dismissal of the complaint (*Millard* v. *Shaw*, 4 How. 137). If there should be any oppression in resorting to this form of action, instead of pursuing the summary proceedings given by the code, the court will consider that in its disposition as to the costs of the action (*Catlin* v. *Doughty*, 12 How. 460).

b. A judgment creditor, without resorting to an execution, may maintain an action to set aside any fraudulent transfer of property made by the judgment debtor (*Parshall* v. *Tillou*, 13 How. 7; *Loomis* v. *Tift*, 16 Barb. 541; *Cooper* v. *Clason*, 1 Code Rep. N. S. 347; *Skinner* v. *Stuart*, 13 Abb. 442; *Wilson* v. *Forsyth*, 24 Barb. 105; *Gaspar* v. *Bennett*, 12 How. 307; *contra*, see *McCullough* v. *Colby*, 5 Bosw. 477); and after a receiver has been appointed in supplementary proceedings (*Gere* v *Dibble*, 16 How, 31); the revised statutes (2 R. S. 174, §§ 38, 39), apply only to creditor's bills, strictly so called, where the only claim to relief is that the remedy at law is exhausted, and they leave untouched the common-law powers of the court, as a court of chancery, in reference to fraudulent trusts and conveyances (*Chautauque County Bank* v. *White*, 2 Selden, 236). The creditor, on establishing a lien, or *quasi* lien, on the property conveyed away, is entitled to relief, notwithstanding he may have a remedy on his execution. (*Id.*; *Greenwood* v. *Broadhead*, 8 Barb. 593; *Crippen* v. *Hudson*, 3 Kernan, 161). But a creditor not having a lien or *quasi* lien by judgment, or otherwise, has no right to ask to have a transfer set aside as fraudulent (*Reubens* v. *Joel*, 13 N. Y. 488; *N. Y. Ice Co.* v. *N. Western Ins. Co.*, 21 How. 296).

c. A creditor who has commenced an action to recover his debt, in which

an attachment has been issued and levied, cannot bring a second action to recover his debt, set aside a judgment previously recovered against the debtor, and for an injunction (*Mills* v. *Block*, 30 Barb. 549; and see *Cropsey* v. *McKinney*, *id.* 47; *Brooks* v. *Stone*, 11 Abb. 220; contra, see *Skinner* v. *Stuart*, 18 Abb. 442; 39 Barb. 206).

a. The judgment creditor may commence the action for his own benefit, or in behalf of himself and all others in the same situation with himself, who may choose to come in and contribute to the expenses of the suit; and it is not a subject of demurrer that all the creditors of the judgment debtors are not joined as plaintiffs. And property in the hands of a fraudulent assignee may be reached by a direct action against the debtor and assignee (*Hammond* v. *Hudson River Iron and Machine Co.*, 20 Barb. 378). Where in an action brought by a judgment creditor against a judgment debtor, in aid of the suit at law, the complaint alleges that property and money received by third persons, under and by virtue of a fraudulent assignment and judgment, was the property of the judgment debtor, such third persons are necessary parties to the action; and independently of any claim such third persons may set up, as owners of the property sought to be reached by the action; if they were charged by clear, distinct, and specific allegations in the complaint with fraudulent and unlawful acts, and with efforts to hinder and delay the plaintiffs in the collection of their debt, it is enough to render them proper parties to the action. (*Id.*)

b. Where the complaint in a creditor's suit alleged that the judgment debtor had made a fraudulent general assignment, with intent to delay his creditors, and that the assignee colluded with him. It also alleged several other conveyances by the debtor in fraud of his creditors, to various persons, made defendants. No privity was alleged between the defendants, and the complaint asked to have the assignment and conveyances set aside. On demurrer, it was held that there was no misjoinder of parties and causes of action (*Read* v. *Stryker*, 12 Abb. 47; reversing, 6 Abb. 109; and see *Morton* v. *Weil*, 11 Abb. 421).

c. **Executors.**—A complaint against executors on an indebtedness of the testator after alleging a promise by *one* defendant, "who was then and there the only executor who had qualified," and that afterwards letters testamentary were granted to the other executor, whereby an action had accrued against the defendants as executors, was held sufficient (*Benjamin* v. *Taylor*, 12 Barb. 328).

d. **False imprisonment.**—[The material allegations are, (1) that defendant imprisoned plaintiff; (2) against his will, and without authority of law]. The mode of stating a cause of action for false imprisonment before the code, may still be followed (*Shaw* v. *Jayne*, 2 Code Rep. 69; 4 How. 119; *Eddy* v. *Beach*, 7 Abb. 19). The circumstances and particular instrumentality by which the plaintiff was deprived of his liberty need not be stated, and if stated, will be stricken out (*id.*; *Molony* v. *Dows*, 15 How. 266; but allegations of special damage by reason of the imprisonment may be inserted. Thus, in an action against a member of the San Francisco Vigilance Committee for false imprisonment, &c., an averment that the Vigilance Committee caused to be published in numerous organs conducted by them, that the plaintiff was a notorious criminal, and a worthless, disreputable character, was, on motion to strike out, allowed to stand, as being an averment of special injury (*Molony* v. *Dows*, 15 How. 266, citing *Reg.* v. *Best*, 1 Salk. 174; 2 Ld. Raym. 1167; *Anon.* 3 Salk. 97). But in the same case allegations of aggravating circumstances were struck out. (See note to section 160, *post.*)

e. In an action for false imprisonment against a justice of the peace, it was held that the plaintiff could not recover in damages the amount of costs incurred by him in an unsuccessful application for his discharge on a writ of, *habeas corpus*, such costs not having beeen alleged as special damage in the complaint (*Spence* v. *Meynell*, 2 New Mag. Cas. 19; contra, *Williams* v. *Garrett* 12 How. 456).

a. **False representations to induce credit.**—The complaint must aver, (1) a representation; (2) that it was false; (3) and made with an intention to deceive and defraud the plaintiff (*Zabriskie* v. *Smith*, 3 Kernan, 330). "The complaint shows a false representation, known to be false, made the foundation of a contract with a person deceived thereby, and damages in consequence of such deception. I know no other requisite to make out a sufficient cause of action for a false representation" (*Robinson* v. *Flint*, 16 How. 240). "To represent of a man entirely insolvent, that you have examined into his affairs, and considered him solvent and worthy of credit, and that he is going on well, when all you know of his business condition is, that he owes a large sum of money, is actionable if the representation was made from bad motives, in order to induce a credit" (Denio, J., *Zabriskie* v. *Smith*, 3 Kernan, 330). The complaint must also state *in what manner* the plaintiff was induced to give the credit; in other words, the representation made should be stated, that the court may judge if it was sufficient to mislead, or the plaintiff does not show a cause of action; and where (*Wells* v. *Jewett*, 11 How. 242) a complaint alleged the fraudulent issue, by the defendants, of certain stock, and that plaintiff believing the representations of M., J., and S., three of the defendants, as to the value of said stock, and being ignorant as to the fraudulent issue of the stock, became the purchaser of said shares, believing them to be genuine,—the defendants demurred. The demurrer was allowed; and per Mitchell, J.: "This complaint merely intimates that there were representations made by Mali, Jewett, and Stacy *as to the value of the stock*, but what they were is not stated; nor is it stated that they were untrue, or known to the defendants to be untrue, or that they induced the plaintiff to buy, or that they were made with an intent to deceive and defraud the plaintiff, nor that they were made to the plaintiff, or in such way as to show an intention to have been communicated to dealers in the stock, or to others. The complaint is bad in those respects." (See *Bell* v. *Mali*, 11 How. 254; *Galliard* v. *Mali*, id.; *Mead* v. *Mali*, 15 *id.* 348). See *Fraud*.

b. **False warranty.**—[The material allegations are (1) the warranty; (2) that it was false; and (3) that the purchaser was deceived by it (*Holman* v. *Dord*, 12 Barb. 339).] There need be no allegation that defendant *knew* the warranty was false (*id.*), or that there was fraud on the part of the seller. It is enough to aver the warranty, and that the warranty is false. If fraud be averred, it is not necessary that it should be proved, to entitle the plaintiff to recover. Therefore, where the plaintiff averred that the defendant "by falsely and fraudulently warranting a horse sold by him to the plaintiff, &c., and on the trial proved an express warranty, and that it was false,—held that he was entitled to recover, although the jury found specially that there was no fraud (*Fowler* v. *Abrams*, 3 E. D. Smith 1; and see *Edick* v. *Crim*, 10 Barb. 445).

c. The existence and terms of the warranty, as material and traversable facts, must be alleged in the complaint, whether the warranty be express or implied (*Prentice* v. *Dike*, 6 Duer, 223). No scienter need be alleged; it is sufficient to aver that the warranty was false, and that the plaintiff was deceived by it (*Holman* v. *Dord*, 12 Barb. 336; see, however, *Mabey* v. *Adams*, 3 Bosw. 346).

d. To sustain an action on a warranty, it is not necessary that all the representations made by the defendant should be false, or all actionable; if any part of the representations are actionable it will suffice. An affirmation in regard to an existing fact, distinctly and positively made in the negotiations for trade, should be regarded as a contract and enforced as a warranty (2 Cowen, 438; 4 *id.* 440; 10 Wend. 41; 6 Barb. 537; *Sweet* v. *Bradley*, 24 Barb. 554).

e. **Foreclosure of mortgage.**—In a complaint to foreclose, the general allegation that the defendants, naming them, have or claim some interest in, or lien upon, the mortgaged premises, which, if any, is subsequent to the plaintiff's mortgage, is a sufficient statement of a cause of action against such defendants (*Drury* v. *Clark*, 16 How. 424, 431; 2 R. S. 191, § 155); and where there are infant defendants, the complaint should allege the requisite facts to

show what are the interests of the infants in the premises (*Aldrich* v. *Lapham*, 6 How. 129). If proceedings have been taken on the bond, it should be stated that that form of remedy has been exhausted (*Lovet* v. *German Ref'd Ch.*, 12 Barb. 68). The prayer of the complaint must ask for a judgment for deficiency, or the defendant not answering, no such relief can be granted (*Simonson* v. *Blake*, 20 How. 484).

a. It seems a foreign executor may foreclose a mortgage in this State without taking out letters testamentary here (*Averill* v. *Taylor*, 5 How. 476).

b. No prior demand necessary to an action to foreclose a mortgage (*Harris* v. *Mulock*, 9 How. 402) although expressed to be payable on demand (*Gillett* v. *Balcom*, 6 Barb. 371).

c. **Foreclosure of mechanics' liens.**—The complaint in a proceeding to enforce a mechanic's lien, is governed by the same general rules as govern pleadings in other actions. It should aver (1) the doing the work or furnishing the materials; (2) that notice was filed (*Foster* v. *Poillon*, 1 Abb. 321); (3) that defendant is the owner; (4) that the work was done or materials delivered in pursuance of a contract and in conformity therewith; (5) it should describe the premises in such a manner that the sheriff in the event of the defendant's having more than one building in the locality, would be able to determine by the judgment, beyond doubt, the premises to be sold; and if the number of the street be not given, the reason for omitting it should be stated, as that the building has no number, or that the plaintiff is ignorant thereof (*Duffy* v. *McManus*, 3 E. D. Smith, 659). A complaint by a sub-contractor should show that his own contract with the contractor was made in conformity with the terms of the contractor's contract with the owner (*Broderick* v. *Boyle*, 1 Abb. 319; *Quin* v. *McOliff*, *id.* 322). Where the complaint purports to set forth more than one cause of action, "the causes of action should be stated so distinctly and separately, that each one by itself, and unconnected with the others, may show a good cause of action against the defendants" *Sinclair* v. *Fitch*, 3 E. D. Smith, 689; and see *post*, *Several Defences*, in note to § 150).

d. The principle that where the complaint contains averments sufficient to authorize a judgment, the court may grant any remedy warranted by the facts, although differing from the relief demanded, does not apply to this kind of action (*Sinclair* v. *Fitch*, 3 E. D. Smith, 689).

e. **Foreign laws, how pled.**—*Gould* v. *Webb*, 4 El. and Bl. 933.

f. **Fraud.**—Wherever a party seeks to maintain his cause of action or defence on the ground of fraud, the fraud must be alleged in his pleading (*Fisher* v. *Fredenhall*, 21 Barb. 84; *Bailey* v. *Ryder*, 10 N. Y. 363; *Robinson* v. *Stewart*, *id.* 189; and see 4 Barb. 272; 12 *id.* 348; 6 Johns. 595; 1 Bro. C. C. 94; *Chautauque Co. B'k.* v. *White*, 2 Selden, 237); and as to the effect of a denial in the answer of analleged fraudulent intent, see *Tyler* v. *Canady* (2 Barb. 164).

g. Where the pleadings raise a question of fraud in relation to the acts of a board of public officers, and the evidence on the trial goes only to show an irregularity without fraudulent intent, the court is not bound to submit it to the jury as an open question (*The People* v. *Cook*, 4 Selden, 67). "Fraud consists in intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea, and would have been traversable" (*Moss* v. *Riddle*, 5 Cranch, 351).

h. An action to rescind a contract of sale on the ground of fraud cannot be maintained by the vendor while he retains any part of the consideration received by him from the purchaser (*Fisher* v. *Conant*, 3 E. D. Smith, 199; and see *Rosenbaum* v. *Gunter*, id. 203; *Fisher* v. *Fridenhall*, 21 Barb. 82). Before commencing the action, the vendor should return or tender to the vendee what he has received, and this should be alleged in the complaint. (*Id.*) A party who, upon the sale of goods receives from the purchaser a promissory note made by a third person in payment, and afterwards sues the purchaser for goods sold, on account of fraudulent representations made by him as to

the solvency of the maker, by which he was induced to receive the note, must, in order to recover, show that he returned or tendered the note to the defendant before suit brought. If he have recovered judgment against the maker, he must tender an assignment of it (*Baker* v. *Robbins*, 2 Denio, 136).

a. A complaint in an action to recover from a director damages for falsely and fraudulently representing that the stock of a bank is worth par, by which plaintiff's intestate was induced to purchase stock from the bank, when in truth the stock was worthless,—must aver that the defendant knew the stock was worthless, and that he made the representations with the intent to induce plaintiff's intestate to become a purchaser (*Mabey* v. *Adams*, 8 Bosw. 346; and see *Harper* v. *Chamberlain*, 11 Abb. 234).

b. Where vendees have been guilty of fraud on the purchaser of goods on credit, the vendor may, without waiting until the time of credit expires, reclaim the goods, or waive the tort and recover in an action for the value of the goods (*Kayser* v. *Sichel*, 34 Barb. 84). In such a case the complaint may be in the ordinary form of a complaint for goods sold (*id.; Bliss* v. *Cottle*, 32 Barb. 322).

c. Where a vendor of a chattel is guilty of a fraudulent concealment of material facts in relation to the sale, to the injury of the vendee, the vendee has an action for his damage. It is not enough that the vendor tell the truth so far as he goes; he should tell the whole truth (*Nickley* v. *Thomas*, 22 Barb. 652; *Edick* v. *Crim*, 10 Barb. 445).

d. An action may be maintained by the purchaser of lands against the seller for fraudulently misrepresenting the boundaries of the lands. In such action the intent to defraud need not be established by direct proof, but may be made out by circumstantial or presumptive evidence. A vendor of real estate is guilty of fraud, if, knowing that he has no title to a portion of the lands sold, he wilfully suppresses that fact from the purchaser (*Clark* v. *Baird*, 5 Selden, 183).

See *False Warranty*, *False Representations*.

e. **Goods sold and delivered.**—[The material allegations are, (1) sale and delivery of goods to defendant; and (2) their price or value.] It is not necessary to allege that sale and delivery was at defendant's request (*Glenny* v. *Hitchins*, 2 Code R. 56; 4 How. 98; see *Neefus* v. *Kloppenburg*, 2 Code R. 76; *Acome* v. *American Mineral Co.*, 11 How. 26; and see 20 Barb. 152; 21 Barb. 275; note to *Fisher* v. *Pyne*, 1 M. & G. 266; *Vietors* v. *Davis*, 1 Dowl. & L. 986; 12 M. & W. 760), nor that defendant promised to pay (*Furren* v. *Sherwood*, 17 N. Y. 230; *Glenny* v. *Hitchins*, 2 Code Rep. 56; 8 id. 153; 4 How. 98); the sale and delivery implies a promise (*Acome* v. *American Mineral Co.*, 11 How. 26).

f. An action will not lie for goods sold and delivered, if there has been no delivery. To recover in that action, there must be an actual or constructive delivery, and the plaintiffs must show that they have actually delivered the goods, or enabled the defendant to remove them. If a special agreement has been performed, so as to leave a mere simple debt or duty between the parties, there can be a recovery under a general count of *indebitatus assumpsit* (*Evans* v. *Harris*, 19 Barb. 424; see *Rogers* v. *Verona*, 1 Bosw. 417). To a complaint which stated, "The plaintiffs complain against the defendant for that the defendant is indebted to the plaintiffs in the sum of $300 for goods sold and delivered by the plaintiffs to the defendant at his request, on the 1st day of May, 1849. And the plaintiffs say that the items in their account exceed twenty in number. And the plaintiffs say that there is now due them from the defendants the sum of $300, for which sum the plaintiffs demand judgment against the defendant, with interest from the 20th day of October, 1849, besides costs," the defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The court of appeals overruled the demurrer, and decided that the complaint was sufficient. In pronouncing the judgment, Jewett, J., said, "The words,

that the defendant is indebted to the plaintiffs in the sum of $300 for goods sold and delivered by them to him at his request on the 1st of May, 1849, and that there was then due to the plaintiffs from the defendant, said sum, clearly imply that a contract had been made between the plaintiffs and defendant, by which the former sold and delivered to the latter, goods at his request, for which he promised to pay the plaintiffs the sum of $300, and that the period when the same was promised to be paid had expired. It contains every statement of fact necessary to constitute a good indebitatus count in debt according to the mode of pleading before the code (*Allen* v. *Patterson*, 3 Selden, 476). In *Chamberlain* v. *Kaylor* (2 E. D. Smith, 134), the New York common pleas, Woodruff, J., dissenting, overruled a demurrer to a complaint in the form following:—"Shows that the plaintiffs sold and delivered to the defendants the following described goods and chattels at the time and for the prices below specified [here followed the items], amounting in the whole to the sum of $220; upon account of which said goods and chattels the defendants remain indebted to the plaintiffs in the sum of $220 with interest." In an action by several plaintiffs, to recover the price of property sold and delivered, the complaint alleged the sale and delivery at defendant's request, &c., but did not allege that the plaintiffs were partners or joint owners; on demurrer, for want of this allegation, held that such an allegation was only necessary when the right of the plaintiffs to maintain the action depends upon their partnership; but as without being partners they might prove a joint ownership, and joint contract, and upon such proof would be entitled to recover, the objection was untenable and the demurrer frivolous (*Soper* v. *Welch*, 3 Duer, 644). A complaint alleged that the plaintiff held a lease, and was entitled to the possession of a house and lot for a certain term, and that the defendant having purchased the property subject to such lease, promised the plaintiff, in consideration that he [the plaintiff] would give up the house and lot for the said term, and would surrender possession immediately, to pay him [the plaintiff] $30. The plaintiff then alleged that he did give up the said house and lot and the possession thereof to the defendant, but that defendant refused to pay the $30. Held on demurrer, that the facts were sufficient to constitute a cause of action, the defendant's proposition having been actually performed by the plaintiff on his part, and the performance accepted by the defendant; held also, that the case made by the complaint was in fact one of a sale by the plaintiff of his rights under the lease, at the request of the defendant, in which light his proposition, connected with his subsequent act, might be regarded, as a delivery to and acceptance thereof by the defendants, at the price of $30 (*Ambler* v. *Owen*, 19 Barb. 145).

a. A complaint which alleged that defendant was and still is indebted to plaintiff in $1,000, for divers personal property sold and delivered to defendant by plaintiff; and for work, labor, care and diligence of plaintiff, by him and his wife and servants, done for defendant in and about the business of defendant; also for divers materials and other necessary things found, provided, used, and applied about that work at defendant's request; and for money had and received by defendant for the use of plaintiff; and money paid, laid out, and expended by plaintiff for defendant, at his request; and for money lent and advanced by plaintiff to defendant; and also on an account stated between the parties,—held to be "manifestly indefinite and uncertain" (*Blanchard* v. *Strait*, 8 How. 85). And per Crippen, J., "The complaint in this case wholly omits to state the time, place, quantity, or description of the personal property alleged therein to have been sold and delivered to the defendant. Neither does it set forth the value thereof, or the amount claimed therefor. (*Ib.*)

b. Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels, within a specified time, and the seller delivers part, no action lies until the time for delivery of all has passed; but action lies for the part delivered, if the purchaser retain them after the seller has neglected to perform his contract (*Ozendall* v. *Wetherall*, 9 B. & C. 386; *Shipton* v. *Casson*, 5 *id.* 388; *Baker* v. *Higgins*, 21 N. Y. 397; see 2 Saund. Pl. & Ev. 113, 114).

a. Where goods are tortiously taken or detained, the owner can—waiving the tort—sue for and recover their value as goods sold and delivered by him to the wrong-doer *Henry* v. *Marvin* (3 E. D. Smith, 71; and see *Roth* v. *Palmer* (27 Barb. 652); *Kayser* v. *Sichel* (34 Barb. 84). See note to section 140, p. 179 *b*, *ante*, and 10 Abb. 206; 37 Barb. 270; and *post*, *To recover personal property*.

b. Where the complaint alleged substantially a sale and delivery of goods on a credit of six months, defendant's insolvency at the time of sale, and that he purchased without any intent to pay for them, and intending to defraud plaintiffs of their value, and that by reason of such fraud the defendant became liable to pay for them immediately on delivery,—on demurrer, the complaint was held to state a cause of action (*Roth* v. *Palmer*, 27 Barb. 652; *Kayser* v. *Sichel*, 34 Barb. 84); and held further, that the plaintiff instead of setting out the facts might have complained simply for goods sold, and given the other matters in evidence (*id.*; *Bliss* v. *Cottle*, 32 Barb. 322).

c. Where a vendor seeks to avoid a contract of sale on the ground of fraud by the purchaser, he must, in order to recover, show that he has returned or offered to return the consideration received from the purchaser (*Fisher* v. *Fredenhall*, 21 Barb. 82). And such return or tender of return must be made promptly; where not made until four years after the transaction, it was held too late. (*Id.*) See *ante*, *Fraud*.

d. Where an action is brought to recover goods or the price of goods sold, for which notes of the defendants have been taken, it is sufficient for the plaintiff to surrender or offer to surrender the notes, on the trial, to be cancelled. They need not be surrendered before bringing suit (*Armstrong* v. *Tufts*, 6 Barb. 432; *Thurston* v. *Blanchard*, 22 Pick. 18; *Keutgen* v. *Parks*, 2 Sand. 60; *Nichols* v. *Michaels*, 23 N. Y. 264). If the notes were of parties not defendants, it would be necessary to surrender them before bringing suit. See *ante*, *Fraud*.

e. Where credit is given and notes taken for a debt on the false representations of the debtor, the creditor, or his assignee, may sue before the expiration of the time of credit and the maturity of the notes. All that is necessary is for the plaintiff to produce the notes on the trial, to be cancelled (*French* v. *White*, 5 Duer, 256). The fraud in obtaining credit does not render the debt the less the subject of an assignment. (*Id.*).

f. In an action to recover for personal property sold and delivered, the complaint stated as a cause of action the sale and delivery of thirty-six dressed hogs, worth $327 87,—admitted a payment on account of $150, and asked judgment for $177 87. The cause was referred; and it was proved without objection on the trial before the referee, that the plaintiff sold and delivered to the defendant forty dressed hogs, of the value of $396, that the defendant had paid $250 on account, and that the balance due the plaintiff was $146; and the referee so reported. The court allowed the complaint to be amended, to conform to the facts proved, without imposing the condition of a new trial (*Barth* v. *Walther*, 4 Duer, 228).

g. **Heirs.**—Complaint against, for debt of ancestor (*Hollister* v. *Hollister*, 10 How. 532).

h. **Injury causing death.**—For injuries causing death, no right of action existed at common law (*Green* v. *Hudson R. R. R. Co.*, 16 How. 230; 28 Barb. 9). For such injuries an action can be maintained only in the cases provided by the statutes of 1847 and 1849 (*Crowley* v. *Panama R. R. Company*, 30 Barb. 99). Those statutes give a right of action—(1) where the party killed would have been entitled to bring an action if death had not ensued, and whether the death be instantaneous or consequential (*Brown* v. *Buffalo and State Line R. R. Co.*, 22 Barb. 191), and provide, (2) that the action shall be in the name of the personal representatives of the deceased, (3) for the exclusive benefit of the *widow and next of kin* of the deceased. By personal representatives are meant executors or administrators (*Saberton* v. *Skeels*, 1 Russ. and M. 587; Tamlyn R. 383; and see 2 Mad. 155; 6 Mad. 159; 1 Mad. Ch. 108; 5 Ves. 402; *Lee* v. *Dilly*, 16 How. 93), and do not include a husband *as such* (*Robinson* v. *Smith*, 6 Sim. 47). But a husband may be administrator of his deceased wife, and then, as administrator, he is her personal representative, and as such

he may sue (*Tilley* v. *Hudson River R. R. Co.*, 23 How. 363; *Green* v. *Hudson River R. R.*, 32 Barb. 25; *Dickens* v. *N. Y. Cent. R. R. Co.*, 23 N. Y. 158). A husband is not one of the next of kin to his deceased wife (*Lucas* v. *N. Y. Cent. R. R. Co.*, 21 Barb. 245). A wife is not next of kin to her deceased husband (*Horn* v. *Coleman*, 1 Sm. & G. 169; 22 Law Jour. Rep., N. S., 779; 17 Jur., 408; 19 Eng. Law and Eq. R. 19; *Cholmondley* v. *Ashburton*, 6 Beav. 86; *Mulner* v. *Gilbert*, 27 Eng. Law and Eq. R. 349). But in *Merchants' Ins. Co.* v. *Hinman* (15 How. 182; 4 Abb. 312–315), it is said, the term next of kin will include, and sometimes exclude, the widow of the decedent. In *Oldfield* v. *N. Y. & Harlem R. R. Co.* (14 N. Y. 316), the court say the terms *widow* and *wife* are used to designate a person not included in the term next of kin. Although the statute uses the term widow and next of kin, yet the action is maintainable in cases where there is next of kin only, and no widow, or where there is a widow only, and no next of kin (*Safford* v. *Drew*, 3 Duer, 627; *Quin* v. *Moore*, 15 N. Y. 432; *Oldfield* v. *Harlem R. R. Co.*, 3 E. D. Smith, 103; affirmed, 4 Ker. 310; *Green* v. *Hudson River R. R. Co.*, 16 How. 263; *Keller* v. *N. Y. Cent. R. R. Co.*, 24 How. 172; 17 *id.* 102).

a. In an action by a husband as administrator of his wife he can recover only for the pecuniary injury sustained by her next of kin. He cannot recover for the value of her services to him (*Dickens* v. *N. Y. Cent. R. R. Co.*, 23 N. Y. 158; see *Tilley* v. *Hudson River R. R. Co.*, 23 How. 363; *Green* v. *Hudson River R. R. Co.*, 32 Barb. 25).

b. An action under these statutes, cannot be sustained if the deceased in any wise contributed to the result (*Lehman* v. *City of Brooklyn*, 29 Barb. 234; *Johnson* v. *Hudson R. R. Co.*, 5 Duer, 21; and see *Bernhardt* v. *Renss. & Saratoga R. R. Co.*, 32 Barb. 165; affirmed, 23 How. 166; *Ernst* v. *Hudson R. R. Co.*, 24 How. 97; *Keller* v. *N. Y. Cent. R. R. Co.*, 24 How. 172).

c. The statutes authorize an action against individuals equally with corporations (*Baker* v. *Bailey*, 16 Barb. 54; and see *Blackwell* v. *Wiswall*, 14 How. 257; *Brown* v. *Harmon*, 21 Barb. 508). These statutes are purely local, and apply only when the injury occurred within this State (*Crowley* v. *Panama R. R. Co.*, 30 Barb. 99; *Whitford* v. *Panama R. R. Co.*, 3 Bosw. 67; 23 N. Y. 465; *Vanderwerker* v. *N. Y. & N. Haven R. R. Co.*, 6 Abb. 239; 27 Barb. 244; *Beach* v. *Bay State Steamboat Co.*, 18 How. 335; 10 Abb. 71; 30 Barb. 433).

d. An employer, whether an individual or a corporation, is not liable for the death of one of his or its servants, occasioned by the negligence of another of his or its servants (*Sherman* v. *Rochester & Syracuse R. R. Co.*, 15 Barb. 574).

e. To render one party liable for the acts of another, it must be shown that the acts were done by one in his employ (*Blackwell* v. *Wiswall*, 14 How. 257).

f. Where the accident causing the death, occurred to the deceased while a passenger *for hire*, in a vehicle of carriers of passengers, there the action may be regarded as based on the breach of the contract of such carriers safely to carry the deceased. So regarded, it is an action the cause of which survives against the executors or administrators of the carriers (*Doedt* v. *Wiswall*, 15 How. 128; *Yertore* v. *Wiswall*, 16 *id.* 8; *contra*, *Norton* v. *Wiswall*, 16 How. 42); would it be the same if the passenger was carried gratuitously (*Nolton* v. *West. R. R. Corp.* 15 N. Y. 444)?

g. The complaint must allege that the decedent left a widow *or* next of kin (*Safford* v. *Drew*, 3 Duer, 627; *Lucas* v. *N. Y. Cent. R. R. Co.*, 21 Barb. 245); and without this allegation it will be bad on demurrer. (*Id.*) It need not refer to the statute, but should state a time when the injury occurred, subsequent to the statute's taking effect. It must state all the facts requisite to bring the case within the statute (*Brown* v. *Harmon*, 21 Barb. 508). Where the complaint alleged that on, &c., "the defendants possessed and occupied as a granary for storing grain for the use of their brewery, the loft of a building which had been negligently and improperly constructed, and was by reason thereof unfit from weakness for the business to which the defendants applied it, *of which they had notice;* that they had deposited an unusual quantity of barley in the loft, more than the outer wall could bear, in consequence of its weak and insecure state and improper construction, whereby the wall was pressed out, and

fell upon an adjoining shop belonging to and used by H., P. & Co., in which the deceased was then at work, and he was killed by the fall of said wall, *owing to the carelessness, negligence, and fault* of the defendants in using said building in its weak and insecure state, and in overloading the same,"—held that the complaint was defective, the only negligence, or default, directly averred, being in the construction of the building, without any allegation that the defendants then owned the building. (*Id*; see *Hutchinson* v. *York N. & B. R. R. Co.*, 3 Boston Law Rep. 380).

a. Where the complaint alleged that the car of the defendants in charge of their servants was wrongfully driven over a child, and that the defendants, by the negligence of themselves and their servants, ran over the said child and caused her death, held that under these allegations the plaintiff might show, as well the defective construction of the car, as the carelessness of the driver in its management (*Oldfield* v. *N. Y. & Harlem R. R. Co.*, 3 E. D. Smith, 103; affirmed, 4 Ker. 310).

b. An allegation in a complaint that "plaintiff was and will be compelled to pay $100 for medical attendance, funeral and other expenses," was on demurrer, held a sufficient allegation of damage (*Roeder* v. *Ormsby*, 22 How. 270).

c. The plaintiff cannot join a cause of action under the statute as adminis trator, with a cause of action in his own individual right (*Lucas* v. *N. Y. Cent R. R. Co.*, 21 Barb. 245, and see *Lynch* v. *Davis*, 12 How. 323).

d. If the defendants show that they settled with the deceased in his lifetime, for the injury he received, and which resulted in his death, that will bar the action by his representatives (*Dibble* v. *N.Y. & Erie R. R. Co.*, 25 Barb. 183).

e. **Injury by defendant's negligence.**—In actions brought to recover dam ages for an injury alleged to have been occasioned by the negligence of the defendant, whether the defendant be an individual or a corporation, to entitle the plaintiff to recover, he must show some fault on the part of the defendant (*Terry* v. *N. Y. Central R. R. Co.*, 22 Barb. 576, and see *Hayes* v. *Cohoes Co.*, 3 Barb. 42, *Great Northern R. R.* v. *Harrison*, 10 Ex. 376; *Berkett* v. *Whitehaven Junct. R. R.* 28 Law Jour. Ex. 348). And fault will not be inferred merely from the injury, unless the defendant is a common carrier of persons, and the plaintiff was a passenger (*Id. Holbrook* v. *Utica R. R. Co.*, 16 Barb. 113; *Willets* v. *Buffalo R. R. Co.* 14 Barb. 585). It need not be alleged in the complaint that the plaintiff was without fault (*Wolfe* v. *Supervisors of Richmond*, 11 Abb. 273; 19 How. 370).

f. **Injuries caused by non-repair of premises.**—A complaint against the *owner* of premises leased to a third person, to recover damages sustained by plaintiff by the falling of a part of the building, through want of repairs, is bad on demurrer, unless it states facts from which the court can say that the owner was bound to keep the premises in repair. A mere general allegation that defendant was bound to keep the premises in repair is insufficient (*Casey* v. *Munn*, 5 Abb. 91; S. C. 14 How. 162; see *Brown* v. *Harmon*, 21 Barb. 508, *ante*, p. 223, *g*).

g. **Injury by leaving hatchways open.**—(*Chapman* v. *Rothwell*, 1 El. Bl. & E. 178).

h. **Injury by one animal to another.**—In an action to recover damages for alleged injuries to plaintiff's dog, inflicted by the defendant's dog, whatever may have been the character and habits of the plaintiff's dog, it is necessary for the plaintiff to prove that the defendant's dog was the aggressor, or in the wrong on that particular occasion. If the plaintiff's dog provoked the quarrel which led to his being injured, the defendant, as the owner of the other dog, cannot be made responsible for the consequences. The cases in which dogs have attacked human beings, although trespassers, and their owners have been held liable, are not applicable to the case of one dog attacking another (*Wiley* v. *Slater*, 22 Barb. 506; see *ante*, p. 180 *b*; and see *Duncle* v. *Kocker*, 11 Barb. 387; and *Earl* v. *Van Alstine*, 8 *id.* 630; *Van Leuven* v. *Lyke*, 1 Coms. 515).

i. **Insurance policy.**— A complaint on a fire insurance policy must allege

that the insurer had an interest in the thing insured, at the time of insuring, and at the time of the loss (*Freeman* v. *Fulton Fire Ins. Co.* 14 Abb. 404, 38 Barb. 247), or an interest to be protected by the insurance (*Williams* v. *Ins. Co. of North America*, 9 How. 365), an allegation that the insurance was upon "his [the assured's] three-story and attic store building," and "on his water-wheel, and on a frame one-story building attached, occupied by the said assured,"—was held a sufficient averment of interest in the assured (*Fowler* v. *N. Y. Idem. Ins. Co.* 23 Barb. 143; but this decision was revised in the court of appeal, Dec. 1862).

a. The necessity of an averment of interest in the assured, applies to complaints on life policies, but not marine policies (*Freeman* v. *Fulton Fire Ins. Co.* 14 App. 404; 38 Barb. 247).

b. In an action on a fire policy it is not necessary to state that the fire was not caused by invasion or riot (*Lounsbury* v. *Protection Ins. Co.*, 8 Com. 466; *Rucker* v. *Green*, 15 East, 290; *Hunt* v. *Hudson River Insurance Co.*. 2 Duer, 487; *Catlin* v. *Springfield Fire Ins Co.*, 1 Sumner, 439, contra; see 1 Phil. Ins. 2d edition, 642). But where, after setting forth the substance of the policy the complaint averred that plaintiff, within the term of the insurance "did sustain loss to the amount of $231 by reason of a fire taking place in the cellar of said premises," was held insufficient (*Rodi* v. *Rutger Ins. Co.*, 6 Bosw. 23), the complaint ought to have stated that the *property insured* was injured by fire. (*Id*).

c. In an action on a policy of insurance, the complaint, among other things, stated the policy to be in the usual printed form, but that it did not state the precise contract of the parties, and that certain words (not stated), which were necessary to definitely express the real contract were omitted. It then prayed, among other things, that "*if necessary*, the policy might be reformed," and demanded judgment for the amount insured. On motion by the defendant, that the plaintiff should amend so as to ask unconditionally for a reformation of the policy, or wholly to omit asking such relief, it was ordered that the words "*if necessary*" should be struck out (*Lamoreux* v. *Atlantic Mut. Ins. Co.*, 3 Duer, 680).

d. **Judgment.**—In an action on a judgment brought by an assignee thereof, it is not necessary to allege in the complaint any demand of payment by the assignee, or any refusal to pay by the debtor. (*Mass* v. *Shannon*, 1 Hilton, 175).

e. **Libel and Slander.**—(See *post*, §§ 164, 165.) [The material allegations, where the words are defamatory on their face, and in the English language, are—(1) that defendant, with *malice* or wrongfully; (2) published; (3) of and concerning plaintiff; (4) these *false* words (stating them). In slander, instead of alleging that defendant published, it is customary to allege that he spoke in the presence and hearing of divers persons (*Wood* v. *Gilchrist*, 1 Code Rep. 117); but the word *published* imports, *ex vi termini*, a speaking in the presence and hearing of somebody (*Duel* v. *Agan*, 1 Code Rep. 134). It must be stated that the words were published "concerning the plaintiff" (§ 164); and on demurrer to a complaint containing this averment, the court assumes the words complained of do in fact refer to the plaintiff (*Wesley* v. *Bennet*, 5 Abb. 498). The precise words published should be set forth (*Finnerty* v. *Barker*, 7 New York Leg. Obs. 316); and where the allegation was that the defendant charged the plaintiff with stealing, or some other misdemeanor, it was held not sufficient (*id.*); and so where the allegation was that the defendant spoke words "of the following tenor and import, and to the following effect, that is to say," and on demurrer it was held that the complaint was insufficient in not professing to allege the very words or the substance of the very words spoken (*Forsyth* v. *Edmiston*, 2 Abb. 430; 5 Duer, 653; and see *Wood* v. *Brown*, 6 Taunt. 169; *Wright* v. *Clements*, 3 B. & A. 503). But the whole publication need not be set forth in the complaint, but only the particular passage complained of (*Culver* v. *Van Anden*, 4 Abb. 375). In one case, however, where the complaint alleged the speaking of the following words, "*Your wife is a damned Irish woman, and has got the palsy, and your son is insane*, and you are

a damned thief," Harris, J., denied a motion to strike out as irrevelant and redundant the words in italic, on the ground that in proving the charge it would be proper, indeed necessary, to prove all that was said at the time the slander was uttered, and although not necessary to allege in the complaint all that was said, it was certainly quite proper, and he had always thought it the best and fairest mode of stating the cause of action in cases of that description (*Deyo* v. *Brundage*, 13 How. 221). [In an unreported case, in which the plaintiff set out the whole publication (nearly a whole column in a newspaper), and complained of it as a libel, Justice Pierepont, on the defendant's motion, made an order that the plaintiff should specify in writing the particular passages in the publication on which he intended to rely as defamatory.]

a. Where a complaint in slander set forth the speaking by the defendant at a certain time and place certain words, and further that the *defendant on divers days and times between that day and the commencement of this suit* spoke the same words. The words in *italic* were held to be redundant (*Gray* v. *Nellis*, 6 How. 290).

b. Where the words were published in a foreign language, they should be set forth in the language in which they were published, accompanied by an averment of their meaning in English (*Setterman* v. *Ritz*, 3 Sand. 734). But omitting to set forth the words in the language in which they were published, may be remedied by an amendment (*Deboux* v. *Lehind*, 1 Code Rep. N. S. 235). And in case of oral slander in a foreign tongue, it should also be alleged that the persons present understood the language in which the words were spoken (Cro. Eliz. 865).

c. Where the words are actionable only because spoken of the plaintiff in some business, profession, or special character, the fact of his being engaged in such business or profession, or answering to such special character *at the time the words were spoken*, should be alleged in a traversable form in the complaint (*Carroll* v. *White*, 33 Barb. 615).

d. In a complaint for libel, it is a sufficient allegation of its publication by the defendant, to allege that he was the proprietor of the newspaper in which it was published. An allegation that the words published are "a libel" is a sufficient allegation of falsehood and malice (*Hunt* v. *Bennett*, 19 N. Y. 173; and see *Viele* v. *Gray*, 18 How. 550; 10 Abb. 1).

e. Where the libel is in ambiguous terms or by insinuation, it is requisite to aver in the complaint that the defendant, by means of the words insinuated and meant to be understood by those to whom it was published, as charging the plaintiff with the crime imputed. And whether such was the intention of the defendant is a question of fact to be determined by the jury (*Rundell* v. *Butler*, 7 Barb. 260). If the words are spoken *ironically*, there must be an express averment that they were so spoken (11 Mod. 86). It is said that here the words are fairly susceptible of a construction which would render them libelous, the complaint will be sustained upon demurrer, although the words may also be interpreted in a way which would render them innocent (*Wesley* v. *Bennett*, 5 Abb. 498). The words are to be taken in their natural meaning, and according to common acceptation (*Carroll* v. *White*, 33 Barb. 618).

f. Where a publication is not defamatory on its face, and becomes so only by reference to extrinsic facts, the existence of those facts must be alleged in the complaint (*Pike* v. *Van Wormer*, 5 How. 171; 6 *id.* 99; *Fry* v. *Bennett*, 5 Sand. 54; 1 Code Rep. N. S. 247; *Deas* v. *Short*, 16 How. 322; *Blaisdell* v. *Raymond*, 4 Abb. 446; *Carroll* v. *White*, 33 Barb. 615: *Hallock* v. *Miller*, 2 Barb. 630). Section 164 merely dispenses with the allegation of extrinsic facts showing the application of the words to the plaintiff. It does not dispense with the necessity of an averment or inuendo when it becomes essential to show the *meaning of the words themselves.* (*Id.*) These extrinsic facts, when necessary to be averred, must be averred in a traversable form; to allege them by way of inuendo will not suffice (*Caldwell* v. *Raymond*, 2 Abb. 193). Thus where the alleged libel was the publication of a notice that the plaintiff had married E. E., and the extrinsic fact relied on as making the publication libelous was that E. E. was a common prostitute, but the complaint did not allege

this fact otherwise than as follows, "Married, J. W. C. (plaintiff meaning) to E. E. (meaning a public prostitute known by that name); that said E. E. is and was a public prostitute, and well known to be so," was on demurrer held insufficient. (*Id.*) The judge in that case said that not only must the extrinsic fact be alleged, but the allegation of it must *precede* the inuendo. The office of an inuendo is to connect the words published with the persons, or facts and extrinsic circumstances previously named and set forth in the inducement, and to explain their application thereto; and being merely explanatory, cannot enlarge the sense of the words, or supply or alter them, where they are deficient (*Blaisdell* v. *Raymond*, 14 How. 265; 4 Abb. 446). Where the inuendo extends the meaning, the excess in meaning may be disregarded, (*Carroll* v. *White*, 33 Barb. 621; *Weed* v. *Bibbins*, 32 Barb. 315). Defects in *inuendoes* are usually apparent upon the face of the pleading, and formerly would have been taken advantage of by special demurrer, but now the remedy is by motion to strike out. (*Id.*) Where in a complaint for libel there is an inuendo, such as that it is not supported by the prefatory extrinsic facts, or that it enlarges the meaning of the words charged, or alters them, or substitutes other words in their place—the proper remedy is by motion. But where passages in a complaint for libel, although in the form of inuendoes, were obviously not intended as such by the pleader, but were inserted as an allegation of the import of the words charged, they should not be stricken out on motion, but the defendant should answer them as averments of issuable facts. (*Id.*)

a. In an action for slander charging the plaintiff with carrying away the examination of S. G., taken by and deposited with T., a justice of the peace, the complaint did not allege that the examination was taken by the justice upon any complaint made or pending before him against S. G. or any other person, nor did the occasion or purpose, or whether it was a civil or criminal proceeding, appear, nor that T. had jurisdiction,—held on demurrer that the complaint was defective in substance, for not showing that the examination was taken on a charge pending before T., and that T. had jurisdiction (*Ayres* v. *Covill*, 18 Barb. 260).

b. In libel, all who concur in its publication may be sued together; but in slander, every speaker must be sued separately (*Forsyth* v. *Edminston*, 2 Abb. 430); and this rule holds even in the case of man and wife; for the slander by the husband, he must be sued alone: for the slander by the wife, the husband and wife must be sued together; but a plaintiff cannot unite in one action a cause of action for slander by the husband, with a cause of action for slander by the wife, although the words spoken may be the same (*Malone* v. *Stillwell*, 15 Abb. 421). For a libel on partners, all the partners may sue together (*Taylor* v. *Church*, 4 Selden, 452). But a joint action for libel cannot be sustained by the members of a company or association, not being partners nor persons having a community of pecuniary interest wherein they could sustain damages. So held in an action by a volunteer hose company in the city of New York, where the libel consisted of a charge of theft against the members of such hose company, without specifying the persons referred to (*Giraud* v. *Beach*, 3 E. D. Smith, 337).

c. In all actions of slander for words not in themselves actionable, the right to recover depends upon the question whether they caused special damage, and the special damage must be fully and accurately stated. If the special damage was a loss of customers or of a sale of property, the persons who ceased to be customers or who refused to purchase, must (if possible) be named, and that if they are not named no cause of action is stated (*Linden* v. *Graham*, 1 Duer, 672; *Hallock* v. *Miller*, 2 Barb. 630, and see 1 Duer, 672; *Evans* v. *Harris*, 1 H. & N. 251; *Hartley* v. *Herring*, 8 T. R. 130; *Harrison* v. *Pearce*, 1 F. & F. 570). [Would the failure to state the names of the persons be more than uncertainty or want of definiteness?] Where the complaint alleged that by reason of the speaking of the words the plaintiff was injured in his good name and business and excluded from the society of his friends and neighbors, it was held that the injury to business and exclusion from society were damages of a special character, that perhaps the plaintiff should have been more spe-

cific, but the objection could not be raised by demurrer (*Hewit* v. *Mason*, 24 How. 366). The special damage to support an action for defamatory words, not actionable in themselves, must result from injury to the plaintiff's reputation, which affects the conduct of others toward him. His mental distress, physical illness and inability to labor, occasioned by the aspersion, are not such natural and legal consequences of the words spoken as to give an action. The cases of *Bradt* v. *Towsley* (13 Wend. 253); and *Fuller* v. *Fenner* (16 Barb. 333, overruled *Terwilliger* v. *Wands*, Co't of Appeals, Jan. 1859). The loss of a wife's services from illness, the consequence of mental depression resulting from defamatory words not actionable in themselves, will not support an action by the husband. The wife, if sole, could maintain no action for words which have not actually injured her reputation, and the husband cannot recover damages from her inability to labor where she could not if a *feme sole* (*Wilson* v. *Goit*, Co't of Appeals, Jan. 1859).

a. No reporter, editor or proprietor of a newspaper is liable for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings, of any statement, speech, argument, or debate in the course of the same, except upon actual proof of malice in making the report; which is not implied from the fact of publication. But this gives no protection for any libelous comments added to or interspersed with such report (Laws 1854, p. 314; see *Sandford* v. *Bennett*, 24 N. Y. 20).

b. **Slander of title.**—To maintain an action for slander of title to lands, the words spoken must not only be false, but they must be uttered maliciously, and be followed, as a natural and legal consequence, by a pecuniary damage to the plaintiff, which must be specially alleged and proved (*Kendall* v. *Stone*, 1 Selden, 14). In stating the special damage of the loss of a purchaser or of an opportunity to raise money by loan, the complaint, it is said, should name the person who refused to purchase or to make the loan, in consequence of the slander (*Linden* v. *Graham*, 1 Duer, 670; and see *Bailey* v. *Dean*, 5 Barb. 297).

c. **Malicious prosecution.**—[The material allegations are, (1) a prosecution by defendant; (2) its termination favorably to the plaintiff; (3) malice; (4) want of probable cause (*Besson* v. *Southard*, 10 N. Y. 236; *Ransford* v. *Copeland*, 6 Adol. & El. 482; *Brown* v. *Chadsey*, 39 Barb. 263).] The complaint must allege the termination of the suit or proceeding alleged to have been malicious (*Hall* v. *Fisher*, 20 Barb. 442; and see *Hall* v. *Suydam*, 6 *id.* 83; *Bacon* v. *Townsend*, 2 Code Rep. 51; *Watkins* v. *Lees*, 5 Mees. & W., 278; *Vanderbilt* v. *Mathis*, 5 Duer, 304; *Garrison* v. *Pearce*, 3 E. D. Smith, 255). An acquittal, on or an ignoring the bill by the grand jury, terminates the prosecution (*Morris* v. *Scott*, 21 Wend. 281; *Stone* v. *Stewart*, 12 Cow. 219); but a *nolle prosequi* does not (*Goddard* v. *Smith*, 6 Mod. 261). An allegation that the district attorney had certified that the case was frivolous and should never be tried, does not show a determination of the prosecution (*Thomason* v. *Demotte*, 9 Abb. 242; 18 How. 529).]

d. Allegations, in a complaint, tending to show defendant's motives, such as if not alleged might be proved at the trial, as showing special injury, *e. g.*, a malicious publication by defendant concerning such prosecution, will not be stricken out as irrevelant or redundant: the defendant is not aggrieved by them (*Brockleman* v. *Brandt*, 10 Abb. 141).

e. If it appear in the complaint that the prosecution alleged to be malicious the plaintiff was found guilty, the fact shows there was probable cause for the prosecution, and renders the complaint defective (*Miller* v. *Deere*, 2 Abb. 1), unless it also appear that the conviction was procured by the fraud of the defendant. (*Id.*) And where the action is for maliciously obtaining an order of arrest against the plaintiff, the complaint must show that such order of arrest has been vacated, or that it was void *ab initio*; or that the action in which it issued was determined in favor of the defendant therein (*Searll* v. *McCracken*, 16 How. 262). In an answer the facts showing probable cause need not be set forth, and if set forth will be struck out as redundant (*Rost* v. *Harris*, 12 Abb. 446; *Radde* v. *Ruckgaber*, 3 Duer, 685).

a. **Promise to marry.**—[The form of complaint will vary according to the promise, whether it be (1) to marry on request, (2) in a reasonable time, (3) at a particular time, (4) after a particular event, or (5) generally. The material facts are, that in consideration that plaintiff promised to marry defendant, defendant promised to marry plaintiff, either on request or as the case may be; a statement of the request, the expiration of the time, or the happening of the event; that plaintiff offered to marry defendant; and defendant's neglect to fulfill his promise (*Buzzard* v. *Knapp*, 12 How. 504).]

b. The manner of stating a cause of action formerly in use, may still be employed (*Leopold* v. *Poppenheimer*, 1 Code Rep. 23). It cannot be sustained *against* an infant (*Hamilton* v. *Lomax*, 6 Abb. 142), but may be sustained *by* an infant, suing by guardian (*Warwick* v. *Bruce*, 2 M. & S. 209; *Willard* v. *Stone*, 7 Cow. 23; *Holt* v. *Ward*, 2 Strange, 93; *Hunt* v. *Peeke*, 5 Cow. 475). The fact that the defendant was married when he made the promise does not deprive the promisee of the right of action on it (*Blaatmacker* v. *Saal*, 7 Abb. 409; 29 Barb. 22). In such a case, the plaintiff need not allege a readiness, offer, or request to marry (*id.* 3 D. & L. 580; 5 B. & Ad. 712; 1 D. & R. 361). Except in the case of a promise to marry on request, an offer to marry need not be alleged (1 Pars. on Cont. 544; see, however, 2 C. & P. 634); and where the defendant has married another woman, a request need not be alleged (*Caines* v. *Smith*, 15 M. & W. 189).

c. A complaint which alleged that plaintiff being unmarried and competent to contract to marry, and defendant representing himself to be unmarried and competent to contract to marry, the latter in consideration of the plaintiff's promise to marry him, promised plaintiff to marry her. It then averred that plaintiff confiding in such representation and promise continued and still was unmarried, and she had no knowledge or information to lead her to believe that the promise and representations of defendant were false; and it averred that said representations were false, made with intent to deceive, that defendant when he made such representations was and still continued a married man, that his promise to marry was fraudulent, and to plaintiff's damage. On demurrer to the complaint that it did not state facts sufficient to constitute a cause of action, it was held sufficient, and that it was not necessary to allege that defendant knew his representations to be untrue (*Blattmacker* v. *Saal*, 29 Barb. 22).

d. In an action for a breach of promise to marry, the complaint followed very closely the form in use before the code took effect, and after stating the promise, set out the breach in these words,—"Yet the defendant, in disregard of his said promise *and undertaking, but contriving and fraudulently intending craftily and subtilely to deceive and injure the plaintiff in this respect*, did not nor would perform his said promise." On motion to set aside the complaint, the court said, The complaint is sufficiently plain to apprise the defendant of the charge against him. The words in italic are, perhaps, obscure and unnecessary, and must be stricken out (*Leopold* v. *Poppenheimer*, 1 Code Rep. 40).

e. In an action for a breach of promise to marry, the loss of the plaintiff's health is not a necessary consequence of the breach of the promise; and to admit proof of it on the trial, it should be set up in the complaint as special damage (*Bedell* v. *Powell*, 13 Barb. 183). Is the loss of health special damage? (see *Terwilliger* v. *Wand*, Court of Appeals, January, 1859, overruling *Bradt* v. *Towsley*, 13 Wend. 253; and *Fuller* v. *Fenner*, 16 Barb. 333).

f. **To charge separate estate of a married woman.**—[This note must be read in connection with the law of 1860, ch. 90, p. 158.] In an action to charge the separate property of a married woman with a debt contracted by her during coverture, the complaint should show the nature of the debt, and if it is evidenced by a promissory note or bond the consideration thereof, and that she had a separate estate at the time the debt was contracted, and of what it consisted, and its situation and value, and that she made, or intended to make, the debt a charge or lien on such separate estate at the time she contracted it; and the demand for judgment should be that her separate estate be charged with, and be applied to, the payment of the debt, and that a receiver be appointed to take possession of the estate of the wife, and dispose of the same, or

so much thereof as shall be necessary to satisfy such debt and the costs of the action (*Cobine* v. *St. John*, 12 How. 336; *Sexton* v. *Fleet*, 6 Abb. 8; 15 How. 106; *Palen* v. *Lent*, 5 Bosw. 715; *Howland* v. *Fort Edward Paper Mill Co.*, 8 How. 105; *Francis* v. *Ross*, 17 How. 561.)

a. Held that an action could not be maintained against a married woman for damages for breach of an agreement, for cutting off gas pipes from apartments rented by her to plaintiffs, although she was doing business in her own name as a *feme sole*, and her husband had absconded (*Morgan* v. *Andrut*, 18 How. 371).

b. As to liability of separate property for debts of husband, see *Freeman* v. *Orser*, 5 Duer, 476; *Benger* v. *White*, 2 Bosw. 92.

c. Where work and labor are performed and materials furnished upon the separate estate of a married woman, at the request of her and her husband, and the husband is insolvent, the wife's separate estate may be charged in equity with the payment of the debt (*Colvin* v. *Currier*, 22 Barb. 371; and see *Bass* v. *Bean*, 16 How. 93). And it seems in such case the separate estate will be liable, even although the husband be solvent (*Dickerman* v. *Abrahams*, 2 Barb. 551; see *Owen* v. *Cawley*, 13 Abb. 13; 36 Barb. 52). But the mere purchase of goods by a married woman, having a separate estate, if the goods are not required for that estate, would not constitute a lien on such separate estate. Property purchased by a wife, unless paid for out of her separate estate, belongs to her husband, would be liable to seizure for his debts, and he would be liable to an action for the price of it. The mere fact that the seller of the goods, at the time of the sale, knew the wife had a separate estate, and that the credit was given on that account, is not sufficient to render the separate estate liable (*Ledeliey* v. *Powers*, 25 How. 240; *Palen* v. *Lent*, 5 Bosw. 714; *Phillips* v. *Hagadorn*, 12 How. 17). And where a married woman, cohabiting with her husband, professed to carry on a grocery business on her own account, and purchased goods for retailing in such business, it was held that the law gives no authority to a married woman cohabiting with her husband to carry on business as a *feme sole*, and that for goods so purchased the husband was liable, and not the separate estate of the wife (*Bass* v. *Bean*, 16 How. 93; and see *Lovett* v. *Robinson*, 7 *id.* 105; *Curtis* v. *Engell*, 2 Sand. Ch. R. 287; *Gates* v. *Brower*, 5 Selden, 205; *Freeman* v. *Orser*, 5 Duer, 477; *Dunderdale* v. *Grymes*, 16 How. 195; *Avogadro* v. *Bull*, 4 E. D. Smith, 385; *Switzer* v. *Valentine*, 4 Duer, 96; 10 How. 109; 5 Duer, 125; *Cropsey* v. *McKinney*, 30 Barb. 48). It seems that a married woman's contracting a debt, as surety for her husband, is not *prima facie* evidence of an intent to charge her separate estate (2 Story Eq. Juris. § 1400; *Vanderheyden* v. *Mallory*, 1 Coms. 452; *Yale* v. *Dederer*, 18 N. Y. 265; 17 How. 165; 22 N. Y. 450; 20 How. 242; *Goodall* v. *McAdam*, 14 How. 385). A joint lease to husband and wife with joint covenant to pay rent does not bind the separate estate of the wife (*Goelet* v. *Gori*, 31 Barb. 314). The wife of a farmer, in the habit of directing the business of his farm, purchased a span of horses, saying she bought them for herself, and gave her own note for the price. The horses were used on the husband's farm, with his knowledge, and it did not appear whether or not the wife had any separate estate. In an action against the husband on the note, held that it was a question for the jury whether the wife did not act in the purchase as her husband's agent (*Gates* v. *Brower*, 5 Selden, 205).

d. At common law, the separate estate of a married woman was not liable for her debts contracted before marriage, unless she did some act *after* marriage, indicating her intention to charge her separate estate (*Vanderheyden* v. *Mallory*, 1 Coms. 462). On her marriage, her debts previously contracted became the debts of her husband; but now by statute the husband is liable only to the extent of the property he acquires by his wife, and an action may be maintained against the husband and wife jointly, for the debt contracted before marriage; but the judgment binds the separate estate of the wife only, and not that of the husband (*Laws*, 1853, p. 1057). This liability of the husband continues only during the coverture, unless a judgment has been recovered. If the wife survives, and no judgment has been obtained, her sole

liability revives (*Vanderheyden* v. *Mallory*, 1 Coms. 467; and see *Goulding* v. *Davidson*, 25 How. 483; *Baldwin* v. *Kimmell*, 16 Abb. 353).

a. The judgment to enforce a charge on the separate estate of a married woman, was *in rem.* and not *in personam* (*Coon* v. *Brook*, 21 Barb. 549; *Dickerman* v. *Abrahams*, id. 551; *Cobine* v. *St. John*, 12 How. 333; and see 3 Sand. Ch. R. 109; 2 My. & C., 111; 1 Coms. 462; 1 Cr. & Ph. 48; 14 How. 191; but now see § 274). The judgment creditor by virtue of his judgment, can reach only the property she may own at the time she contracts the debt, and not any property she may afterwards acquire. If a married woman owns no property on the day she contracts the debt, although she afterwards "has millions of property," the creditor cannot reach it (12 How. 336). It does not authorize the issuing an execution (id.; *Chapman* v. *Lemon*, 11 How. 235), except perhaps in cases within the law of 1853, supra: nor can an action be maintained upon it (*Baldwin* v. *Kinnell*, 16 Abb. 353; *Foot* v. *Morris*, 12 N. Y. Leg. Obs. 61; *Yale* v. *Dederer*, 21 Barb. 290; but this case was reversed in the court of appeals (18 N. Y. 265; 22 N. Y. 450). See Form of judgment to charge the separate estate of a married woman (21 Barb. 292). The judgment, if defective in the first instance, may be amended (*Dickerman* v. *Abrahams*, 21 Barb. 553).

b. An action to charge the separate estate of a married woman, cannot, it seems, be maintained in a justice's court (*Chapman* v. *Lemon*, 11 How. 235; *Coon* v. *Brook*, 21 Barb. 553), nor in the supreme court for a demand less than $100 (*Cobine* v. *St. John*, 12 How. 337; and see *Shepherd* v. *Walker*, 7 *id.* 46; see, however, *ante*, p. 29, *b*; and § 274, *post.*

c. Since the law of 1860, in a complaint against a married woman for goods purchased by her for her separate business, or for the rent of premises wherein to carry on her separate business, allegations that she was married and had a separate estate are not material (*Coster* v. *Isaacs*, 16 Abb. 328; *Aitken* v. *Clark*, 16 Abb. 328, *note*; see *Young* v. *Gori*, 13 Abb. 13, *note*). Nor need it allege that the goods or premises were in fact for the separate business of the defendant—it is sufficient to allege that she represented they were for such purpose (*Coster* v. *Isaacs*, 16 Abb. 328; and see *Goulding* v. *Davidson*, 25 How. 483, reversing S. C. 28 Barb. 438). In a complaint against a married woman it is still necessary to allege the facts showing the peculiar liability (*Baldwin* v. *Kimmel*, 16 Abb. 353). The third section of laws of 1860, requiring the assent of the husband to the bargain, sale or conveyance, by his wife, of her separate estate, does not require his assent to her contract to pay a debt and charge the same on her separate estate (*Ward* v. *Servoss*, 15 Abb. 279).

d. An action may be maintained on the warranty of title in a deed made by a married woman of her separate estate since the law of 1860 (*Kolls* v. *De Leyer*, 26 How. 468). Except in a separate trade or business, carried on by her or relating to her separate estate, the covenant or promissory note of a married woman is absolutely void (*Phillips* v. *Hagadorn*, 12 How. 17; *Cobine* v. *St. John*, *id.* 333; *Coon* v. *Brook*, 21 Barb. 549; *Steenburgh* v. *Hoffman*, 15 Barb. 28), and furnishes no cause of action further than it is an evidence of her intent to charge her separate estate (*Bulpin* v. *Clarke*, 17 Ves. 365; *Field* v. *Sowle*, 4 Russ. 112; *Master* v. *Fuller*, 4 Bro. C. C. 19; *Van Allen* v. *Humphrey*, 15 Barb. 558). What is evidence of separate property of a married woman (*Wasserman* v. *Willett*, 10 Abb. 63). In pleading a deed executed by a married woman, by attorney, the facts which render such a mode of execution permissible must be alleged (*Johnston* v. *Taylor*, 15 Abb. 339).

e. **By married Woman.**—A complaint, in an action by a married woman, which stated that a passenger-carrier undertook to carry her and her baggage from California to New York; that the baggage was her separate property, and was stolen on the passage, is good in substance. If further particulars as to the time or manner of her acquisition of the baggage as separate property, or to show it to be such, are material, the remedy is by motion (*Spies* v. *Acces. Transit Comp.* 5 Duer, 662. See *ante*, p. 122).

f. Where a married woman lends money of her own, and of which her husband never had possession, and takes a note payable to herself, she may sue on such note without joining her husband (*Smart* v. *Comstock* 24 Barb. 411).

a. **For money had and received.**—"The action for money had and received will lie whenever the defendant has received money belonging to the plaintiff which, according to equity and justice, he ought to refund or pay over (*Wiseman* v. *Lyman*, 7 Mass. R. 286; *Wright* v. *Butler*, 6 Wend. 290; *Eddy* v. *Smith*, 13 *id.* 488). It takes the place of a bill in equity, and should be encouraged within proper limits. It should not be extended, however, to cases in which the defendant may be deprived of any right, or subjected to any inconvenience thereby (*Towsey* v. *Preston*, 1 Conn. R. 175;" *Rathbone* v. *Stocking*, 2 Barb. 145. See *Carpenter* v. *Stillwell*, 3 Abb. 460). A complaint which alleged "that defendant received the sum of $100, belonging to or on account of plaintiff, and which is now due him," held sufficient on demurrer (*Betts* v. *Bache*, 14 Abb. 279; 23 How. 197). A complaint which stated that on, &c., "the defendants were indebted to Z. in the sum of $7,000 for moneys, *notes* and *effects*, before that time had and received to and for the use of Z., the particulars of which will appear on reference to the annexed account, which is true, and forms part of this complaint;" that being so indebted, they became liable to pay that sum to Z., or his assigns on request, and promised to pay it him; and then averred an assignment of the debt to the plaintiff;—one item in the annexed account read thus: "To notes received on the Mercantile Insurance Company $10,164 24,"—was, on demurrer, held not to state facts sufficient to constitute a cause of action. It does not follow because a defendant receives *notes* and *effects* to a plaintiff's use, that he becomes liable to pay the amount of them. If he has become so liable, the facts which make him so liable should be set forth (*Lienan* v. *Lincoln*, 2 Duer, 670). A statement of a cause of action as thus was held sufficient: the plaintiff alleges that the said intestate at the time of his death was indebted to the plaintiff in the sum of $6,000, for money had and received by the said intestate to the use of the plaintiff, and that no part thereof has been paid to the plaintiff. (*Adams* v. *Holly*, 12 How. 326). Where the complaint stated that plaintiff was the owner of certain vessels, and had paid certain moneys as hospital moneys to the authorities of the State of New York, which they subsequently directed to be repaid, that thereupon defendant, as the agent of the plaintiff, received from said authorities a large portion of said moneys, to the amount of $1,650; that payment of said moneys had been demanded, and defendant had not paid any part thereof, a motion to make the complaint definite and certain was denied; and it was held that the defendant, if he desired more specific information must obtain it by means of the bill of particulars (*Sloman* v. *Schmidt*, 8 Abb. 5. See *Bates* v. *Cobb*, 5 Bosw. 29).

b. Where a carrier or other party has goods which he refuses to deliver to the owner unless paid an illegal demand, and the owner of such goods pays such demand to obtain the goods, he may recover the amount paid as money had and received (*Harmony* v. *Bingham*, 2 Kernan, 99). It is not a voluntary payment. If a payment is voluntary, it cannot be recovered. Money paid on a tax-collector's warrant, there being no misrepresentation or mistake of fact, cannot be recovered on its being ascertained that there was a defect in the assessment, rendering the tax void, which appeared from the warrant (*Harlem R. R. Co.* v. *Marsh*, 2 Kernan, 308; and see *Hill* v. *Supervisors of Livingston Co. id.* 52; *Unwin* v. *Leaper*, 1 Man. & G. 748).

c. A bailee or depositary is not liable to an action until a demand and refusal. Therefore, when money is left with another in naked deposit, for the benefit of the owner, the latter cannot maintain an action to recover it until a demand has been made upon the depositary to restore it, and he refused so to do (*Phelps* v. *Bostwick*, 22 Barb. 318).

d. Where money is paid by mistake, in an action to recover it no demand of its return need be alleged (*Utica B'k* v. *Van Giesen*, 18 Johns. 485).

e. In an action by a purchaser to recover money paid in part execution of a contract which has been rescinded by the vendor, the plaintiff is not obliged to allege a tender or readiness to pay the price agreed upon (*Maine* v. *King*, 8 Barb. 535).

f. Where a plaintiff sued in tort for the conversion of a promissory note,

held that after trial and an appeal, the complaint could not be amended so as to make the action one to recover the avails of such note as money had and received (*Andrews* v. *Bond*, 16 Barb. 633). And, where the plaintiff as one cause of action claimed to recover the possession of a draft which he alleged to belong to him, and to be wrongfully detained by the defendant, and as a second cause of action claimed to recover possession of $7,250 of money which he alleged to be his property, wrongfully detained. At the trial he proved that the defendant, as his agent, had sold a quantity of pork and received therefor the draft claimed, which he procured to be discounted, and had the money put to his own credit in bank; after he had done so, the plaintiff demanded of him the draft or the avails thereof, and the defendant refused to deliver same. Upon this proof the plaintiff claimed to recover as upon contract, the money due from defendant,—held he could not do this, and was nonsuited (*Walker* v. *Bennett*, 16 N. Y. 250).

a. Under a complaint for money had and received, a plaintiff may recover money deposited with a stakeholder, to abide a result, the subject of a wager (*O'Maley* v. *Reese*, 6 Barb. 658). Or the plaintiff may complain specially. For the form of a special complaint, see 6 Barb. 658, and p. 179 *b*, *ante*.

See *Constable*, *ante*, p. 212 *i*.

b. Where a person not an attorney or foreign factor, entrusted by the owner with a note against a third party, for collection, receives the money thereon, but neglects to pay it over, an action may be maintained against him for the money collected, without any previous demand (*Hickok* v. *Hickok*, 13 Barb. 632). And where a person receives money to remit to another, and he fails to remit, he becomes liable to an action without any demand (*Stacey* v. *Graham*, 4 Kernan, 497).

c. A foreign factor is not liable to an action for the proceeds of sales made by him for account of his principal on commission, until a demand made by the principal or instructions to remit. Therefore, in an action against a foreign factor to recover the proceeds of sales effected by him, the complaint must allege a demand and refusal before action commenced (*Walden* v. *Crafts*, 2 Abb. 303; S. C., 4 E. D. Smith, 490); and the rule applies to a domestic factor (*Baird* v. *Walker*, 12 Barb. 298; *Brink* v. *Dolson*, 8 *id.* 337; and see *Lyle* v. *Murray*, 4 Sand. 590; *Heuback* v. *Mullman*, 2 Duer, 252). In *Renia* v. *Cross* (6 Cal. 29), a complaint for money had and received, which did not allege a demand, was held bad on demurrer; and in an action against an agent for not accounting, it was held a request to account and pay over must be alleged (*Bushnell* v. *M'Cauly*, 7 Cal. 421). Where goods are left with a mercantile firm to sell on commission, and a demand is subsequently made by the owner on a member of the firm for the goods or a settlement, which is not complied with, that is a sufficient demand to authorize a suit (*Baird* v. *Walker*, 12 Barb. 298). For a demand on one of two joint debtors is a demand on both (*Giesler* v. *Acosta*, 5 Selden, 235). Where a complaint alleged that the defendant was the treasurer of the plaintiffs, and "that the defendant is indebted to the plaintiffs $5,800 for money received by the defendant, while acting as such treasurer," and then set forth the items received and the dates when received, the defendant demurred on the ground that facts sufficient to constitute a cause of action were not stated, and it was argued that before the plaintiffs could maintain an action, they must have demanded the balance in the defendant's hands, and a demand should have been alleged. The demurrer was overruled; and the court said, "If the defendant is not liable until demand made on him, the allegation, as a matter of fact, that he is indebted, and a statement of the moneys received, is an allegation that all that is essential to make him indebted has been done, and consequently that a demand has been made (*Second Av. R. R.* v. *Coleman*, 24 Barb. 300).

d. **Money lent.**—[The material allegations are (1) that money was lent; (2) it has not been repaid.] It is not necessary to allege that the loan was at the defendant's request (*Victors* v. *Davis*, 1 Dowl. & L. 984; 12 M. & W. 760).

e. A complaint by assignees of a claim, stating the cause of action thus: "The defendant was indebted to one James Whitney on, &c. in the sum of

$5.046, being a balance of account due from said defendant to said Whitney on an account for money lent by said Whitney to said defendant, and for money paid by said Whitney, to and for the use of said defendant, and at his request," was, on motion that the same be made more definite and certain, held to be sufficient, and that if the defendant had "any doubt as to the items in respect to which a recovery is sought, his remedy is to demand a copy of the account constituting the cause of action stated in the complaint" (*Cudlipp* v. *Whipple*, 1 Abb. 107; 4 Duer, 610). A complaint which alleged that the defendant was indebted to the plaintiff in the sum of $4,500 for money lent and for money found due from the defendant to the plaintiff on an account stated, was, on motion that it be made certain, held defective in not alleging with sufficient certainty whether the plaintiff sought to recover on one or two causes of action, and if upon two, what sum was claimed to be due upon each (*Clark* v. *Farley*, 3 Duer, 645).

a. The plaintiff lent the defendant money, and received from the defendant shares in a company as a security, and agreed to give twenty-one days' notice to the defendant before proceeding to compel the repayment of the loan, or of any part thereof, and upon repayment of any part of the loan, to give back a proportionate amount of shares; held, that after twenty-one days the plaintiff was not bound to declare specially, averring a tender of the shares, but that he might declare in the usual form for money lent (3 Bing. N. C. 737; *Scott* v. *Parker*, 1 G. & D. 258).

b. **Money Paid.**—[The material allegations are, (1) money paid to use of defendant; (2) at his request; (3) it has not been repaid.] If one person, without a compulsion of law, or legal obligation, pay the debt of another without a previous request, the debtor is not liable for the amount thus paid (*Bartholomew* v. *Jackson*, 20 Johns. 28; *Dunbar* v. *Williams*, 10 *id.* 259; *Hearne* v. *Keene*, 5 Bosw. 584; and see 7 M. & W. 439). Therefore, to recover for money paid, it must be alleged to have been paid at the request of the defendant. Where an indorsee of a note has paid up the *whole* note and become the legal owner of it, he can either sue the endorser on the note, or for money paid. But if he has only paid the note in part, he cannot sue thereon, but may sue the endorser or maker for the money actually paid for him at his request (*Baker* v. *Martin*, 3 Barb. 635; *Dygert* v. *Gross*, 9 *id.* 506; *Barker* v. *Cassidy*, 16 *id.* 177; and see *Neass* v. *Mercer*, 15 *id.* 318).

c. A joint action by a subsequent indorser against separate prior indorsees for money paid for the use of the defendants, cannot be maintained (*Barker* v. *Cassidy*, 16 Barb. 177).

d. In an action to recover money alleged to have been paid by the plaintiff as surety for J. V., upon notes given by J. V. to L. J., and signed by the plaintiff and the defendants and H. V., as co-sureties, the complaint, after alleging the facts, among others, that he had paid the amount of the notes, alleged that none of the money had been repaid to him by H. V. or by the defendants; nor had the portion he was entitled to collect of his co-sureties been repaid to him by any person, but part thereof was still due. A motion by the defendants, requiring the plaintiff to make the complaint more definite and certain, stating what part of the money paid by the plaintiff had been repaid, and how much was remaining due, was denied on the ground that the complaint did not admit that any part of what the defendants were bound to contribute had been paid, and if anything had been paid it was a matter of defence (*Van Demark* v. *Van Demark*, 13 How. 372). [The defendant's remedy was a motion for a bill of particulars.—*Ed.*]

e. Under an allegation in a complaint that the plaintiff had paid, &c., moneys for the defendant, evidence to charge the defendant as an endorser of a promissory note cannot be received. Nor can such evidence be received in support of an allegation that the defendant guaranteed the payment of the note (*Cottrell* v. *Conklin*, 4 Duer. 45).

f. **Money lost by Gaming.**—Semble, the form of declaration prescribed by 2 Rev. Stat. 347, § 1, would constitute a sufficient complaint and as to what is held a sufficient complaint (see *Betts* v. *Bache*, 14 Abb. 279; 23 How. 197).

a. **Partners.**—Two firms, in each of which A. was a partner, stated an account of their mutual dealings. The partners in the creditor firm—with the exception of A., who declined to be a plaintiff, and was made a defendant—brought their action against the debtor firm; held it was not necessary the complaint should propose an accounting as between the firms (*Cole* v. *Reynolds*, 18 N. Y. 74).

b. When a complaint contains a good cause of action upon contract against several defendants who are partners, it is not rendered demurrible by going on to allege the insolvency of the defendants and the confession of a judgment by them to defraud their creditors, and asking for an injunction and a receiver (*Meyer* v. *Van Collem*, 28 Barb. 230).

c. A complaint which set forth a partnership between the parties, a dissolution, the existence of unsettled accounts, a balance in favor of plaintiff, and demands an accounting and judgment for the balance, shows a sufficient cause of action (*Ludington* v. *Taft*, 10 Barb. 447).

d. **Limited Partnerships.**—In an action to reach and distribute the assets of a limited partnership—the allegations of the complaint to show that the plaintiffs are creditors, must be so definite and specific, as to inform the defendants when, in what manner, and by what contracts it is claimed that they became indebted to the plaintiffs (*Gray* v. *Kendall*, 10 Abb. 66).

e. **Mayor, &c., of New York.**—In actions against the Mayor, Aldermen and Commonalty of the City of New York, it must be alleged in the complaint that at least twenty days have elapsed since the claim in suit was presented to the comptroller of said City for adjustment, and that upon a second demand in writing made on said comptroller after the expiration of said twenty days, the said comptroller neglected or refused to make an adjustment or payment (Laws 1860, ch. 379, § 2).

f. **Partition of Personal Property.**—Complaint for (*Tinney* v. *Stebbins*, 28 Barb. 290).

g. **For Penalties.**—In *Morehouse, overseer, &c.* v. *Crilley* (8 How. 431), an action for the recovery of penalties imposed by statute for violations of the excise law, the complaint set forth that the defendant was indebted to the plaintiffs, overseers, &c., "in the sum of $25—penalty incurred by said defendant at," &c., "for violations of the provisions of § 15, title 9, chapter 20 of part 1 of the revised statutes, between the 1st of October, 1852, and the commencement of the action, but on what particular day the plaintiffs are unable to state." To this the defendant demurred, alleging for cause that "the complaint did not state the place where, the time when, the kind or quantity of liquor sold by the defendant, *or that any liquor was sold by defendant.*" Barculo, J., held the demurrer well taken, and adjudged the complaint insufficient, observing that it would have been good under the provisions of the revised statutes (2 R. S. 482, § 10), which specially authorizes such a form of pleading, but that that provision had been abrogated by § 140 of the code, and that the complaint should have set forth the facts constituting the cause of action. In a subsequent case, *The People* v. *Bennett* (5 Abb. 384; aff'd 6 Abb. 343), also an action to recover a penalty imposed by statute, the complaint alleged that the defendant on, &c., that day being Sunday, at, &c., did publicly keep intoxicating liquors contrary to the provisions of, &c. (describing the statute), whereby the defendant was indebted to the plaintiffs in the sum of $50 for the benefit of the police contingent fund. On a motion by the defendant to set aside the complaint for irregularity, Birdseye, J., considered that inasmuch as Justice Barculo, in *Morehouse* v. *Crilley* (supra), apparently did not have brought to his notice § 471 of the code, that case could not "well be considered a decisive authority, * * * * the consideration of the question being manifestly incomplete," and he held that the provisions of 2 R. S. 482, § 10 were still in force. This last decision was, we are informed, affirmed on appeal at general term, and seems to accord with *B'k of Genesee* v. *Patchin B'k* (3 Kernan, 314; *ante*, p. 179 *a*).

h. In penal actions founded on a statute, a reference to the statute is usu-

ally but not necessarily (*Brown* v. *Harman*, 21 Barb. 510), made for the purpose of informing the defendant distinctly of the nature and character of the offence (*Shaw* v. *Tobias*, 3 Coms. 190); and in cases where no general form of complaining is given, the plaintiff must set forth the particular acts and omissions which constitute the cause of action; and where the general term allowed by 2 R. S. 482, § 10, is resorted to, the section of the statute imposing the penalty must be accurately referred to (*The People* v. *Brooks*, 4 Denio, 469; *Cole* v. *Smith*, 14 Johns. 193; *Bigelow* v. *Johnson*, 13 *id.* 428; and see 17 Wend. 86). But omitting to refer to the statute is a defect in form only (*O'Malley* v. *Reese*, 6 Barb. 658).

a. Where a statute provided that in actions for penalties it should be lawful to declare generally, stating the section of the act under which the penalty was claimed, held that it was sufficient to refer to the section by its number (*City of Utica* v. *Richardson*, 6 Hill, 300).

b. A public statute need not be recited or referred to in pleading, and all that seems material is, that enough be stated to bring the case within it (*Carris* v. *Ingalls*, 12 Wend. 70; *Bayard* v. *Smith*, 17 *id.* 88; *Goelet* v. *Cowdry*, 1 Duer, 132; *Bogardus* v. *Trinity Church*, 4 Paige, 197; *Cole* v. *Jessup*, 10 How. 524). Where the act prohibited is not an offence at common law, the complaint should conclude,—against the form of the statute (*The People* v. *Barton*, 6 Cow. 290). See, *Injuries causing death.*

c. In pleading a statute which is required to be passed by a three-fifth vote, it is not necessary to allege that such a vote was had; an averment that the statute was passed is sufficient (*Wolfe* v. *Superv. of Richmond*, 11 Abb. 270; 19 How. 370).

d. The complaint need not negative a proviso in the section giving the penalty, furnishing mere matter of excuse (*Bennett* v. *Hurd*, 3 Johns. 438; *Sheldon* v. *Clarke*, 1 *id.* 513; *Teel* v. *Fonda*, 4 *id.* 403; *Hart* v. *Cleis*, 8 *id.* 41). But where a statute declares an act unlawful, and makes an exception in the enacting clause and not in the proviso, the exception must be negatived (*First Baptist Church* v. *Schenectady R. R. Comp.*, 6 Barb. 319. See, *ante*, p. 200 *b*; and see *Dexter Plank Road* v. *Allen*, 16 Barb. 15; *Washburn* v. *Franklin*, 28 Barb. 27).

e. If one statute imposes a penalty on a public officer for every refusal to perform his duty, and another statute imposes a duty, in a complaint for the penalty, it would be sufficient to refer to the former statute only (*Morris* v. *The People*, 3 Denio, 381).

f. In a complaint for using unlawful weights (1 R. S. 779, § 37), it is not necessary to allege that the defendant *knowingly* used them (*Bayard* v. *Smith*, 17 Wend. 88).

g. **For a cause of action given by statute.**—In a complaint for a cause of action, given by statute, it is not necessary to refer to the statute, nor to allege that the cause of action arose after the passage of the law; all that is requisite is to state a time when the cause of action arose subsequent to the time when the law went into operation: the time thus stated will be deemed, *prima facie*, the true time; and although the parties are not bound by the allegation as to time, yet if it should appear by the evidence that the transaction occurred at a time not within the statute, it will be ground for a nonsuit (*Brown* v. *Harmon*, 21 Barb. 510; and see *O'Malley* v. *Reese*, 6 Barb. 658).

h. In an action which is not founded upon and did not exist at common law, but is based wholly upon the statute, there must, in order to sustain the action, be a positive allegation, not only of the acts, but of the qualifications, if any, prescribed by the statute. (*Id.*)

i. But where the statute giving the cause of action prescribes what the plaintiff shall state in his complaint, and requires a reference to be made to the statute, in such a case the statute requirement must be complied with, or the plaintiff cannot recover (See *Schroeppell* v. *Corning*, 2 Coms. 132; and see 17 Wend. 86).

j. Complaint against railroad company for not ringing bell on approaching a crossing (*Wilson* v. *Rochester & Syracuse R. R. Co.*, 16 Barb. 167).

See, *Bonds, Commissioners of Highways, Injury causing death, Penalties, Public officer, Railroad act.*

a. **To recover personal property.**—An action to recover possession of personal property will lie, although the goods, the subject of the action, have been previously transferred by the defendant to some other person, and are not under the manual control of the defendant at the time the action is commenced (*Van Neste* v. *Conover*, 20 Barb. 547). This was the conclusion the general term arrived at (but see *Nash* v. *Fredericks*, 12 Abb. 147). In one case, where the complaint alleged that the defendant had become possessed of and wrongfully detained from the plaintiff twelve tons of hay, the property of the plaintiff, and demanded that the defendant might be adjudged to deliver it up to the plaintiff. The answer was a general denial. It appeared on the trial that the defendant had never had possession of the hay, and was only connected with it by having bid for it at public vendue and been declared the purchaser; that at the time of the sale, the hay in question was mixed with other hay, and there had been no delivery of it to the defendant. The plaintiff was nonsuited, and on refusing a motion to set aside the nonsuit, Harris, J., said, "To sustain an action for the wrongful detention of personal property and for delivery thereof, it must appear that at the time of the commencement of the action the defendant had such control over the property that he might have delivered the possession to the plaintiff. A wrongful withholding implies a power to deliver" (*Elwood* v. *Smith*, 9 How. 528). And the same judge expressed himself to the like effect, *Maxwell* v. *Farnum*, (7 *id.* 236).

b. In an action to recover personal property, the complaint was in effect that plaintiff on, &c., was lawfully possessed, as of his own property, of a watch of the value, &c., and that on, &c., at &c., *he did lend said watch without any* consideration therefor, to defendant for the space of four days, and defendant promised within that time to return said watch to plaintiff; but defendant, intending to defraud plaintiff, had not re-delivered said watch to him, although often requested so to do, but had converted same to his own use. &c. The defendant answered, he is not informed and cannot state whether plaintiff on, &c., was possessed, as of his own property, of said watch, and further specifically denies that plaintiff on, &c., did leave such watch with defendant for any period, with the promise of defendant to return same to plaintiff; and defendant denies all fraudulent intent on his part towards plaintiff, or any unlawful conversion of said watch to his own use; and further, that plaintiff on, &c., at &c., for a full consideration agreed to be paid defendant to plaintiff, sold and delivered said watch to defendant. It was held that it did not appear that the watch came to the hands of the defendant otherwise than by the allegation that the plaintiff lent same to him. The allegation, therefore, was material. For although a general allegation that defendant had the watch in his possession, without showing *how*, would have been sufficient, yet, as the plaintiff had chosen to make the allegation in that form, and in none other, the allegation was an issuable one. The denial in the answer, of that allegation of the complaint, was bad in form—might be strictly true, and yet be only a denial of the *time when* the loan was made—still it controverted the allegation of the complaint. It might on motion, have been struck out, or required to be made definite and certain (*Elton* v. *Markham*, 20 Barb. 343).

c. A complaint which alleged that the defendants became possessed of and wrongfully detained from the plaintiff the goods and chattels described in the schedule annexed, to the value of $1,500, and demanded judgment for that amount, was held after verdict to state facts sufficient to constitute a cause of action; and *semble* that it would have been good on demurrer, and was not even liable to objection for want of definiteness or certainty (*Hunter* v. *Hudson River Iron and Machine Co.*, 20 Barb. 493). Questioned by Bosworth, J., in *Allen* v. *Wilcox*, M.S. Were the plaintiff claimed as the assignee *of a right of action* which had accrued to his assignor by a conversion by the defendant of personal property of such assignor. Answer, general denial, and other defences. On the trial the conversion alleged was proved, but it was not proved that after the assignment to the plaintiff he had made any demand on the defendant;

and on this ground the defendant moved for a nonsuit. The motion was denied. On appeal to the court of appeals, it was said, "No demand or refusal was necessary to maintain the action. By the assignment the plaintiff succeeded to all the rights of the assignor, this is a necessary consequence of the assignability of the claim, as distinguished from the property converted (1 Selden, 344; *McKee* v. *Judd*, 2 Kernan, 626). If the assignment had been of the property, the conversion before the assignment would not have enured to the assignee (*Bowman* v. *Eaton*, 24 Barb. 528; *Hicks* v. *Cleveland*, 39 Barb. 573); and a demand subsequent to the assignment would have been necessary (*Sherman* v. *Eldon*, 1 Hilton, 178).

a. The innocent holder of the personal property of another cannot be said to have converted it, *i. e.* to wrongfully withhold it from the owner, until it has been demanded of him by the owner and he has refused to deliver it, or until by some act of his he has rendered the demand and refusal an idle ceremony; and there cannot be a conversion unless by an act done with intent to convert it to his own use or that of some third person, or unless the act had the effect to destroy it or to change its quality (*Foulkes* v. *Willoughby*, 8 M. & W. 540; *Tallman* v. *Turck*, 26 Barb. 167; *Scovill* v. *Griffith*, 2 Kernan, 516). Where the taking is wrongful no demand is necessary before action (*N. Y. Car Oil Co.* v. *Richmond*, 6 Bosw. 213; 10 Abb. 193; *Moses* v. *Walker*, 2 Hilton, 536); but where defendant obtained possession without wrong a demand is necessary (see *post*, *Request or Demand*). In *Fuller* v. *Lewis* (13 How. 219; 8 Abb. 383), as reported, Clerke, J., is made to decide that in an action for injury to property, the fact of a demand and refusal must be alleged in the complaint. The report is very meager, and does not state the form of the complaint. No doubt the pleading justified the decision; but the demand and refusal are not the conversion, but only the evidence of it (*Hill* v. *Covell*, 1 Coms. 524): unlawfully converted, is a question of fact (*Covell* v. *Hill*, 2 Selden, 381); and facts, not evidence are to be stated. To charge that defendant "converted and disposed" of the property to his own use, is the "usual form of alleging a conversion of a chattel. It was not under the former system, and is not now, necessary to state the manner in which the defendant has converted property for which trover is brought, but the simple allegation that he has done so is sufficient." The allegation that the defendant has converted it [the subject of the action], refers to some act by which the property could be converted (*Decker* v. *Matthews*, 2 Kernan, 324).

b. Where a complaint alleged, "that the defendant took and converted to his own use one black horse of the value of $175, the property of A. P.; that afterwards said A. P. sold and assigned said horse to the plaintiff, of which the defendant had notice; that plaintiff had demanded possession of said horse, which defendant refused; and claimed judgment "for the recovery of said property and damages for the detention,"—the defendant demurred (1) That the complaint did not state facts sufficient to constitute a cause of action; that the conversion alleged was before the assignment, and no consideration for the assignment was alleged; (2) That several causes of action (trover and replevin) were improperly united; (3) That the prayer for relief should have been either for delivery or damages, and not both unless the causes of action had been separately stated. On appeal to the general term, it was held, reversing the decision at special term, that the complaint was sufficient; that the allegation as to the conversion before the assignment, although needless, did not essentially affect the complaint, or make the action equivalent to trover; that the complaint would have been sufficient if it had stated the assignment, and that the defendant had possession of and wrongfully detained the property, and prayed delivery, and damages for detention. That there was no misjoinder of causes of action, in fact, no joinder at all. The complaint set forth only one cause of action, and demanded only one kind of remedy. That it was not necessary to allege any consideration for the assignment (*Vogel* v. *Babcock*, 1 Abb. 177).

c. An administrator may sue in his own name for personal property of his intestate converted at any time after the death of the intestate, even before the grant of the letters of administration (*Sheldon* v. *Hoy* 11 How. 15).

a. A sale and delivery of goods procured through the false representations of the vendee in regard to his solvency and credit, and as between the vendor and vendee, passes no title to the vendee; and the vendor may, without any previous demand and refusal, maintain an action against the vendee to recover possession of the goods; and in such a case a complaint in the form of the old declaration in replevin, without any allegation of a demand of the goods or of the circumstances of the sale and delivery, is sufficient (*Hunter* v. *Hudson River Iron and Machine Co.*, 20 Barb. 500). If the goods had passed into the hands of an innocent and bona-fide purchaser, then before an action would lie for the recovery of the goods from him, perhaps a previous demand and refusal might be necessary. (*Id.*) But although the vendor *may*, in an action to recover such goods, complain in the form used in replevin, yet the defendant may move to have such a complaint made definite and certain, by stating the facts out of which the cause of action arose. (*Id.* See *ante*, p. 222 *a*, *b*.)

b. If the plaintiff, instead of complaining in the general form as used in replevin, undertakes to state the facts out of which the cause of action arose, he must show not only that the defendant was insolvent at the time of the purchase, but that the defendants knew of such insolvency (*id.*; *McCracken* v. *Cholwell*, 4 Selden, 133); nor will the fact that the vendee knew of his insolvency at the time of the purchase, be alone sufficient to vitiate the sale; it must also be shown either that the vendor was induced to part with his goods by the *false* representations of the vendee as to his solvency, or that the vendee, remaining silent as to his condition, got possession of the goods without any intention to pay for them (*Buckley* v. *Aricher*, 21 Barb. 585).

c. In an action to recover damages for the detention of personal property, it is not necessary to set forth the plaintiff's title in the complaint otherwise than by a general averment of ownership; and under such an averment if controverted, the plaintiff may give evidence of the manner in which he acquired title (*Heine* v. *Anderson*, 2 Duer, 318). The complaint should show a wrongful taking, and that is sufficiently shown by an allegation that the defendant took the property of the plaintiff and unjustly detained it. Such an allegation imports a tortious taking (*Childs* v. *Hart*, 7 Barb. 370). The complaint must also allege that the property is the property of the plaintiff, and this should be done by a direct and traversable averment, and not by allegations of the evidence of ownership. It is not sufficient to allege that the plaintiff is entitled to the possession of the goods, and that they are the property of him, the plaintiff, *by virtue of* attachments duly issued by justices of the peace, and delivered to the plaintiff as a constable, to be executed (*Vandenburgh* v. *Van Valkenburg*, 8 Barb. 217; *Bond* v. *Mitchell*, 3 Barb. 304; see, however, *Kissam* v. *Roberts*, 6 Bosw. 154). An allegation that the plaintiff "was the *owner* and entitled to the immediate possession of the goods," was held to be an allegation of fact; and the court said, "The case is not analogous to those in which the averment of ownership is a mere conclusion of law from the facts previously stated. The averment here is not a conclusion of law, for no facts are stated from which such a conclusion would follow. It is not a conclusion of law, but affirmative of a fact (*Davis* v. *Hoppock*, 6 Duer. 256). And in an action to recover real property, it was held that an allegation that "plaintiff is the owner," was an allegation of fact (*Walter* v. *Lockwood*, 23 Barb. 233).

d. Under a complaint for taking and detaining personal property, a plaintiff cannot enforce a specific lien upon property (*Ottis* v. *Sill*, 8 Barb. 103; and see *Baker Hoag*, 3 Selden, 557).

e. A declaration in replevin in the cepit, had to show a wrongful taking; but it was sufficient to allege that the defendant took the property of the plaintiff and unjustly detains the same. Such an allegation imports a tortious taking (*Childs* v. *Hart*, 7 Barb. 370).

f. In an action for levying upon property exempt from execution, it is not necessary to allege in the complaint that the property was exempt from execution (*Stevens* v. *Somerindyke*, 4 E. D. Smith, 418).

g. Where the complaint in an action to recover the possession of personal

property, alleged the value of the property to be "*about* $130," which allegation was not controverted by the answer, held that the defendant might show the true value of the property (*Woodruff* v. *Cook*, 25 Barb. 505).

a. **Public officer.**—In an action by an officer of a foreign corporation in his own name, on a bill or note, the property of such corporation, the complaint, should state the existence and terms of the foreign law under which the corporation was organized, and which authorizes the plaintiff to sue in its behalf (*Myers* v. *Machado*, 14 How. 149; 6 Abb. 198). Thus where, in such a case, the complaint alleged that the plaintiff was a public officer of a certain banking company, duly created by the laws of Great Britain, and as such was "duly authorized" to commence an action on behalf of said bank, and that the action was for the benefit and on behalf of said bank, on demurrer for defect of parties, it was held that the averment that the plaintiff was "duly authorized" was not an averment of a fact, but of a conclusion of law, and that the complaint was also defective in not setting forth the existence and terms of the statute under which the bank was organized, and which gave the plaintiff authority to sue (*Id.*; see *Commissioners of Highways*).

b. Complaint in action to try the right to an office (*The People* v. *Ryder*, 16 Barb. 370).

c. **Railroad act.**—In an action under the railroad act of 1850, against a stock-holder to recover for services performed for the railroad company, the complaint must show that the services were rendered by *a laborer* or *servant* to the company (*Boutwell* v. *Townsend*, 37 Barb. 205).

d. Complaint against railroad company under section 53 of the General Rail Road Act (*Hempstead* v. *N. Y. Central R. R. Co.*, 28 Barb. 486).

See *Actions given by statute.*

f. **Railway mortgage.**—Requisite of a complaint in an action by a trustee respecting the trust fund arising under a railway mortgage (*Coe* v. *Beckwith*, 10 Abb. 296).

g. **Recognizance.**—The complaint need not set out the facts which show the officer had jurisdiction (*Champlain* v. *The People*, 2 Coms. 83; *The People* v. *Millis*, 5 Barb. 511; *The People* v. *Kane*, 4 Denio, 530); nor the order directing the prosecution of the recognizance (*The People* v. *Blankman*, 17 Wend. 252). If the recognizance was taken out of court, the complaint should allege that it was filed and recorded in court (*The People* v. *Van Epps*, 4 Wend. 387); but this requirement is satisfied by a reference to the recognizance as a record (*The People* v. *Huggins*, 10 Wend. 464). It seems it should be alleged that the defendant's default for not appearing was entered of record, and that the bail did not produce him; but these particulars are imported in an averment that the principal, though called, did not appear. (*Id.*)

h. **By Seneca Nation of Indians.**—An action brought by the Seneca Nation of Indians in their own name, upon a promissory note given and made payable to them, may be sustained; and it is not necessary that they should aver their act of incorporation, or their authority to sue in courts of this State (*The Seneca Nation of Indians* v. *Tyler*, 14 How. 109).

i. **To set aside fraudulent deed.**—In a complaint to set aside a fraudulent deed, it is sufficient to charge that the assignment was made to hinder, defraud and delay the creditors of the assignor, and that it is therefore fraudulent and void; it need not point out the particular features or clauses of the deed which are objected to (*Jessup* v. *Hulse*, 29 Barb. 539). Where a complaint alleged that on, &c., F. was owner of certain real estate, that on that day the plaintiff commenced an action against him for debt, and sued out an attachment against his property, as an absconding debtor, and delivered same to the sheriff, who attached the real estate of F.; that plaintiff obtained a judgment in said action, docketed the same, issued execution thereon, on, &c.; that sheriff satisfied a portion of the judgment out of the personal property of F.; that on, &c. (a day prior to the issuing the attachment), F. assigned all his property to the defendant, who, under such assignment, claimed to hold same; that such assignment was fraudulent and void, and made with intent to hinder, delay, or defraud the creditors of F., and particularly the plaintiff; and

prayed judgment that the assignment should be set aside,—held that it did not state facts sufficient to constitute a cause of action (*Wilson* v. *Forsyth*, 24 Barb. 106; and see *Amer. Ex. Bank* v. *Webb*, 15 How. 193).

a. Where an application is made to the discretionary power of a court of equity, as for the delivering up and cancelling a written instrument, the special circumstances that alone justify the exercise of such a power must be set forth in the complaint, since these are emphatically the facts which constitute the cause of action (*Field* v. *Holbrook*, 14 How. 104; 3 Abb. 377).

b. In an action to set aside an assignment for fraud appearing on its face, the complaint is sufficiently definite and certain if it states the circumstances under which the assignment was made, sets forth the assignment, and alleges that it is fraudulent and void on its face. The reasons why it is deemed void need not be stated (*Hastings* v. *Thurston*, 10 Abb. 418).

c. **To set aside judgment.**—Requisites of a complaint in action to set aside a judgment (*Hamel* v. *Grimms*, 10 Abb. 150).

d. **Against shareholders.**—As to complaint in actions by creditors of manufacturing corporations in the county of Herkimer, see *Herkimer Co. Bank* v. *Furman*, 17 Barb. 116; *Walker* v. *Crain*, *id.* 119.

e. In an action against ten persons as members of a joint stock company, the complaint averred that defendants were all shareholders in said company during the year 1857, that while they were such shareholders the company became indebted to plaintiff, for goods sold to the company, to the amount of $162, and an action was commenced on such demand against such company by service of a summons on its president, and judgment obtained for $178 damages and costs, and execution issued and returned unsatisfied,—on demurrer held sufficient (*Witherhead* v. *Allen*, 28 Barb. 661).

f. **Sheriff.**—Form of complaint against a late sheriff for not delivering execution debtor in his custody over to his successor (*French* v. *Willett*, 10 Abb. 99; 4 Bosw. 649); for an escape (*McCreary* v. *Willett*, 4 Bosw. 463; *Renick* v. *Orser*, 4 Bosw. 384).

g. In an action for not executing process, complaint need not state all the steps in the action; it will be sufficient if it states enough to show jurisdiction to issue process, and then allege that the process was duly issued (*French* v. *Willett*, 10 Abb. 99).

h. Form of complaint by sheriff to recover property levied upon by attachment (*Kelly* v. *Breusing*, 32 Barb. 601; aff'd 33 Barb. 123).

i. In an action by a sheriff, the complaint need not set forth the time and circumstances of his election or induction into office (*Kelly* v. *Breusing*, 33 Barb. 123, aff'g 32 Barb. 601).

j. **Specific performance.**—The complaint in an action for specific performance of a contract for the sale and purchase of land, need not supply the circumstances which will furnish materials and guidance for drawing a decree or judgment directing a conveyance with a definite description, so that an officer may go upon the ground and select the farm. Such a degree of certainty is not necessary (*Richards* v. *Edick*, 17 Barb. 261).

k. **Stakeholder.**—Form of complaint against a stakeholder to recover deposit on an illegal wager (*O'Malley* v. *Reese*, 6 Barb. 658).

l. **Stock broker.**—In an action against stock brokers for damages for selling plaintiff's stock in violation of his instructions, the complaint otherwise sufficient, need not allege a demand on defendants and a tender of the amount due them (*Clarke* v. *Meigs*, 22 How. 340; 13 Abb. 467, rev's'g 21 How. 187 and 12 Abb. 267).

m. **Against or by stockholders of corporations.**—In an action against a stock holder of a corporation formed under the statute for the formation of corporations for manufacturing, &c., purposes (Laws of 1848, ch. 40), founded on a judgment recovered against such corporation, it is sufficient for the complaint to allege the recovery of such judgment without any reference to the consideration and circumstances of the original indebtedness (*Peckham* v. *Smith*, 9 How. 436).

a. Complaint against stockholder of incorporated company for debt of company, need not aver insolvency of corporation, except in cases were the liability depends on such insolvency (*Perkins* v. *Church*, 31 Barb. 84).

b. Complaint against stockholders under laws of 1848, ch. 40 (*Chambers* v. *Lewis*, 16 Abb. 433).

c. In an action against a trustee of a moneyed corporation to charge him personally with a debt of the corporation, the complaint is demurrable if it appears on its face that the wrongful acts of the defendant were committed before the indebtedness arose (*Ogden* v. *Rollo*, 13 Abb. 300).

d. In an action to charge stockholders personally with the debts of their corporation, under a charter which provides that the stockholders shall be liable, *etc.*, until the amount of capital stock has been paid in, the complaint must show the defendants were stockholders during the time the debts sued on were incurred (*Young* v. *N. Y. & Liverpool Steamship Co.*, 10 Abb. 229; 15 Abb. 70; see *House* v. *Cooper*, 16 How. 294).

e. A complaint by certain stockholders in a corporation, on behalf of themselves and the other stockholders, against a former agent of the corporation for misapplication of funds of the corporation received by him, should allege that the corporation by its officers had refused to sue. A demurrer to a complaint for want of such an allegation, was sustained (*Vanderbilt* v. *Garrison*, 3 Abb. 361); See, *Shareholders.*

f. **Rent.**—In an action for rent due where there is a lease under seal, the plaintiff may elect to sue on the covenant, and thereby make the covenant his cause of action, or he may sue for the subsequent use and occupation, and make that his cause of action (*Ten Eyck* v. *Houghtaling*, 12 How. 523).

g. The complaint in an action by the landlord against an assignee of the lease, was held good on demurrer, although it did not aver that the rent was unpaid at the commencement of the action, but merely that, although frequently requested, the assignee had refused to pay (*Holsman* v. *De Gray*, 6 Abb. 79).

h. A covenant for payment of rent runs with the land. Where, in an action for rent, the complaint alleged that the grantor and covenantee, V. R., died on, &c., seized of the rent in question; that by his will he devised the rent to W.; whereupon and whereby he became seized of the rent; and that on, &c., W. conveyed said rent to A. W. and others, and the latter conveyed it and all arrears thereof to the plaintiff: held sufficient, not only to show that the plaintiff was entitled as an assignee of a chose in action, to sue for the rent due and unpaid at the time of the assignment to him, but that he was also the assignee of the covenant for the payment of the rent subsequently accruing. The complaint in such a case need not allege that after the plaintiff became assignee of the rent, he continued to be the owner until the action was commenced. In the absence of any allegation to the contrary, this is a legal presumption, and need not be alleged or proved (*Van Rensselaer* v. *Bonesteel*, 24 Barb. 366). In an action for rent against an assignee of a portion of the demised premises, the owners of the other portions of the lot need not be made parties. After a partition, each owner becomes severally and independently liable for his proportionate share of the rent. (*Id.*)

i. In a complaint against an assignee of a lease, it is not necessary to show *how* he became such assignee (*Norton* v. *Vultee*, 1 Hall, 384).

j. See *Covenant, Use and Occupation.*

k. **Undertaking.** See *Bond.*—In an action on an undertaking given to discharge an attachment issuing out of a court of general jurisdiction, it is not necessary to allege that the court had jurisdiction to issue the attachment. All that need be alleged is the pending of a suit (*Cruyt* v. *Phillips*, 16 How. 120; 7 Abb. 205). The same was held in an action on a bond given on the granting of an injunction (*Loomis* v. *Brown*, 16 Barb. 325).

l. In an action against the sureties in an undertaking given by the defendant for the return of specific personal property, it is not necessary to allege the issuing an execution against the original defendant (*Slack* v. *Heath*, 1 Abb. 331;

4 E. D. Smith, 95; aff'd Co't App's, June, 1860; and see *Morange* v. *Mudge*, 6 Abb. 243; *Livingston* v. *Hammer*, 7 Bosw. 671).

a. In an action on an undertaking given by a defendant in a proceeding of claim and delivery, the complaint must state that the property was delivered to the defendant (*Nickerson* v. *Chatterton*, 7 Cal. 568). And in an action by an assignee of an undertaking in such a proceeding, it is sufficient for the plaintiff, by way of showing his title, to allege that the undertaking was duly assigned to him, without alleging that the judgment in the action was also assigned (*Morange* v. *Mudge*, 6 Abb. 243). If the undertaking is made to the plaintiff, no assignment is necessary (*Decker* v. *Anderson*, 39 Barb. 346).

b. In an action on an undertaking, given on the issuance of an injunction, it is a sufficient statement of the nature of the action, the manner of its commencement, place of trial, jurisdiction of the court, &c., to allege that an injunction was granted in the action, by a justice of the court, and that issues were joined in the action, and judgment rendered thereon (*Loomis* v. *Brown*, 16 Barb. 325).

c. In an action on an undertaking on appeal in the usual form, it is not necessary in the complant to allege any notice of affirmance or demand of payment of the judgment. The action is a demand (*Heebner* v. *Townsend*, 8 Abb. 234).

d. To sustain such an action it is not necessary that any execution should have issued on the judgment affirmed. The undertaking is forfeited, and the liability of the sureties fixed, as soon as the judgment of affirmance is rendered and the debtor makes default in its payment (*Wood* v. *Derrickson*, 1 Hilton, 410).

e. Where in an action on an undertaking the complaint alleges that upon the appeal to the court of appeals the defendants made and filed with the clerk of the court, for the use of the plaintiffs, the undertaking in question, and also, that the appeal has been prosecuted to a final determination in the court of appeals,—it states a sufficient consideration to make the undertaking obligatory upon the defendants. The complaint need not allege that the undertaking was accompanied by the affidavits of the sureties, that they were worth double the sum specified therein (*Gibbons* v. *Berhard*, 8 Bosw. 635).

f. **Use and Occupation.**—[The material allegations are, (1) occupation by defendant; (2) by permission of plaintiff.] The statute giving an action for use and occupation, applies only to the case of a demise, *actual* or *implied* (*Smith* v. *Stewart*, 6 Johns. 46; *Osgood* v. *Dewey*, 13 *id.* 240; *Bancroft* v. *Wardwell*, id. 489). The action lies against a lessee by deed, holding over after the expiration of his term (*Abeel* v. *Radcliff*, 13 *id.* 297). But not against a tenant holding over, against whom summary proceedings are commenced immediately on the expiration of the term, and he ejected (*Bradshaw* v. *Featherstonehaugh*, 1 Wend. 134).

g. The action will not lie where there has been no occupation, *actual* or *constructive* (*Wood* v. *Wilcox*, 1 Denio, 37; *Cleves* v. *Willoughby*, 7 Hill, 83; *Glover* v. *Wilson*, 2 Barb. 264; *Croswell* v. *Crane*, 7 *id.* 191; *Beach* v. *Gray*, 2 Denio, 84). An occupation the defendant might have had if he had not voluntarily abstained from it, is sufficient to support the action (*Westlake* v. *Degraw*, 25 Wend. 669).

h. In an action for use and occupation, the complaint need not aver how the relation of landlord and tenant arose between the parties (*Waters* v. *Clark*, 22 How. 104).

i. A complaint which omits to allege the period of occupation, the rate of rent, and the time for which the rent is in arrear, may be indefinite and uncertain, but is not demurrable. (*Id.*) A complaint as follows: "The complaint of the plaintiff shows that the defendant is indebted to the plaintiff in the sum of $300 and interest thereon, from and after the 16th day of May, 1847, for the use and occupation of certain lands and tenements [describing them], being the property of the plaintiff, for and during the following years [describing them], for which the plaintiff claims the said sum of $300, with interest as aforesaid, for which principal money and interest the plaintiff de-

mands judgment, was held not to state facts sufficient to constitute a cause of action; that it did not show any relation of landlord and tenant, and none could be presumed from the facts stated (*Hall* v. *Southmayd*, 15 Barb. 32; *Hurd* v. *Miller*, 2 Hilton, 540). An averment that defendant occupied plaintiff's land, without saying it was by the plaintiff's permission, is no more sufficient than to say, the plaintiff performed work for defendant, without saying it was done at his request (*Bradley* v. *Davenport*, 4 Conn. R. 4). No *express* promise is alleged, and no fact alleged from which one may be implied. (*Id.*)

a. A husband, after his wife's death, might maintain an action for use and occupation of the wife's real estate, *by the permission of the plaintiff and his wife* during coverture (*Jones* v. *Patterson*, 11 Barb. 572).

b. Where a plaintiff becomes the grantee and owner of premises at the time occupied by the defendants under an unsealed and unexpired lease, at a specified sum per annum, and becomes such owner, and assignee of such lease, with the assent of such tenants, and they continue to occupy the premises after notice of such facts, and that the plaintiff is their landlord, and without objection, the plaintiff can recover for subsequently-accruing rent, on a complaint which merely states that he is owner of the premises, and that the defendants occupied them at their request and by his permission, and that the use of them is worth $284 14. But he can only recover at the rate specified in the lease under which the defendants entered (*Peckham* v. *Leary*, 6 Duer, 494).

c. Where a plaintiff in an action against a lessee and his surety declares generally for use and occupation, the defence being a general denial, and the plaintiff on the trial introduces the lease and guarantee in evidence, the defendants may then avail themselves of the misjoinder. The objection could not be raised until the plaintiff put the instruments in evidence (*Phalen* v. *Dingee*, 4 E. D. Smith, 379). [Query—Was there more than a failure of proof against the surety, and should not the plaintiff have had judgment against the lessee? See in note to § 274, *post*, 1 Kernan, 301; see *ante*, p. 131 *c.*]

See *Rent.*

d. **Work and services.**—If one person render services for another, without his request or consent and against his will, he cannot recover therefor (*Calkins* v. *Parker*, 21 Barb. 275); and therefore on complaining upon an indebtedness for past service, it is necessary to aver that the service was performed upon request, otherwise from all that would appear upon the record the service may have been a voluntary courtesy (*Comstock* v. *Smith*, 7 Johns. 87; 6 Wend. 647). Such averment of request may be sustained by evidence of facts from which a request may be implied (*Ingraham* v. *Gilbert*, 20 Barb. 152). A *subsequent* implied promise is equivalent to a previous request. (*Id.*)

e. Where a complaint alleged an indebtedness by the defendant to the plaintiff, for work, labor, and services of the plaintiff for the defendant, and for the materials, &c., supplied by the plaintiff in and about such work, as follows: $425 for the balance due to him on a contract between them dated, &c. [describing it], and $162 for extra work and services not included in said contract, and performed by plaintiff in and about, &c., the court said, the complaint was grossly defective in not setting out the facts upon which the alleged balance arose (*Brown* v. *Colie*, 1 E. D. Smith, 267).

f. A complaint which alleged that the defendant was indebted to the plaintiff for services for the defendant by the plaintiff done and bestowed as the attorney of the defendant, and at his request, and for money paid out and expended for the defendant at his request, previous to January, 1852, was held sufficient after judgment (*Beekman* v. *Platner*, 15 Barb. 550). Probably it was not sufficiently definite; for a complaint which alleged that the plaintiff at the defendant's request rendered other services as agent, for which he is entitled to have as a fair reward $50, also for work, labor and services done and materials furnished by the plaintiff for the defendants, was held to be indefinite and uncertain (*Chesborough* v. *N. Y. & Erie R. R. Co.*, 26 Barb. 9; 13 How. 557).

g. Where a claim was for the construction and delivery of patterns for a gas

meter, made and delivered for a fixed sum,—it was held that the complaint was properly framed as for work, labor and materials. "The plaintiff undertook to do work and furnish materials necessary when he undertook to mak and deliver the patterns. The compensation being fixed at a gross sum, did not alter the claim" (*Prince* v. *Down*, 2 E. D. Smith, 525).

a. One who rendered services in the supposed relation of lawful wife, cannot, on discovering that the marriage was void, recover on an implied promise to pay for them (*Cropsey* v. *Sweeney*, 7 Abb. 129; 27 Barb. 310).

b. Where in an action to recover the price agreed to be paid for the building a school-house, a complaint which alleges, that the plaintiff had performed all the work and labor of building and completing the school-house, and had fulfilled all the conditions of the contract in every respect, *except wherein the same were afterwards waived and altered by the direction, consent or negligence and fault of the defendants*, is too indefinite and held insufficient on demurrer, (*Smith* v. *Brown*, 17 Barb. 431).

c. Where a plaintiff seeks to recover for work and labor performed under a written contract, containing special provisions, the performance of which as conditions precedent, he is bound to prove, the contract or its substance must be stated in the complaint, and a compliance with its conditions be distinctly averred (*Adams* v. *Mayor of N. Y.*, 4 Duer, 295; see however, *Hosley* v. *Black*, 26 How. 97).

d. Where the complaint alleged that plaintiffs, before and at, &c, were partners and stockholders at, &c., and that they reasonably deserve to have from defendant, for their services as such stock-brokers in making * * * other purchases and sales of stock which they were employed by defendant to make, and which they made as his brokers, the sum of $115, or thereabouts; and that defendant has not paid said commission, or any part thereof, to plaintiffs, the court said, that the plaintiffs were employed by the defendant to make purchases and sales of stock; that they made such purchases and sales as his brokers; and that they deserve to have, for their services therein, the sum of $115, and that the defendant had not paid them,—"we cannot say there are not facts enough stated to entitle the plaintiffs to recover. * * * No doubt the complaint is greatly deficient in particulars which, upon a proper motion, the plaintiffs would be required to supply" (*Merwin* v. *Hamilton*, 6 Duer, 253).

e. Under a complaint for services generally, plaintiff cannot recover for services under a special contract; to recover for such services he must set forth the contract and the partial performance (*Atkinson* v. *Collins*, 9 Abb. 353).

f. A complaint for work and materials should state the kind of work and materials, and the time when done and supplied; and where a complaint alleged that plaintiff had rendered services for defendant and furnished materials therefor, at the times, about the matters, and at the prices "specified in an account already delivered to the defendant," to which account plaintiff prays leave to refer, but no copy of such account was annexed to or inserted in the complaint; held that the complaint was indefinite and uncertain, as to the nature of the services and materials, and the time at which they were rendered and supplied (*Farey* v. *Lee*, 10 Abb. 143).

See note to section 162, *post*.

g. In an action for a wrongful dismissal, an allegation of readiness and willingness to serve is sufficient without any allegation of an offer to serve (*Wallace* v. *Warren*, 18 Law Jour. R. 449 Ex.; 7 Dowl. & L. 60; 4 Ex. 364).

Some miscellaneous rules.

h. **Knowledge in defendant (scienter).**—Scienter is the gist of the following actions: For keeping mischievous animals (*Thomas* v. *Morgan*, 2 Cr. M. & R. 496; 4 Dowl. 223; *Vrooman* v. *Lawyer*, 13 Johns. 339; *Van Leuven* v. *Lyke*, 1 Coms. 515; *Fairchild* v. *Bentley*, 30 Barb. 147); for falsely representing a person as fit to be trusted (*Upton* v. *Vail*, 6 Johns. 181; *Russell* v. *Clark*, 7 Cranch, 92; *Armstrong* v. *Tuffs*, 6 Barb. 432); against municipal corporation, for area in sidewalk being defective (*McGinity* v. *Mayor of N. Y.*, 5 Duer, 674); for

enticing away or harboring a wife or servant (Peake, Cas. N. P. 55; Willis, 577; 21 Barb. 539); in malicious prosecution, that court had no jurisdiction (2 Wils. 302); against sheriff, for removing goods without paying rent (7 Price, 566); in an action against the continuance of a private nuisance originated by another (*Hubbard* v. *Russell*, 24 Barb. 404). A master is not responsible to his servant for an accident happening in the course of his services, unless he *knew* that it exposed the servant to peculiar danger, and the servant did not know it; and therefore, in an action against an employer, to recover damages for an injury causing the death of the plaintiff's intestate, while acting as a servant of the defendant, it is necessary to aver in the complaint that the defendant had *notice* (*i. e.* knowledge) of the defect which occasioned the accident (*M'Millan* v. *Saratoga R'l'd. Co.*, 20 Barb. 449; see *Omrod* v. *Huth*, 14 Law Jour. 366, Ex; *Fish* v. *Scutt*, 21 Barb. 333; *Byron* v. *N. Y. State Print. Tele. Co.*, 26 Barb. 39).

a. The general rule with respect to the necessity of averring notice, is that when the matter is to be considered as lying more properly in the knowledge of the party pleading, than of the adverse party, notice thereof should be averred (*Cole* v. *Jessup*, 2 Barb. 310).

b. An averment that defendant had good reason to believe that plaintiff well knew, held a sufficient allegation of actual knowledge in plaintiff (*Spencer* v. *Southwick*, 9 Johns. 314; and see *Wilson* v. *Rochester R. R. Co.*, 16 Barb. 170). An allegation that a party was influenced by certain acts implies knowledge (*Mead* v. *Mali*, 15 How. 352). And so does an allegation of a false and fraudulent representation (*Thomas* v. *Beebe*, 25 N. Y. 244).

c. Scienter need not be alleged in the following actions: For selling goods in which the seller has no property (4 Bing. 66; see *Edick* v. *Crim*, 10 Barb. 445); for malicious prosecution (*Ross* v. *Norman*, 5 Exch. 359); for driving unruly horses (2 Lev. 172); for debauching wife or servant (Peake C. N. P. 55; Willis, 557); against the owner of a dog for killing sheep (1 R. S. 704, § 9; *Fish* v. *Skut*, 21 Barb. 333; see *Penalties*); for one animal injuring another (*Wheeler* v. *Brandt*, 23 Barb. 324; *Dunckle* v. *Knocker*, 11 Barb. 387; *Van Leuven* v. *Lyke*, 1 Coms. 515); or for a false warranty (*Holman* v. *Dord*, 12 Barb. 336); 1 Code Rep. N. S. 331; *Fowler* v. *Abrams*, 3 E. D Smith, 1; *Mabey* v. *Adams*, 3 Bosw. 346; 12 East 446; 4 Bing. 73).

d. **Consideration, how alleged.**—A consideration for a promise must always be alleged (*Burnet* v. *Bisco*, 4 Johns. 235); whether the promise be in writing or by parol. (*Id.*) Where an instrument declared on purports to be for value received, and is set out in the complaint, it is sufficient allegation of consideration (*Prindle* v. *Caruthers*, 15 N. Y. 426); so to allege that the promise was for value received is sufficient (*id*). Where a consideration is a past act, the act must be alleged to have been done at the request of the defendant (*Comstock* v. *Smith*, 7 Johns. 87; *Parker* v. *Crane*, 6 Wend. 647; *Livingston* v. *Rogers*, 1 Caines, 584; see *Pleading a written instrument*).

e. Where the complaint alleged that the defendants were indebted to plaintiffs, and to secure such indebtedness delivered certain promissory notes, and then and there agreed in writing that in case of default in payment of any one note the whole amount remaining unpaid should become due. On motion to make the complaint definite and certain as to the consideration for the notes, Sutherland, J., held that, although there was no consideration stated for the first-mentioned indebtedness, nor when nor where nor how it arose, yet the allegation that at the time of the delivery of the notes the defendants agreed in writing, the complaint was sufficiently definite and certain, in the respect objected to (*Brown* v. *South Mich. R. R. Comp.* 6 Abb. 238).

f. **Negligence.**—Degrees of negligence are matters of proof, and not of averment. An allegation in a pleading of negligence applies as well to gross as to ordinary negligence (*Nolton* v. *West. R. R. Corp.* 15 N. Y. 450; as to negligence, see 2 Selden, 410, 435).

g. **Request or demand.**—The plaintiff is only bound to allege a request when it is the object of the request to oblige the defendant to do something (18 Eng. Com. Law Rep. 355). And if a defendant is liable to pay without a request,

no request need be alleged (*Smith* v. *Emery*, 7 Halst. 53, 61). A party entitled to a conveyance on request, may bring his action without any request (*Bruce* v. *Tilson*, 25 N. Y. 194).

a. A request must be alleged when, by the express or implied terms of the contract, it was incumbent on the plaintiff to request the defendant to perform his contract, such request being then in the nature of a condition precedent. Thus a request must be alleged in an action for not delivering a horse sold by defendant to the plaintiff; or for not finding timber for repairs (5 T. R. 409; 1 East, 204; Com. Dig. Pl. C. 69); or on a note payable "*after* demand" (1 R. & M. 388), or at a particular place (*Ferner* v. *Williams*, 14 Abb. 215); but not on a note payable "on demand," as the commencement of the action is a demand (4 B. & C. 327; 2 Scott, 334; and see 24 Barb. 300; 36 Barb. 629). Where a mere duty is promised to be paid upon request, there needs no actual request, but where a collateral sum is promised to be paid upon request, there must be an actual request (*Birks* v. *Trippet*, 1 Saund. 33 *a*). Where a man engages to pay on demand the debt of another, no debt is due from him until demand has been made, and in such a case a prior demand must be alleged (*Milliken* v. *Byerly*, 6 How. 214); but the rule does not apply to a commission merchant who is to sell and guarantee payment unless he be a foreign factor, for, as against a foreign factor a demand is necessary (*Halden* v. *Craft*, 4 E. D. Smith, 490; S. C. 2 Abb. 303; *Cooley* v. *Betts*, 24 Wend. 203); nor does the rule requiring a demand apply to a surety for rent after the tenant has left the premises (*McKenzie* v. *Farrell*, 4 Bosw. 193); nor to the case of a joint promissory note given by the principal debtor and another as his surety (*Exp. Whitworth, re Mayor*, 2 Mon. D. & De G. 158). A request must be alleged in a complaint on a contract to deliver up a bond "on request" (3 Bulstr. 297); or to pay money "on request" (3 Camp. 459); or to pay an annuity on request (Cro. Eliz. 548, 721); or to perform any act on request (1 Saund. 32; *Smith* v. *Tiffany*, 36 Barb. 23); or as surety to pay rent on request (6 M. & S. 9, 121, 125; 11 Price, 494). In an action for not marrying in a reasonable time a request should be alleged (2 D. & R. 55); so in an action against a bailee or depositary (*Phelps* v. *Bostwick*, 22 Barb. 314; see, however, *Fancher* v. *Goodman*, 29 Barb. 316; or treasurer (*Second Av. R. R. Co.* v. *Coleman*, 24 Barb. 300); or for money collected by an attorney, unless waived (*Walradt* v. *Maynard*, 3 Barb. 584); or for not accepting goods sold (*Bach* v. *Owen*, 5 T. R. 409; see, however, *Radford* v. *Smith*, 6 Dowl. Pr. Cas. 384). An action for detention of chattels where defendant came lawfully by the possession (*N. Y. Car Oil Co.* v. *Richmond*, 10 Abb. 185; 6 Bosw. 213; *Powers* v. *Bassford*, 19 How. 309; *Fuller* v. *Lewis*, 3 Abb. 384; 13 How. 219; *Gurney* v. *Kenny*, 2 E D. Smith, 132; *Barrett* v. *Warren*, 3 Hill, 315; *Storm* v. *Livingston*, 6 Johns. 44); but where defendant came wrongfully by the chattels, or has converted them, no demand is necessary (*Pilsbury* v. *Webb*, 33 Barb. 213; see *ante*, p. 238 *a*). In alleging a past consideration it must be alleged to have been at the the defendant's request (*Comstock* v. *Smith*, 7 Johns. 87; *Parker* v. *Crane*, 6 Wend. 647; *Livingston* v. *Rogers*, 1 Caines, 584). Where request must be alleged, see *Spear* v. *Downing*, 12 Abb. 437; 34 Barb. 523. No request need be alleged where one entrusted to collect money collects it and neglects to pay it over (*Hickok* v. *Hickok*, 13 Barb. 632; and see *Second Ave. R. R. Co.* v. *Coleman*, 24 Barb. 300); or where one having received a part payment on a contract, unlawfully rescinds the contract (*Fancher* v. *Goodman*, 29 Barb. 316); or to recover of a stakeholder on an illegal wager (*O'Malley* v. *Rees*, 6 Barb. 658); or to foreclose a mortgage (*Harris* v. *Mulock*, 9 How. 402); although expressed to be payable on demand (*Gillett* v. *Balcom*, 6 Barb. 371); or to recover money collected by a commission merchant who is to sell and guarantee payment (*Milliken* v. *Byerly*, 7 How. 214); or to recover for a passenger's baggage lost by a carrier (*Schroeder* v. *Hudson R. R. R. Co.*, 5 Duer, 55; *Garvey* v. *Camden R. R. Co.*, 1 Hilton, 280); nor to recover money paid by mistake (*Utica B'k.* v. *Van Giessen*, 18 Johns. 485); but the absence of a demand may affect the right to recover interest (*id.*); where the complaint is upon a contract to pay a precedent debt (*Ernst* v. *Bartle*, 1 Johns. Cas. 319); as in the cases of money lent, and goods sold and delivered (*ante*, pp. 220 *e*, 233 *c*); or where the defendant is to perform the first act (2 N. Rep. 355; *Lent* v.

Padleford, 10 Mass. 230); or where it appears that the defendant has, by his own voluntary act, put it out of his power to comply with a request, if made (*Short* v. *Stone*, 3 D. &. L. 580; *Clark* v. *Crandall*, 3 Barb. 612); or has otherwise so acted as to render a request useless and unnecessary (*Lutweller* v. *Linneil*, 12 Barb. 512; 5 B. & Ald. 712; 1 D. & R. 361; 10 East. 359; 11 Price, 494); as when, after a promise to marry A., the defendant married B. (*Caines* v. *Smith*, 15 M. & W. 189); but in such cases the act relied on as rendering a request unnecessary should be alleged. (*Id.*) No demand need be alleged in an action on a bond conditioned generally for payment of a specified sum with interest (*Gibbs* v. *Southam*, 5 B. & Adol. 911; 3 Nev. & M. 155).

a. In an action for continuing a nuisance erected by another, the plaintiff must prove knowledge, in the defendant, of its existence, and a request to remove it (*Hubbard* v. *Russell*, 24 Barb. 404; and see 2 Ker. 492).

b. There was formerly a distinction as to the mode of pleading a request, depending on the fact whether or not it was necessary to prove the alleged request on the trial (see Lawes Pl. in Assumpsit, 231; *Carpenter* v. *Brown*, 6 Barb. 150). No such distinction now exists. It need not be alleged whether the request was written or oral (*Barnes* v. *Perine*, 2 Kernan, 27). A demand on one of several joint debtors or partners is a demand on all (*Geisler* v. *Acosta*, 5 Selden, 235; *Baird* v. *Walker*, 12 Barb. 298); and should be so alleged (*Carman* v. *Pultz*, 21 N. Y. 551); and where a special request is necessary, it should be alleged, with time and place, or the pleading will be indefinite, but not demurrable (*Brush* v. *Stevens*, 24 Wend. 257; *Carpenter* v. *Brown*, 6 Barb. 150). *Semble*, that if where a demand is necessary an action to recover money is commenced without any previous demand the service of the summons is a demand, and defendant should then pay the money without costs (*Second Ave. R. R. Co.* v. *Coleman*, 24 Barb. 300; and see *Gillett* v. *Balcom*, 6 Barb. 371).

c. **Performance.**—The rules respecting the mode of setting forth the performance of conditions precedent [not embraced in section 162, or where the pleader does not avail himself of that section] were not intended to be substantially changed by the code. Facts showing performance, are to be stated; not circumstances that are mere evidence, nor mere legal conclusions (*Hatch* v. *Peet*, 23 Barb. 580). An allegation in a complaint, intended as an averment of performance of a condition to execute a release of all actions, that plaintiff did execute a release in full of all actions, without stating that the release was under seal, or in what manner it was made, was held insufficient on demurrer. That it was not a case of indefiniteness or uncertainty merely, but an omission to state any fact. (*Id.*) And the like decision was made in that case as to an allegation intended as an averment of performance of a condition in a bond to discontinue all suits, that all suits "were discontinued, each party paying his own costs as in the condition of said bond stipulated." A complaint alleged that on, &c., S. executed to plaintiff an instrument under seal, by which in consideration of $4,050 to be paid him on, &c., then next, he agreed to convey to plaintiff a lot of land—payment to be made $500 cash, $500 by note, and the residue secured by mortgage: possession to be given on, &c. That by an indorsement on said instrument executed by W., the defendant's testator, he, in consideration of $1, guaranteed the fulfillment of said contract by S. The complaint then alleged the payment of the first-mentioned sum of $500, "*and that the plaintiff was ready and willing to fulfill the obligations by virtue of said instrument;*" that on account of the failure of S. to perform said contract, plaintiff had sued him, and recovered a judgment against him for $526, which, owing to the insolvency of S., remained unsatisfied. And plaintiff claimed that by virtue of the guarantee, the defendants, as the executors of W., were liable for the amount of the said judgment against S. On demurrer, it was held that the plaintiff could not recover without showing performance or an offer to perform on his part; that the complaint should have averred that the plaintiff offered to perform on his part, or had requested S. to convey, and had given him notice of his readiness to perform (*Van Schaick* v. *Winne*, 16 Barb. 94; see *Beecher* v. *Conradt*, 3 Kernan, 110).

d. The general rule of law is, that full performance of an entire contract to

do any particular service is essential to the payment of compensation, and that no recovery can be had for a part performance (14 Wend. 257; 12 Johns. 165; 19 *id.* 337; 8 Cow. 63; 1 Ker. 25). It is no excuse that the service which a party has undertaken to perform is impracticable in itself (*Wolfe* v. *Howes*, 24 Barb. 174–666; 20 N. Y. 197). But the sickness or death of the party contracting is a legal excuse for the non-performance (*Id.; Faby* v. *North*, 19 Barb. 341), and so is the fact that complete performance is rendered impossible by the act of the law (*Jones* v. *Judd*, 4 Coms. 411), and where such an excuse exists, a recovery may be had for the part of the work actually performed (*Wolfe* v. *Howes*, 20 N. Y. 197).

a. In an action for the non-delivery of goods, pursuant to a contract for sale and for delivery at a particular place, the plaintiff need only allege that he was ready, at the time and place appointed for the delivery, to receive and pay for the goods: he need not allege payment nor an offer to pay (*Bronson* v. *Wiman*, 4 Selden, 188).

b. In an executory contract for the sale of an article to be paid for upon delivery, at any time within a certain period, the obligation of the one party to pay, and the other to deliver, are mutual and dependant; and in an action by the seller for the price, it is not enough simply to show the default of the purchaser; the seller must show that he was ready and offered to deliver the goods (*Dunham* v. *Mann*, 4 Selden, 508; *Kelly* v. *Upton*, 5 Duer, 336; *Cornwall* v. *Haight*, 8 Barb. 328; *Crandall* v. *Clark*, 7 *id.* 169; *Considerant* v. *Brisbane*, 14 How. 487; 2 Bosw. 471; *Dunham* v. *Pettee*, 4 E. D. Smith, 500; 21 N. Y. 397; and see *McKnight* v. *Dunlop*, 4 Barb. 36; *Fancher* v. *Goodman*, 29 Barb. 316). Whichever party seeks to enforce the contract against the other, must show performance or a tender of performance on his part. (*Id. Fickett* v. *Brice*, 22 How. 194.) The mere admission of liability, when payment is demanded, does not operate as a waiver of such tender. (*Id.*) Where each party has in part performed, semble no allegation of readiness to complete performance is necessary (*Grant* v. *Johnson*, 5 Barb. 161; *Wallace* v. *Warren*, 18 Law Jour. Rep. Ex. 449; 14 Law Times, 108; 7 Dowl. & L. 60; 4 Ex. 364).

c. Where goods on storage have been lost or converted by the bailee, tender of the storage is not necessary before bringing a suit for the value of the goods (*Rivara* v. *Ghio*, 3 E. D. Smith, 264).

d. Where a complaint alleged that the defendants W. and L. and the defendants O. and G., mutually agreed to make contracts with divers persons for the sale and delivery of flour, &c., at a future day, with a view to realize an increase in the price then anticipated, and upon the express agreement that such contracts should be made for the joint benefit of the said W. and L. and O. and G.; and that in pursuance of said agreement, O. and G. made a certain contract to deliver to C. and J. (the assignors of the plaintiff) 2,000 barrels of flour at a certain price; and that although requested to deliver said flour at the time in the contract stated, and although the parties to whom the same was and ought to be delivered were ready and willing to accept and receive and pay for the same, yet neither the said O. and G. nor the said W. and L. would deliver the same nor any part thereof,—on demurrer to the complaint that it did not appear that any tender of the price of the flour had been made, held by the court of appeals that the complaint "was defective in not alleging a performance, or what is regarded as equivalent an offer or a tender of performance, on the part of the plaintiff or those through whom he claims. The contract in suit was for the sale of flour, at a price agreed on. The payment of the price was the consideration for the delivery. The payment and delivery were to be concurrent acts, and neither party was entitled to recover from the other without alleging an offer or tender of performance on his part;" and for these reasons the complaint was defective (*Smith* v. *Wright*, 1 Abb. 243; and see *Lester* v. *Jewett*, 12 Barb. 502; 1 Kernan, 458).

e. Where it was agreed that the plaintiff in consideration of the payment by defendant of a certain sum on a certain day, and on the delivery to him of certain notes would make a certain assignment to the defendant,—held that, the money not being paid on the day named, the plaintiff might maintain his ac-

tion therefor without alleging that he had performed or offered to perform on his part (*Smith* v. *Betts*, 16 How. 251).

a. In an action by a purchaser to recover money paid in part execution of a contract, which has been rescinded by the vendor, the plaintiff is not obliged to allege a tender or readiness to pay the whole price (*Main* v. *King*, 8 Barb. 535; *Fancher* v. *Goodman*, 29 Barb. 316; and see *McKnight* v. *Dunlop*, 4 Barb. 36).

b. Where the non-performance of a condition precedent is occasioned by the act of a party either disqualifying himself for performing on his part, or by refusal to perform, the opposite party, in seeking his remedy, is not bound to aver performance or readiness to perform, on his part, but may allege the facts constituting his excuse (*Clark* v. *Crandall*, 27 Barb. 73; *Garvey* v. *Fowler*, 4 Sand. 665; *Crist* v. *Armour*, 34 Barb. 378; *Clarke* v. *Crandall*, 3 Barb. 612 *Ricara* v. *Ghio*, 3 E. D. Smith, 264).

c. The owner of a sheep which has been slain by a dog may bring an action against the owner of the dog without any previous application to the fence viewers (*Fish* v. *Scutt*, 21 Barb. 334).

d. Under an allegation of performance, evidence in excuse of non-performance is not admissible. But the party may amend (*Hosley* v. *Black*, 26 How. 97).

Where performance to be alleged, see *ante*, p. 245, *b*, *c*.

e. **Profert and oyer.**—The rules which formerly prevailed with reference to profert and oyer of an instrument, have no application to actions under the code (*Mayor of N. Y.* v. *Doody*, 4 Abb. 129; *Wells* v. *Webster*, 9 How. 251). An executor or administrator need not make profert of letters testamentary or of administration (*Id*; *Bright* v. *Currie*, 5 Sand. 433).

f. **Reasonable time.**—When no time is fixed by agreement for the performance of a duty, the law requires it to be done in a reasonable time (*Thomas* v. *Dicherson*, 2 Kernan, 369). A contract to do as soon as possible means in a reasonable time (1 Com. B. N. S. 110). What is a reasonable time, is a question of fact for the jury (*Pattershall* v. *Tranter*, 4 Nev. & M. 649; *Fielder* v. *Starkie*, 1 H. Bl. 17). "But such a question can never arise where the agreement itself can be fairly construed to settle the time at which the option is to determined. It then becomes a question of law for the court" (*Sage* v. *Hazard*, 6 Barb. 179). To the same effect is *Nelson* v. *Patrick* (2 C. & K. 641), *Fry* v. *Hill* (7 Taunt. 379); *contra*, Chitty on Bills, 412, 8th ed. A ship staid at a particular port for a period of 109 days, and whether this was an unreasonable time was held to be a question of fact for the jury. "Whether it was an unreasonable time, is a question of fact" (*Bain* v. *Case*, 3 Car. & P. 497,—Lord Tenderden, Ch. J.); and where a statute required "a reasonable notice *of not less than ten days*," an averment "that the defendants did pursuant to said act, *** then and there for that purpose made, give to the plaintiff reasonable notice,"—was held insufficient for not stating that the notice was "of not less than ten days" (*Cruger* v. *The Hudson River Railroad Co.*, 2 Kernan, 190). What is a "reasonable period," must depend upon the actual circumstances existing at the time (*Wilbert* v. *The N. Y. & Erie R. R. Co.*, 2 Kernan, 249). Again it is said, reasonable time is such a period as would be required by a person of ordinary business talents to accomplish the duties which the respective parties had to perform (*Smedbury* v. *More*, 26 Wend. 242. See further, *Hoggins* v. *Becroft*, 1 Dana [Ken.] R. 30; *Shepherd* v. *Scroggin*, 3 *id.* 62; *Muir* v. *Louisville & Portland Canal*, 8 *id.* 161; *Murray* v. *Smith*, 1 Hawks, 41; *Bell* v. *Beveridge*, 4 Dal. 272; *Duncan* v. *Rock*, Wallace's Rep. 39; *Harton* v. *Phœnix Ins. Co.*, MS.; Wharton's Dig. 332; *White* v. *Kyle's Lessee*, 1 Ser. and R. 520; *ante*, p. 194, *r*).

a. **Defect in the Complaint may be Cured by the Answer.**—In a complaint for rent on a parol demise, the demise was alleged, but nothing was averred as to any entry on the premises by defendant; the answer set forth, that at the time of the demise the defendant had nothing in the premises, but admitted an occupation of the premises by defendant. On demurrer to the

answer, it was contended on behalf of the defendant, that the action was on the contract of the parties, and not for the occupation; and per curiam: "If the complaint alone be examined, the defendant's position is correct;" but the defendant admits in his answer that he took possession, * * has thus voluntarily shown the fact of occupation which the plaintiff omitted to state, and which precludes him (the defendant) from making an issue upon the plaintiff's title (*Vernam* v. *Smith*, 15 N. Y. 330).

a. Where the complaint omitted to aver that the defendants insisted that an assignment it was the object of the action to set aside, was not executed with a fraudulent intent, and might have been successfully demurred to for that cause, yet the defendants, by denying that the assignment was executed with any fraudulent intent, were held to have supplied the defect (*Bate* v. *Graham*, 1 Kernan, 237; and see *Hyde* v. *Watts*, 12 M. & W. 254).

b. Where the answer consists of more than one defence, an admission in one defence which supplies a defect in the complaint, does not make the complaint sufficient as to any other defence in the answer not containing such admission (*Ayers* v. *Covill*, 18 Barb. 264). Therefore, on a demurrer to that defence, it is still open to the defendant, to insist on the defect in the complaint, and the defendant cannot avail himself of the admission in the defence not demurred to (*id*; and see *Swift* v. *Kingsley*, 24 Barb. 541).

c. **Defects cured by Verdict.**—Faults in pleading are in some cases aided by a verdict (Steph. Pl. 148). Cured by verdict means that the court will after verdict presume that the particular thing required to sustain it was proved at the trial (*Merrick* v. *Trustee*, &c., 8 Gill, 59). But the court never presumes a cause of action even after verdict, when none appears on the pleadings (*Wright* v. *Smith*, 27 Barb. 631). "The facts which will after verdict be presumed to have been proved are those which, though entirely omitted to be stated in the complaint, are so connected with the facts alleged that the facts alleged cannot be proved without proving the facts not alleged" (*Addington* v. *Allen*, 11 Wend. 374; and see *Barnes* v. *Harris*, 3 Barb. 604; *The People* v. *Warner*, 4 Barb. 314). The same rule is stated 1 Saunders, 228, a. n. 1, in these words, "When there is any defect, imperfection, or omission in any pleading, whether in *substance* or form, which would have been a fatal objection upon demurrer, if the issue joined be such as necessarily require on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict,—such defect, imperfection, or omission, is cured by the verdict." In *Brown* v. *Harmon* (21 Barb. 512), S. B. Strong, J., after citing as above from Saunders, adds, "This rule has often been mentioned with approbation, and it has not, I think, been abolished by the code." In the case then under consideration by that learned judge, the cause of action was one given by statute, and the defendants were not liable unless they had been guilty of *misconduct*; no misconduct was alleged, except *inferentially* by stating that the act was *owing* to the carelessness, negligence, and fault of the defendants; this mode of charging misconduct, it was said, would have been held sufficient (the action being wholly given by statute) on demurrer, but was good after verdict. In another case (*Clark* v. *Dales*, 20 Barb. 66) the complaint ought properly to have stated a readiness and willingness on the part of the plaintiff to perform his part of the contract *at a particular place*, instead of which it merely stated a readiness and willingness to perform without particularizing the place, and the omission was held to be supplied by verdict. But in this last-mentioned case the omission would probably not have entitled the defendant to demur for cause that the complaint did not state facts sufficient to constitute a cause of action; because a *general* readiness and willingness to perform, must or may imply a readiness and willingness to perform at the particular place; and therefore, for such an omission as that in the complaint in *Clark* v. *Dales*, supra, the only remedy open to the defendant was to move that the complaint be made definite and certain by stating a readiness and willingness at the particular place; for it has been said, and properly as we think, that no objection on the ground of an omission to allege the time

and place at which an act was done, is available either in arrest of judgment or on demurrer (*Carpenter* v. *Brown*, 6 Barb. 147).

a. In an action to recover personal property, there was an express averment in the complaint of property in the plaintiff, but nothing more stated to show that he was entitled to the note [the subject of the action]; and, by Marvin, J., "This is sufficient certainly after verdict. I think it would have been proper to aver property in the plaintiff" (*Decker* v. *Matthews*, 2 Kernan, 321). See *Harris* v. *Goodwyn* (9 Dowl. 423), *Ladd* v. *Thomas* (11 Adol. & El. 117). To a complaint on a bill of exchange, indorsee against indorser, an answer alleging that the defendant indorsed without having or receiving any value or consideration whatsoever, would be too indefinite, but good after verdict (*Eaton* v. *Pratchett*, 1 Gale, 30).

6. *For a single cause of action only one count or statement is allowed.*

b. "As there can be but one substantially true statement of a single cause of action, the practice of setting it forth in different counts is necessarily abolished (*Nash* v. *McCauley*, 9 Abb. 159; *Hepburn* v. *Babcock*, *id.* note). A merely formal one is unnecessary, while a substantial one would involve a contradiction, and one must be false" (*Lackey* v. *Vanderbilt*, 10 How. 161; see *Sipperly* v. *Troy & Boston R. R. Co.*, 9 How. 83). If a plaintiff having really only one cause of action, sets it forth in several counts or divisions in his complaint, the remedy of the defendant is by a motion that the plaintiff elect on which count he will rely, and that the others be struck out. (*Id.*) It is not a cause for demurrer (*Id.*; *Hillman* v. *Hillman*, 14 How. 456). "No doubt a declaration containing two counts, which necessarily on the face of them are for the same cause of action, would be bad for duplicity, on special demurrer (*Slade* v. *Drake*, Hobart, 295). Therefore it has been usual to insert the word '*other*' in the second count, in order to avoid on demurrer the defect that would otherwise appear. * * * All the authorities show that one cause of action cannot properly be charged twice over in the same declaration" (Ld. Denman, *Campbell* v. *The Queen*, 6 Law Times, 434). [It seems that in this State, a second statement of a cause of action could not be retained merely by calling it another cause of action.] Where it appears *on the face of the complaint*, that the several statements of causes of action are really for but one and the same cause of action, varied only in the mode of statement, no affidavit or other proof need be produced, as to there being in truth but one cause of action (*Ford* v. *Mattice*, 14 How. 91). But if it is not apparent from an inspection of the complaint, that the several statements are but for one and the same cause of action, then to warrant an order to strike out all the statements but one, the court must be satisfied by affidavit or other proof, that the plaintiff has in fact but one alleged cause of action (*Lackey* v. *Vanderbilt*, 10 How. 161).

c. In *Churchill* v. *Churchill* (9 How. 552), the complaint contained sixteen distinct statements of causes of action based on one and the same cause of action; the motion and order were to *set aside* the complaint. And where a complaint stated as cause of action, *first*, a promise by the defendant to marry the plaintiff *on request*; *secondly*, generally a promise to marry; *thirdly*, a promise to marry in a reasonable time; and *fourthly*, a promise to marry when the plaintiff should be disengaged from another,—a motion that the plaintiff should elect on which of the four causes of action she would proceed, or that the complaint be set aside, was granted (*Dunning* v. *Thomas*, 11 How. 282; and see *Young* v. *Edwards*, 11 How. 201). In *Whittier* v. *Bates* (2 Abb, 477), Davies, J., set aside a complaint with costs, which set out one cause of action in three different statements of causes of action. And in *Stockbridge Iron Co.* v. *Mellen* (5 How. 439), where the plaintiff stated his one cause of action in six different statements, Harris, J., on motion, ordered that all but one statement be struck out. Again, in *Dickens* v. *N. Y. Central R. R. Co.* (13 *id.* 228), at general term, an order requiring a plaintiff to elect one of several statements of one cause of action, was affirmed. In *Jones* v. *Palmer* (1 Abb. 442), Cowles, J., denied a motion to strike out one of two counts. The decision was made after consulting with other of the judges (not named in the report), and who assented to it.

In the complaint in that case, the first statement alleged an agreement to deliver goods to the defendant for other goods to be delivered by defendant, performance by plaintiffs, and breach by defendant. The second statement was for goods (the same goods, so says the report) sold and delivered. The defendant produced an affidavit to show that there was but one cause of action. The court will not compel the plaintiff to elect between several causes of action properly pleaded, although it may appear probable that on the trial but one cause of action will be presented (*Smith* v. *Douglass*, 15 Abb. 266).

Note to subdivision 3.

a. There is no reason against uniting in one action claims for both legal and equitable relief (*Getty* v. *Hudson River R. R. Co.*, 6 How. 269; *N. Y. Ice Co.* v. *N'west Ins. Co.* 21 How. 296; and see 16 N. Y. 264; 9 How. 123; 3 Duer, 680; 5 Duer, 661); provided they are not inconsistent with each other (*Linden* v. *Fritz*, 3 Code R. 165; 3 Sand. 668; 5 How. 191; *Young* v. *Edwards*, 11 *id.* 202; *Trull* v. *Granger*, 4 Selden, 115). A demand of judgment of forfeiture of a lease, and an injunction restraining the defendant from repairing the demised premises, would be inconsistent (*Linden* v. *Fritz*, supra); so would a demand of payment of an installment of purchase-money in arrear, and a forfeiture of the contract (*Young* v. *Edwards*, 11 How. 202). And so would a demand of relief and a demand of judgment for a specified sum (*Durant* v. *Gardner*, 10 Abb. 445; 19 How. 94). In some cases alternative relief may be prayed (*Linden* v. *Fritz*; *Young* v. *Edwards*, supra). It has been intimated that a demand of relief in the alternative for one or other of two parties plaintiff, would render the complaint demurrable (*Warwick* v. *Mayor of N. Y.* 7 Abb. 266; 28 Barb. 210). [A demurrer to the relief was allowed in the former chancery practice, in certain cases (Mitf. Eq. Pl. 214). Under the present practice, it seems an objection to the relief should be taken by motion (*Durant* v. *Gardner*, 10 Abb. 445; 19 How. 94; *Ricart* v. *Townsend*, 6 How. 462; *Moses* v. *Walker*, 2 Hilton, 536; Anon. 11 Abb. 233; and see 8 Abb. 19; 28 Barb. 667).] A complaint asking relief for the plaintiff individually or, if that cannot be granted, then for relief in respect of the same subject-matter to him and others as tax payers, held bad on demurrer (*Warwick* v. *Mayor of N. Y.*, 28 Barb. 210; 7 Abb. 266). The complaint in fact contained two causes of action. In such case the remedy is by demurrer (*Redmond* v. *Dana*, 3 Bosw. 616). The prayer for relief, when concisely and clearly stated, should not on motion be incautiously interfered with by the court, inasmuch as the court upon the trial, whatever be the relief prayed, will grant any relief consistent with the case made by the complaint and embraced within the issue, and on default no relief can be granted exceeding that demanded by the complaint (*Redmond* v. *Dana*, 3 Bosw, 616).

b. It is improper to join in one complaint prayers for relief against the defendant individually and in his capacity as executor (*McMahon* v. *Allen*, 1 Hilton, 103).

c. Thus it has been held, that if the prayer of a complaint is too broad, or embraces too much, it is not a ground for demurrer (*Andrews* v. *Schuffer*, 12 How. 443). Although a complaint which alleged the taking, and conversion of personal property, and claimed not only damages for the conversion, but also a re-delivery to the plaintiff, was held to be demurrable, on the ground that two causes of action were improperly joined (*Maxwell* v. *Farnam*, 7 How. 236). A demand of relief that "*if necessary*" the party should be relieved, was ordered to be amended by striking out the words "if necessary" (*Lamoreaux* v. *Atlantic Mut. Ins. Co.*, 3 Duer, 680). Where a complaint asked judgment for a sum of money, and it appeared that the relief, if any, to which the plaintiff was entitled, was compelling the defendant, a trustee, to account for the trust fund, judgment was given for the defendant (*Bishop* v. *Houghton*, 1 E. D. Smith, 566; and see *Hartt* v. *Harvey*, 21 How. 382). A plaintiff cannot in one complaint pray relief,—1, judgment for the amount claimed; 2, a judicial determination on the validity of an assignment of property, made by the defendant (*Reubens* v. *Joel*, 3 Kernan, 488; overruling *Mott* v. *Dunn*, 10 How. 231).

a. To entitle the plaintiff to a *temporary* injunction, is it necessary that it should be asked for in the complaint. It was necessary so to do under the former practice. But whether or not necessary since the code, is not clear (*Vincent* v. *King*, 13 How. 239). [It is probably not necessary, as the facts which entitle the plaintiff to a temporary injunction should appear by affidavit, and not in the complaint.]

b. Will a complaint be set aside because the sum demanded therein exceeds the sum mentioned in the summons as the amount for which the plaintiff will take judgment in default of an answer—query? (*Johnson* v. *Paul*, 14 How. 454). See in note to subd. 1 of § 246, *post*.

c. Where the demand of relief was that a deed of trust should be declared "void, null, and of no effect," and also for such other or further relief as may be agreeable to equity and good conscience,"—held that, although the deed could not be declared "void, null, and of no effect," yet under the general prayer for relief the court might order it to be reformed (*Grafton* v. *Romsen*, 16 How. 32).

d. If the defendant answers, "the demand of relief becomes immaterial" (*Marquat* v. *Marquat*, 2 Kernan, 341; *Emery* v. *Pease*, 20 N. Y. 62; and see § 275, *post*).

CHAPTER II.

The Demurrer.

SECTION 143. Defendant to demur or answer.
144. When the defendant may demur.
145. Demurrer, what to specify.
146. How to proceed if complaint be amended.
147. Objection not appearing on complaint.
148. Objection, when waived.

§ 143. [121.] *Defendant to demur or answer.*

The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint.

a. **Time to answer.**—A defendant cannot regularly answer before being served with a copy of the complaint (*Phillips* v. *Prescott*, 9 How. 433). The time to answer or demur can only be extended by an order for that purpose, or by consent (*McGown* v. *Leavenworth*, 2 E. D. Smith, 24; *Platt* v. *Townsend*, 3 Abb. 9). An order enlarging the time to answer, is an extension of the time to demur (*Broadhead* v. *Broadhead*, 4 How. 308; 3 Code Rep. 8). Otherwise in former practice (*Davenport* v. *Sniffen*, 1 Barb. 223). To obtain such an order the applicant must present an affidavit of merits, *or* an affidavit of the attorney or counsel retained to defend that "from the statement of the case in the action made to him by the defendant he verily believes that the defendant has a good and substantial defence upon the merits to the cause of action set forth in the complaint or to some part thereof." And if any extension has been granted by stipulation or order, that fact must be stated in the affidavit (Rule 22). This rule is to be construed in conjunction with section 405 of this code; and if an order is made without any affidavit of merits it may be disregarded (*Ellis* v. *Van Ness*, 14 How. 314). An order staying the plaintiff's proceedings, does not extend the time to answer (*McGown* v. *Leavenworth*, 2 E. D. Smith, 31); nor does an order for particulars, with a stay of plaintiff's proceedings (*Platt* v. *Townsend*, 3 Abb. 9.)

b. A defendant by accepting an order or consent extending his time to answer, admits that the complaint is in a form calling for an answer or demurrer (*Bowman* v. *Sheldon*, 5 Sand. 662); and unless leave be reserved by the order or consent, he cannot, after such an extension of time, move to have the complaint amended (*id.*); but where the consent reserved leave to the defendant "to make such application as he should be advised," he may move to strike out parts of the complaint as redundant or irrelevant (*Lackey* v. *Vanderbilt*, 10 How. 155).

c. Where service by mail may be made, an order extending the time to answer, obtained and mailed on the last day of the time to answer, is sufficient to prevent the plaintiff from regularly entering judgment, as upon failure to answer. The defendant need show no excuse for not answering earlier; and although his object may be delay, yet he is strictly regular in mailing an order extending his time to answer, on the day such time expires (*Schuhardt* v. *Roth*, 10 Abb. 203). If the plaintiff enter judgment before receiving the answer, he should vacate it; if he refuse to do so, the court will set it aside with costs. (*Id.*)

a. Where some of the defendants demur to the complaint, and the demurrer is overruled "with liberty to answer in twenty days on payment of costs," and such decision on appeal to the general term is affirmed, then conceding that such defendants have the same time to answer after the decision at general term which was given them by the order at special term, such defendants must tender an answer within twenty days after such affirmance, although the costs of the demurrer have not been taxed, or the right to answer is gone (*Ford* v. *David*, 1 Bosw. 569). *Semble*, the time to answer could not be extended by an *ex parte* order (*Hurd* v. *Haynes*, 9 Paige, 604).

Time to answer after publication, see note to section 188, after order to consolidate. See, *Consolidating actions.*

b. **Where the answer is to be served.**—*Semble*, that a defendant cannot, in any case, be required to serve an answer, either by mail or otherwise, at any place other than the place for service designated in the summons (*Lord* v. *Vandenburgh*, 15 How. 368). And where the place for serving the answer, designated in the summons, was at the attorney's office, 195 Broadway, and the attorney resided out of the city; the defendant's attorney, on the last day for serving the answer, went to 195 Broadway, and found the attorney's office closed; he then tendered the answer next day, but the plaintiff's attorney refused to receive it, and entered judgment. The judgment was set aside as irregular, and it was held that the defendant was not required, on finding the office of the plaintiff's attorney closed, to follow him to his residence to make the service. (*Id.*) And see in note to section 411, *post.*

c. **Service after time expired.**—An answer put in after the time to answer expires, and before judgment is entered, but without any order permitting it to be put in, is irregular (*Dudley* v. *Hubbard*, 2 Code Rep. 70; *Foster* v. *Udell*, *id.* 30; *Mandeville* v. *Winne*, 1 Code Rep. N. S. 161; *id.* 45; *O'Brien* v. *Catlin*, *id.* 273; *McGown* v. *Leavenworth*, *supra*); the plaintiff, if he intends to avail himself of the irregularity, should decline to receive the answer, or return it within a reasonable time (*i. e.*, the day it is received or the day after), stating the irregularity (*Phillips* v. *Prescott*, 9 How. 433), and proceed as for default of an answer (*Strout* v. *Curran*, 7 How. 36; *Jacob* v. *Marshall*, 6 Duer, 689). The person serving the copy answer is a proper person to return it by, with the reasons for returning it, and if after an answer is so returned the defendant's attorney again serve it, the plaintiff's attorney need not again return it, but may enter judgment as for want of an answer. (*Id.*) Where a joint answer of two defendants was served after the time for answering by one of them had expired, the plaintiff's attorney returned it, and after waiting until the time of the other defendant had also expired, entered judgment; it was held regular (*Jacques* v. *Greenwood*, 1 Abb. 230). See opening default, in note to section 246, *post.*

d. **Separate answers.**—A defendant defending separately, need not serve a copy of his answer on his co-defendant (*Bogardus* v. *Parker*, 7 How. 307; *Leavitt* v. *Fisher*, 4 Duer, 2).

e. **Demurrer and answer.**—A demurrer is an answer in law (*N. J.* v. *N. Y.*, 6 Peters, 323). Its province is to point out defects in the pleading demurred to, so that they may be amended (*Cook* v. *Crawford*, 1 Texas, 9). The answer and demurrer are different pleadings; and by the fact that they are on one paper and in form connected, they do not lose their distinct character (Sill, J., *Howard* v. *Michigan Southern R. R. Co.*, 5 How. 207). The insertion in an answer of a claim that the complaint is insufficient, is a demurrer (*Slack* v. *Heath*, 1 Abb. 337; 4 E. D. Smith, 95). And a demurrer and answer to the same matter is not allowed (*Munn* v. *Barnum*, 12 How. 563; *Spelman* v. *Weider*, 5 How. 5). "To determine whether a defence is a demurrer or an answer, it is only necessary to ascertain whether it requires that any facts should be proved or not" (*Struver* v. *Ocean Ins. Comp.*, 16 How. 428). Where the defendants in a portion of their answer took the objection of a want of parties, held that it must be considered as a demurrer, and as they could not answer and demur to one cause of action they must elect which they would abide by. (*Id.*)

f. **Defective pleading.**—An answer, or demurrer, or amended answer, reg-

ularly served, and within the proper time, so that the only question is upon its sufficiency, cannot be disregarded and treated as a nullity, although in fact defective (*Strout* v. *Curran*, 7 How. 36; *Hartness* v. *Bennett*, 3 *id.* 289; *Bergman* v. *Howell*, 3 Abb. 329; *Corning* v. *Haight*, 1 Code R. 72; *Spencer* v. *Tooker*, 12 Abb. 353; *Rossi* v. *Longmuir*, 15 Abb. 328; *Chadwick* v. *Snediker*, 26 How. 60).

a. **Answer of married woman.**—Where a married woman is joined as a party defendant with her husband, she may answer separately from her husband, without leave of the court (*Harley* v. *Ritter*, 18 How. 147; 9 Abb. 400; it was formerly otherwise 16 How. 158; 17 How. 562). Can she answer by attorney? See in note to section 114, *ante*.

b. **Answer of infant.**—See in note to section 115, *ante*.

§ 144. [122.] *When defendant may demur.*

The defendant may demur to the complaint when it shall appear upon the face thereof, either—

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties, for the same cause; or,

4. That there is a defect of parties, plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action.

c. **When a demurrer is proper.**—A demurrer is only appropriate when the ground of demurrer is apparent on the face of the complaint (*Getty* v. *Hudson River R. R. Co.*, 8 How. 177; *Wilson* v. *Mayor of N. Y.*, 6 Abb. 6; 4 E. D. Smith, 675; 15 How. 500; *Coe* v. *Beckwith*, 31 Barb. 339).

d. A demurrer admits the facts that are relevant and well pleaded, but not conclusions of law (*Hall* v. *Bartlet*, 9 Barb. 297; *Acome* v. *American Mineral Co.*, 11 How. 26; *Bennion* v. *Davidson*, 1 Horn. & Hurl. 48; *Freeman* v. *Frank*, 10 Abb. 370). A demurrer remaining on the record is an admission of the facts in the pleading demurred to, not only for the purpose of the argument, but as evidence on the trial of the issue to which the pleading demurred to relates (*Outler* v. *Wright*, 22 N. Y. 472).

e. A portion of one entire cause of action or defence, cannot be the subject of a demurrer (*Lord* v. *Vreeland*, 15 Abb. 122; 24 How. 320).

f. It is not within the office of a demurrer to state objections not apparent on the face of the complaint, *e. g.*, to name parties who should be joined (*Coe* v. *Beckwith*, 10 Abb. 296; 19 How. 399; 31 Barb. 339). [Such a demurrer is called a "speaking demurrer."]

g. Where the complaint in form states but one count or statement of a cause of action, but *states* facts constituting two or more distinct causes of action, the remedy is not by demurrer, but by motion to strike out all not necessary to one cause of action, or to compel the plaintiff to elect by which cause of action he will abide (*Cheney* v. *Fisk*, 22 How. 236; and see *Lord* v. *Vreeland*, 24 How. 316; 13 Abb. 195).

h. Where the defect in a complaint is that it claims relief beyond that authorized by the facts set forth, the remedy is by motion to strike out such parts of the prayer for relief as is not authorized by the facts alleged, not by a

demurrer (*Lord* v. *Vreeland*, 13 Abb. 195; 24 How. 316); and if allegations of special damage are not sufficiently specific, the objection cannot be raised by demurrer (*Hewit* v. *Mason*, 24 How. 366).

a. When it *appears* on the face of the complaint that the action is to recover a debt contracted by partners, and that it is brought against a surviving partner and the personal representatives of a deceased partner, the objection that the parties defendant have been *improperly* joined as defendants can only be by demurrer (*Higgins* v. *Freeman*, 2 Duer, 650); and in actions sounding in tort, where it appears by the complaint that all the proper parties are not made plaintiffs, the defendant should *demur*. If he omit to do so, the defect is waived, although the defendant, in his answer, insists that the complaint should be dismissed for this defect (*Zabriskie* v. *Smith*, 3 Kernan, 322). Thus, in an action by three partners for damages caused to the firm of four partners by a false representation, the answer set up that the fourth partner should have been made a party, and prayed that the complaint should be dismissed on account of his not being joined; it was held that the fourth partner should have been joined as a party plaintiff, but that the defect was waived by the defendant failing to demur for defect of parties. (*Id.*) And to the like effect, see *Dillaye* v. *Parks*, 31 Barb. 132; *Wright* v. *Starrs*, 6 Bosw. 600; *Abbe* v. *Clarke*, 31 Barb. 238; *Lewis* v. *Graham*, 4 Abb. 106; *Wright* v. *Bennett*, 3 Barb. 451.

b. There are no causes of demurrer other than those specified in this section (*Haire* v. *Baker*, 1 Selden, 363; *Simpson* v. *Loft*, 8 How. 235; *Beale* v. *Hayes*, 5 Sand. 640; *Harper* v. *Chamberlain*, 11 Abb. 234). There cannot, therefore, be any demurrer:

c. For irrelevancy, redundancy or uncertainty (*Watson* v. *Husson*, 1 Duer, 242; *Spies* v. *Acces. Transit Co.*, 5 *id.* 663; *Roeder* v. *Ormsby*, 13 Abb. 334; *Seeley* v. *Engell*, 3 Kernan, 542; *Smith* v. *Greening*, 2 Sand. 702; *Richards* v. *Edick*, 17 Barb. 261; *Graham* v. *Camman*, 13 How. 362; 5 Duer, 697; *Hammond* v. *Hudon River Iron and Machine Co.*, 20 Barb. 386; *Chesborough* v. *N. Y. & Erie R. R. Co.*, 26 *id.* 9; *Lee B'k.* v. *Kitching*, 11 Abb. 435; *Roeder* v. *Ormsby*, 13 Abb. 334; *Warren* v. *Phillips*, 30 Barb. 647; *Meyer* v. *Van Collem*, 28 Barb. 230; and other cases; see, however, Anon. 11 Abb. 231; where a complaint for divorce was held bad for uncertainty).

d. Nor for argumentativeness (*Brown* v. *Richardson*, 20 N. Y. 474; *Zabriskie* v. *Smith*, 3 Kernan, 330; *Prindle* v. *Caruthers*, 15 N. Y. 431).

e. Nor because the causes of action are not separately stated and numbered (*Fickett* v. *Brice*, 22 How. 195). The cases to the contrary are not now followed (*id.*); see note to subdivision 5, p. 261.

f. Nor for any mere defect of form (*Howell* v. *Fraser*, 1 Code Rep. N. S. 270). Nor because it appears on the face of the complaint that the cause of action is barred by lapse of time (*Sands* v. *St. John*, 36 Barb. 628; 23 How. 140).

g. Nor to the demand of judgment (*Beale* v. *Hayes*, 5 Sand. 640; *Andrews* v. *Shaffer*, 12 How. 443; *Hecker* v. *Degroot*, 15 *id.* 315; *Lord* v. *Vreeland*, 24 How. 316; 13 Abb. 195; *Moses* v. *Walker*, 2 Hilton, 536; *St. John* v. *Peirce*, 22 Barb. 371; *ante*, note to § 142, p. 0000).

h. Nor for duplicity (*Gooding* v. *M'Allister*, 9 How. 123; *Wells* v. *Webster*, id. 123). If the complaint does not state a case on which, if uncontradicted, the plaintiff has a right to recover, the defendant must present his objection by demurrer, and not by motion to strike out the complaint as irrelevant (*Fabricotti* v. *Launitz*, 1 Code Rep. N. S. 121). A demurrer lies to a supplemental pleading (*Goddard* v. *Benson*, 15 Abb. 191).

i. **Several causes of demurrer.**—It is supposed that a defendant may assign as many causes of demurrer as he thinks fit; and if one be sustained, the demurrer will be allowed (*Harrison* v. *Hogg*, 2 Ves. jun., 323; *Jones* v. *Frost*, 3 Mod. 1); and that he may put in separate demurrers to separate and distinct parts of a complaint for separate and distinct causes; and in such a case one demurrer may be allowed, and another or others overruled (1 Barb. Ch. Pr. 107).

a. **The appropriate cause of demurrer should be stated.**—A demurrer fails if the appropriate cause of demurrer has not been assigned (*Viburt* v. *Frost*, 3 Abb. 120; *Hobart* v. *Frost*, 5 Duer, 672; and see *post*, 262 *a*). For judgment cannot be given for a cause different to the one stated (*Wilson* v. *Mayor of N. Y.*, 6 Abb. 6; 15 How. 500); and all objections except those specified are deemed to be waived (*Malone* v. *Stilwell*, 15 Abb. 421; *Nelis* v. *De Forest*, 16 Barb. 65). Where a demurrer specified as the ground of demurrer, that the complaint did not state facts sufficient to constitute a cause of action,—among other things that it did not show plaintiff's capacity to sue; held, that although the complaint not showing plaintiff's capacity to sue was not a failure to state facts sufficient to constitute a cause of action, yet the objection that the complaint did not show plaintiff's capacity to sue was sufficiently stated in the demurrer to enable the defendant to have the advantage of it on the argument (*Conn. Bank* v. *Smith*, 9 Abb. 168; 17 How. 487).

b. The appropriate ground of demurrer for a misjoinder of parties plaintiff is that the complaint does not state facts sufficient to constitute a cause of action; thus where husband and wife sue for a cause of action, exclusively in the wife, the proper ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action (*Mann* v. *Marsh*, 35 Barb. 68; 21 How. 372; and see *Walrath* v. *Handy*, 24 How. 353).

c. For a substantial and radical defect in a complaint the proper ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action (*Spear* v. *Downing*, 12 Abb. 437; 34 Barb. 523; *Struver* v. *Ocean Ins. Co.*, 2 Hilton, 475).

d. The objection that the complaint does not present a case for the exercise of the power of the court to remove a cloud from plaintiff's title may be insisted upon under a demurrer which alleges for cause, that the complaint does not state facts sufficient to constitute a cause of action (*Hotchkiss* v. *Elting*, 36 Barb. 39).

e. **A demurrer bad in part is bad altogether.**—Where a demurrer is not intended to apply to the whole complaint, it should specify the part it is aimed at (*Jarvis* v. *Palmer*, 11 Paige, 650; *Stuyvesant* v. *Mayor of N. Y.*, id. 415; *Kuypers* v. *Ref. Dutch Church*, 6 *id.* 57). Where a demurrer purported in its commencement to be a demurrer to the whole preceding pleading, but in assigning the grounds of demurrer, it distinctly set forth and specified the parts to which the demurrer was intended to apply, the court of appeals held that it was properly regarded as a demurrer only to the parts specified, and not to the whole preceding pleading (*Matthews* v. *Beach*, 4 Selden, 173).

f. The demurrer must be entirely sustained or fail together (*Peabody* v. *Wash. Mut. Ins. Co.*, 20 Barb. 342; *Cooper* v. *Classon*, 1 Code Rep. N. S. 347; *The People* v. *Mayor of N. Y.*, 17 How. 57; *Wait* v. *Ferguson*, 14 Abb. 387). Thus, where the complaint contained two causes of action of a class that admitted their being united, but of one of which the court had no jurisdiction, a demurrer to the entire complaint, on the ground that several causes of action were improperly united, was overruled (*Cook* v. *Chase*, 3 Duer, 634). The demurrer should have been confined to the cause of action of which the court had no jurisdiction, and should have been on the ground of their want of jurisdiction. (*Id.*) So if a complaint contains two distinct causes of action, and a demurrer to the whole complaint be interposed, the demurrer must be overruled if either of the causes of action alleged is well pleaded (*Butler* v. *Wood*, 10 How. 222; *Martin* v. *Mattison*, 8 Abb. 3); and if a complaint state a cause of action against one or some of several defendants, a joint demurrer by all the defendants, on the ground that the complaint does not state facts sufficient, or for defect of parties, cannot be sustained (*The People* v. *Mayor of N. Y.*, 28 Barb. 240). Where the complaint disclosed a separate cause of action against each defendant, but not a joint cause of action, a joint demurrer for the misjoinder was sustained (*Hess* v. *Buffalo and Niagara Falls R. R.*, 29 Barb. 391; see *Eldridge* v. *Bell*, 12 How. 549; *Phillips* v. *Northrup*, id. 17; *Brownson* v. *Gifford*, 8 id. 392; *Woodbury* v. *Sackrider*, 2 Abb. 402). A demurrer under the sixth sub-division will be overruled if on the facts stated

the plaintiff is entitled to any relief whatever. although not that demanded (*Stuyvesant* v. *Mayor of N. Y.*, 11 Paige, 415; and see *Emery* v. *Pease*, 20 N Y. 62).

Note to subdivision 1.

a. The meaning of this is, that the person is not subject to the jurisdiction of the court, not that original process has been improperly served (*Nones* v. *Hope Mut. Ins. Co.*, 5 How. 96; 3 Code Rep. 161). An objection to the jurisdiction which does not appear on the face of the complaint, cannot be raised by demurrer (*Wilson* v. *Mayor of N. Y.*, 6 Abb. 6; 15 How. 500; *Kœnig* v. *Nott*, 8 Abb 384).

Note to subdivision 2.

b. The capacity of a plaintiff to sue is independent of a cause of action The facts showing the former are not facts constituting the cause of action (*B'k. of Louville* v. *Edwards*, 11 How. 216; *Vibert* v. *Frost*, 3 Abb. 120; *Myers* v. *Machado*, 6 Abb. 198; *Hobert* v. *Frost*, 5 Duer, 672). Therefore the objection that the complaint shows the plaintiff has not legal capacity to sue, cannot be entertained where the only cause of demurrer stated is that given by subd. 6. (*Id.*) A plaintiff in an action on a note has not legal capacity to sue when it appears on the face of the complaint that the plaintiff holds the note as a collateral security under a trust to sell it, but not authorizing the plaintiff to sue on it (*Nelson* v. *Eaton*, 7 Abb. 305; revs'g S. C., 15 How. 305). Where a plaintiff miscalls himself by a name which represents no person real or artificial, the remedy, it seems, is by motion, not by demurrer or answer (*B'k of Havana* v. *Magee*, 20 N. Y. 356).

c. The objection is not that the plaintiff has not capacity to sue, but that no person natural or artificial is named as plaintiff. Certain persons, as infants, lunatics, and married women, cannot sue except by guardian or committee, or in the case of a married woman, by joining their husband in certain cases. This was what the provision refers to and not the absence of a real person as plaintiff. (*Id.*)

Note to subdivision 3.

d. Where it appears on the face of the complaint that there is another action pending between the same parties for the same cause, the remedy is by demurrer. Where it does not appear on the face of the complaint that another action is pending, &c., then if in fact another action be pending, the proper mode for the defendant to avail himself of that fact is by answer setting forth the pendency of such action (*Burrows* v. *Miller*, 5 How. 51). This rule applies to an action for a partition (*Hornfager* v. *Hornfager*, 1 Code Rep. N. S. 412; 6 How. 279). See note to section 147.

Note to subdivision 4.

e. The defect of parties defendant for which a demurrer is allowed, is a deficiency of and not too many parties (*Peabody* v. *Wash. Co. Mut. Ins. Co.*, 20 Barb. 342; *Gregory* v. *Oakesmith*, 12 How. 134; *Pinckney* v. *Wallace*, 1 Abb. 82; *Voorhies* v. *Baxter*, id. 44; *Crosby* v. *Berger*, 4 Edw. Ch. R. 210; *Churchill* v. *Trapp*, 3 Abb. 306; *Davy* v. *Betts*, 23 How. 396; *Davy* v. *Betts*, 16 Abb. 446 *note*; *Bank of Havana* v. *Magee*, 20 N. Y. 359). And the mere joinder of too many *defendants* is not a ground of demurrer by any one of them against whom the complaint sets forth a good cause of action (*N. Y. & N. Haven R. R.* v. *Schuyler*, 7 Abb. 41; 17 N. Y. 592; *Manning* v. *The State of Nicaragua*, 14 How. 517; *Kolle* v. *DeLeyer*, 17 Abb. 312). To sustain a demurrer under this subdivision (the objection being the non-joinder of a defendant), it must appear that the party demurring has an interest in having such other party made a defendant (*Hillman* v. *Hillman*, 14 How. 460; *Newbould* v. *Warren*, 14 Abb. 80); as that the party not joined is jointly liable with the one sued (*Wooster* v. *Chamberlain*, 28 Barb. 602). And it must appear on the face of the complaint that the party defendant for whose non-joinder the demurrer is

interposed is living. If it does not so appear the objection to his non-joinder must be taken by answer (*Scofield* v. *Van Syckle*, 23 How. 97).

a. A defect of parties plaintiff is a good cause of demurrer by all the defendants (*Brownson* v. *Gifford*, 8 How. 392; *Walrath* v. *Handy*, 24 How. 353.) If husband and wife sue together for a cause of action in the husband alone, it is a defect of parties for which a demurrer will be sustained (Id; *Dunderdale* v *Grymes*, 16 How. 195; and see *Avogardo* v. *Bull*, 4 E. D. Smith, 384; *Barlow* v. *Draper*, 5 Duer, 130).

b. Section 122 is to control in determining whether a demurrer for defect of parties is well taken (*Wallace* v. *Eaton*, 5 How. 99).

c. A demurrer for non-joinder of parties is well taken where it appears that the court cannot determine the controversy before it without prejudice to the rights of others, nor by saving their rights (*Wallace* v. *Eaton*, 3 Code Rep. 161; 5 How. 99).

Note to subd. 5.

d Does a demurrer lie to a complaint under this subdivision for the defect of not separately stating two or more causes of action, they being such as might be united in one complaint if properly stated? That it does not, and that the defendant should have the complaint set right by motion; see *Fickett* v. *Brice*, (22 How. 195); *Dorman* v. *Kellam*, (14 How. 184; 4 Abb. 202); *Moore* v. *Smith* (10 How. 361); *Peckham* v. *Smith* (9 *id.* 436); *Robinson* v. *Judd* (id. 378); *Gooding* v. *McAllister* (id 123); *Forsyth* v. *Edmiston* (11 *id.* 408); *Wallar* v. *Raskan* (12 *id.* 28); *Woodbury* v. *Sackrider* (2 Abb. 402); *Badger* v. *Benedict* (4 *id.* 176, 1 Hilton, 415); *Cook* v. *Chase* (3 Duer, 643); *Harsen* v. *Bayard* (5 *id.* 656); *Hess* v. *Buffalo R. R. Co.* (29 Barb. 395); and other cases. That a demurrer may be interposed for this cause, see *Getty* v. *Hudson River R. R. Co.* (8 How. 177); *Van Namee* v. *Peoble* (9 *id.* 198); *Durkee* v. *Saratoga and Wash. R. R. Co.* (4 *id.* 227); *Pike* v. *Van Wormer* (5 *id.* 171); *Struss* v. *Parker* (9 *id.* 342); *Colwell* v. *N. Y. & Erie R. R. Co.* (9 How. 313); and in *Acome* v. *Amer. Min. Co.* (11 How. 27), Hand., J., thought there was too much doubt on the subject to strike out as frivolous a demurrer on the ground that the causes of action were not separately stated.

e. It has been held that a complaint which alleged that defendant had become possessed of one knitting-machine, the property of plaintiff, by wrongfully taking the same from plaintiff, and that he wrongfully detained the same and had converted it to his own use, and then demanded that the defendant might be adjudged to pay plaintiff damages for the wrongful taking, detention and conversion, and that the property may be forthwith delivered to the plaintiff, improperly united two causes of action, and was demurrible on that ground (*Maxwell* v. *Farnham*, 7 How. 236). A complaint after stating a cause of action on contract against partners, and demanding judgment therefor, contained also allegations that defendants were insolvent, and had fraudulently confessed judgments to hinder their creditors, and demanded an injunction and a receiver;—held that although the last matter might be obnoxious to a motion to strike out, its insertion did not render the complaint demurrible for improper joinder of causes of action (*Meyer* v. *Van Collem*, 7 Abb. 222; 28 Barb. 230; see *Durant* v. *Gardner*, 19 How. 94; 10 Abb. 445). Allegations of fraud in support of a cause of action and not as constituting a separate cause of action, do not make an improper joinder of causes of action (*Campbell* v. *Wright*, 21 How. 9).

f. Where a complaint, in fact, contains but a single cause of action, although some of the allegations may be introduced with the words, "and for a further cause of action," the defendant cannot successfully demur on the ground that several causes of action are improperly united (*Hillman* v. *Hillman*, 14 How. 456).

See sections 167, 172.

Note to subdivision 6.

g. It is entirely optional with a defendant whether he will demur or not for the cause that the complaint does not state facts sufficient to constitute a cause

of action; and his election not to avail himself of that right does not preclude him from taking advantage of the defect in the complaint at any stage of the case (*Gould* v. *Glass*, 19 Barb. 186; *Montgomery Co. B'k* v. *Albany City B'k*. 3 Selden, 464; *Higgins* v. *Freeman*, 2 Duer, 650; *Budd* v. *Bingham*, 18 Barb. 494); and if two persons are made defendants, and the complaint does not state facts sufficient to constitute a cause of action against one of them, and there is no demurrer for that cause, the objection may be made upon the trial; and upon the fact appearing, the complaint should be dismissed as to such defendant (*Montgomery Co. B'k* v. *Albany City Bank*, *supra*).

a. Under a demurrer, for the reason that the complaint does not state facts sufficient, the defendant cannot object that there is an improper joinder of parties (*Eldridge* v. *Bell*, 12 How. 547), or that the plaintiff has not legal capacity to sue (*Vibert* v. *Frost*, 3 Abb. 120; *Hobart* v. *Frost*, 5 Duer, 671); or that the court as a court of equity has no jurisdiction (*Wilson* v. *Mayor of N. Y.*, 6 Abb. 6; 15 How. 500; 4 E. D. Smith, 706, note), or that the complaint on a bill of exchange shows the right to sue on the bill is in a third person not a party to the action (*Myers* v. *Machado*, 6 Abb. 198; but see *Palmer* v. *Smedley*, *id.* 205; *De Witt* v. *Chandler*, 11 Abb. 459), or that the complaint by a corporation does not show its authority to sue (*Bank of Lowville* v. *Edwards*, 11 How. 216, *Bank of Havana* v. *Wickham*, 7 Abb. 134), or the prayer for relief is too extensive (*The People* v. *Mayor of N. Y.*, 8 Abb. 19; 4 E. D. Smith, 706, note; *Lord* v. *Vreeland*, 24 How. 316; 13 Abb. 195). The only question raised by a demurrer under this subdivision is, whether the plaintiff, upon the facts stated, is entitled to the relief which he claims; and it is immaterial whether that relief be legal or equitable. If the relief be equitable in its nature, but cannot properly be granted without the presence of other parties; an objection on that account cannot be taken by demurrer under this subdivision (*Gen'l Mut. Ins. Co.* v. *Benson*, 5 Duer, 168), or by objection on the trial. (*Id.*) A demurrer on this subdivision puts in issue the validity of the whole complaint (*White* v *Brown*, 14 How. 282; *Spear* v. *Downing*, 12 Abb. 442; 34 Barb. 523).

b. The complaint, to be overthrown by a demurrer under this subdivision, must present defects so substantial in their nature and so fatal in their character as to authorize the court to say, taking all the facts to be admitted, that they furnish no cause of action whatever (*The People* v. *Mayor of N. Y.*, 8 Abb. 7), or no cause of action against the defendant demurring (*Sinclair* v. *Fitch*, 3 E. D. Smith, 677). Where the demurrer admits facts enough to constitute a cause of action, the complaint will be sustained (*Richards* v. *Edich*, 17 Barb. 260; *Graham* v *Camman*, 13 How. 362; 5 Duer, 697; *Hammond* v. *Hudson River Iron and Machine Co.*, 20 Barb. 386; *Bank of Lowville* v. *Edwards*, 11 How. 218; *Hillman* v. *Hillman*, 14 *id.* 456, and see *Richards* v. *Beavis*, 28 Eng. Law and Eq. R. 157).

c. It seems that in an action against husband and wife, the complaint asking relief against the separate estate of the wife only, but not stating facts sufficient to show a liability of such separate estate, a demurrer by both husband and wife under this subdvision, will be sustained (*Goodall* v. *McAdam*, 14 How. 385). But husband cannot demur alone (see *Goelet* v. *Gori*, 31 Barb. 321).

§ 145. [123.] (Am'd 1849.) *Demurrer must specify the grounds. May be to all or some of the causes of action.*

The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein.

d. As to the 1st and 6th grounds of demurrer, given by section 144, it seems to be settled that a demurrer stating the grounds of it in the language of those subdivisions, is sufficient. With respect to the other subdivisions the

better opinion seems to be that a demurrer under either of those subdivisions, should specifically point out the grounds of objection (*Swift* v. *De Witt*, 1 Code Rep. 25; *Glenny* v. *Hitchings*, 2 *id.* 56; 4 How. 98; *Grant* v. *Lasher*, 2 Code Rep. 2; *Hunter* v. *Frisbee*, id. 59; *Durkee* v. *Saratoga R. R. Co.*, 4 How. 226; *Hyde* v. *Conrad*, 5 *id.* 112; *Annaball* v. *Hunter*, 6 *id.* 255; *Purdy* v. *Carpenter*, id. 361; *Hinds* v. *Tweddle*, 7 *id.* 278; *Skinner* v. *Stuart*, 13 Abb. 457; *Getty* v. *Hudson River R. R. Co.*, 8 *id.* 177; *Haire* v. *Baker*, 1 Selden, 163; *Johnson* v. *Wetmore*, 12 Barb. 433).

a. Where the demurrer specifies the alleged causes of demurrer it "excludes all other grounds of objection than those particularly set forth," and the defendant cannot insist on any others on the argument (*Nellis* v. *De Forrest*, 16 Barb. 65; see *ante*, 262).*a.*

b. A demurrer stating "that it does not appear that the plaintiff had any title to the note when the suit was commenced," was held, not to sufficiently assign the cause of demurrer (*White* v. *Low*, 7 Barb. 204).

c. A demurrer merely alleging that there "is a defect of parties defendant is defective" in not specifying the particular defect (*Skinner* v. *Stuart*, 13 Abb. 443).

d. Where the ground of demurrer stated was that the complaint did not state facts sufficient to constitute a cause of action; among other things, that it did not show plaintiff's capacity to sue; held, sufficiently to point out the objection relied upon, to enable defendants to insist on the argument that the plaintiff had not capacity to sue (*Conn. Bank* v. *Smith*, 9 Abb. 168; 17 How. 487).

e. Where the ground of demurrer alleged is that the complaint does not state facts sufficient to constitute a cause of action, the defendant cannot object to the form of the action or the want of proper parties (*Loomis* v. *Tifft*, 16 Barb. 541); or that the court has no jurisdiction (*Wilson* v. *Mayor of N. Y.*, 4 E. D. Smith, 706 *note*).

f. There cannot be a demurrer to a portion of a cause of action (*Lord* v. *Vreeland*, 24 How. 320; 13 Abb. 195).

g. Where the complaint, after setting forth certain matters of inducement, averred in succession several distinct acts done and committed by the defendants, whereby and by *each* of which acts the defendants became liable to plaintiff, &c.,—held, that such complaint must be regarded as analogous to a declaration containing several distinct counts, and separate demurrers might be interposed to the several causes of action contained in the complaint (*Ogdensburg Bank* v. *Paige*, 2 Code Rep. 75).

§ 146. [125.] (Am'd 1849.) *How to proceed if complaint be amended.*

If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the plaintiff, upon filing with the clerk on [due] proof of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by section 246; but where an application to the court for judgment is necessary, eight days' notice thereof must be given to the defendant.

h. Where a defendant has appeared by attorney, the amended complaint is to be served on the attorney, and not on the defendant personally. A judgment entered as upon failure to answer an amended complaint, which was served on the defendant personally, after he had appeared by attorney, was held irregular (*Mercier* v. *Pearlstone*, 7 Abb. 325).

i. In an action against three defendants, two of the defendants demurred to

the complaint, and the other defendant suffered a judgment for want of an answer. The plaintiff afterwards amended the complaint, in *a substantial manner and not in mere form.* The plaintiff neither served a copy of the amended complaint on the defendant against whom judgment had been taken, nor gave him notice of the amendment; and on motion by such defendant to set the judgment aside, it was held that the judgment was irregular, that it did not follow because he omittted to answer the original complaint that he might not desire to answer the amended complaint, and that he should have been served with notice of the amendment (*People* v. *Woods*, 2 Sand. 652; 2 Code Rep. 18; and see *Thomas* v. *Allen*, 2 Wend. 618; *Aikin* v. *Alb. North R. R. Co.*, 14 How. 337; *Ward* v. *Dewey*, 12 *id.* 193; *Scudder* v. *Voorhis*, 1 Barb. 55).

a. The right to put in an answer to an amended complaint, is substantial and a waiver of it should not be implied (*Low* v. *Graydon*, 14 Abb. 444). Where defendant after service of an amended complaint, under an order allowing him to elect to let his answer stand, or to serve a new answer, had suffered the trial (which was brought on before the time for him to elect had passed) to proceed on the issues raised by his first answer, held that he did not thereby waive his right to serve a new answer (*id.*)

§ 147. [126.] *Objection not appearing on complaint.*

When any of the matters enumerated in section 144 do not appear upon the face of the complaint, the objection may be taken by answer.

b. Where the cause of action alleged in the complaint is a contract made in a foreign state, and such contract is void by the laws of the State in which it was made, and it does not appear on the face of the complaint what is the law of the foreign state, the proper mode of taking advantage of the law of such foreign state is by answer, stating what is the law of the foreign state. A demurrer cannot be sustained (*Humphrey* v. *Chamberlain*, 1 Code Rep. N. S. 387); but where the alleged cause of action arises out of a transaction void by the law of this State, if in fact the transaction took place in a State by the laws of which it was valid, then it must so appear on the complaint (*Thatcher* v. *Morris*, 1 Kernan, 437).

c. Where a married woman sues alone for a cause of action, in which her husband should have joined as plaintiff, and the fact of her being a married woman does not appear on the face of the complaint, the only way in which the defendant can avail himself of the defence of the plaintiff's coverture is to set up her coverture by answer. (*Dillaye* v. *Parks*, 31 Barb. 132). For where in fact there is a defect of parties plaintiff, but the defect does not appear on the face of the complaint, if the defect is not pointed out and insisted on by answer, it is waived (*Scranton* v. *Farmers & Mechanics' Bank of Rochester*, 33 Barb. 527).

d. Where the complaint discloses a joint cause of action against the defendant and another or others who are not joined as defendants, and is silent as to whether the other or others are living or dead, objection to such non-joinder cannot be insisted upon by demurrer; the proper mode of raising the objection is an answer setting up that the party or parties not joined are living (*Brainard* v. *Jones*, 11 How. 569; *Scofield* v. *Van Syckle*, 23 How. 97) [and within the jurisdiction of the court].

e. Where there are in fact two actions pending between the same parties for the same cause, but that fact does not appear on the face of the complaint, the defendant cannot demur; he must put in an answer of the other action pending (*Hornfager* v. *Hornfager*, 1 Code Rep. N. S. 412; 6 How. 279).

f. When in an action by a corporation or a natural person, the want of legal capacity to sue exists or is supposed to exist, but that fact does not appear on the face of the complaint, the objection must be taken by answer; it cannot be

raised by demurrer (*Union Mutual Ins. Co.* v. *Osgood*, 1 Duer, 707; see, however, *Bank of Havana* v. *Wickham*, 7 Abb. 134; 16 How. 97; *Bank of Havana* v. *McGee*, 20 N. Y. 355).

See further, in note to § 144.

§ 148. [128.] (Am'd 1849.) *Objection when deemed waived.* If no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

a. This section means that if the objection is not taken by demurrer, when that mode is proper, or by answer in cases where that is the appropriate method, it is waived (*Zabriskie* v. *Smith*, 3 Kernan, 336; and see *Scranton* v. *Farm. & Mechan. Bank of Rochester*, 33 Barb. 527). And when the objection is one proper to be raised by demurrer, the defendant cannot have the benefit of the objection by raising the objection by answer. (*Id. Mayhew* v. *Robinson*, 10 How. 162; *Ingraham* v. *Baldwin*, 12 Barb. 9; *Baggott* v. *Boulgers*, 2 Duer, 160; *B'k of Waterville* v. *Beltzer*, 13 How. 270; *Gassett* v. *Crocker*, 10 Abb. 133; *Dennison* v. *Dennison*, 9 How. 246). An objection that there is a defect of parties, not taken by demurrer or answer, is waived (*Fosgate* v. *Herkimer Manuf. Co.*, 2 Kernan, 584; *Zabriskie* v. *Smith*, 3 Kernan, 336; *Wright* v. *Storrs*, 6 Bosw. 600; *Dillage* v. *Parks*, 31 Barb. 132; *Lewis* v. *Graham*, 4 Abb. 106; *Wright* v. *Bennett*, 3 Barb. 451; *Abbe* v. *Clarke*, 31 Barb. 238; *Benson* v. *Paine*, 2 Hilton, 552; *Hosley* v. *Black*, 26 How. 97; *Giraud* v. *Beach*, 3 E. D. Smith. 337; *Byxbie* v. *Wood*, 24 N. Y. 607), and cannot be taken for the first time on the trial (*Van Deusen* v. *Young*, 29 Barb. 9; *Abbe* v. *Clark*, 31 *id.* 238) or on appeal from a judgment upon a verdict for the plaintiff (*Bidwell* v. *Astor Mut. Ins. Co.*, 16 N. Y. 266; *Purchase* v. *Mattison*, 6 Duer, 588; *Colegrove* v. *N. Y. & Harlem R. R. Co.*, id. 382; *Bowdoin* v. *Coleman*, 3 Abb. 431; 6 Duer, 183; *Bates* v. *James*, 3 Duer, 45); "or in any other mode, or in any other stage of the cause" (*Leavitt* v. *Fisher*, 4 Duer, 23). And so of an objection that several causes of action are improperly united (*Youngs* v. *Seeley*, 12 How. 395; *Winterson* v. *Eighth Av. R. R. Co.*, 2 Hilton, 393; *Wright* v. *Storrs*, 6 Bosw. 600; *Bonnell* v. *Walsh*, id. 621); or a defence of coverture (*Castres* v. *Gavelle*, 4 E. D. Smith, 425); or that the action was not commenced before the cause of action accrued (*Smith* v. *Holmes*, 19 N. Y. 271), or that the plaintiff is not the real party in interest (*Savage* v. *Corn Ex. Co.*, 4 Bosw. 2), or has not legal capacity to sue (*Mosselman* v. *Caen*, 34 Barb. 66), or any defence which requires to be specially pleaded. (See in note to § 149.)

b. Where one of several parties having a joint interest sues alone and recovers judgment, such judgment is not a bar to a subsequent action by the other party in interest (*Gock* v. *Keneda*, 29 Barb. 120).

c. Is the objection that necessary parties to a complete determination of the action are not joined waived by omitting to raise it by demurrer or answer (see *Davis* v. *Mayor of New York*, 14 N. Y. 506; 2 Duer, 663), an objection that a party suing for himself, should sue on behalf of himself and others, is not a mere objection for defect of parties, and may be made for the first time on the trial (*Greene* v. *Breck*, 10 Abb. 43).

d. Where a defendant demurs to the complaint that it does not state facts sufficient to constitute a cause of action, without objecting to the want of proper parties, or the capacity of the parties to sue, or to the form of the action, he waives his right to insist upon these objections, and for the purposes of the demurrer the complaint will be deemed unobjectionable by reason of any defects of that nature (*Loomis* v. *Tiffi*, 16 Barb. 541).

e. If husband and wife are improperly joined as plaintiffs, the objection

must be taken by demurrer or answer; an answer on the merits will be considered as a waiver of the objection (*Ingraham* v. *Baldwin*, 12 Barb. 9; 5 Selden, 45; and see *Baggott* v. *Boulgers*, 2 Duer, 160; and see *ante*, p. 74 *c*, and *post*, *Several defences*).

a. Objection to the jurisdiction is waived if not taken by answer or demurrer or on the trial (*Mosselman* v. *Caen*, 34 Barb. 66).

b. The failing to demur does not waive the right of the defendant to object *on the trial for the first time*, that the complaint does not state facts sufficient to constitute a cause of action (*Higgins* v. *Freeman*, 2 Duer, 650; *Montgomery Co. Bank* v. *Albany City Bank*, 3 Selden, 464; *Gould* v. *Glass*, 19 Barb. 186; *De Witt* v. *Chandler*, 11 Abb. 459). An incurable defect is not waived by any pleading, but may be taken advantage of whenever the parties are before the court either at special term by motion; or on the trial at circuit by motion (*Burnham* v. *De Bevoise*, 8 How. 159; *Budd* v. *Bingham*, 18 Barb. 494). Thus, the privilege of a foreign consul to be exempt from the jurisdiction of a State tribunal, is not waived by an answer to the merits (*Valarino* v. *Thompson*, 3 Selden, 576; *Flynn* v. *Stoughton*, 5 Barb. 115). His being impleaded with a citizen, upon a *joint contract*, will not give jurisdiction to the State courts (*id.* *Rock River Bank* v. *Hoffman*, 22 How. 250; 510); and it seems that the same rule applies in actions for *tort* (*Hernandez* v. *Carnobeli*, 10 How. 433). He is not only suable in the district courts of the U. S., but if he be an *alien*, he is suable as such by a citizen in the U. S. circuit courts (*St. Luke's Hospital* v. *Barclay*, *British consul*, U. S. circuit court, southern dist. of N. Y., October, 1855). When the court has once acquired jurisdiction of a defendant it is not ousted by his subsequent appointment as a foreign consul (*Koppel* v. *Heinricks*, 1 Barb. 449). If however, on the trial the defect in the complaint is supplied by the proof, the objection may be overruled (*Lounsbury* v. *Purdy*, 18 N. Y. 521; *Emery* v. *Pease*, 20 N. Y. 64).

c. Where a defendant upon demurrer to the answer claims that the complaint is defective, he must be held to have waived all objections to the complaint not raised by answer or demurrer, except the question of jurisdiction and the sufficiency of the facts stated to constitute a cause of action (*The People* v. *Banker*, 8 How. 258; *Winterson* v. *Eighth Ave. R. R. Co.*, 2 Hilton, 389).

d. The objection that the complaint does not state facts sufficient to constitute a cause of action, cannot be taken for the first time on appeal (*Pope* v. *Dinsmore*, 8 Abb. 429; *Corley* v. *Wilkins*, 6 Barb. 558; contra, see *Cole* v. *Blunt*, 2 Bosw. 125).

Chapter III.

The Answer.

Section 149. Answer what to contain.
150. Counter-claim. Several defences.
151. Demurrer and answer, when allowed.
152. Sham and irrelevant defences to be stricken out.

§ 149. [128.] (Am'd 1849, 1851, 1852.) *Answer, what to contain.*

The answer of the defendant must contain,—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

2. A statement of any new matter constituting a defence or counter-claim, in ordinary and concise language, without repetition.

a. The answer is not required to be entitled in the action. It should, however, show in what suit and for what defendant it is put in (see 1 Code Rep. 43). It must either controvert a material allegation of the complaint or state new matter constituting a defence (*McKyring* v. *Bull*, 16 N. Y. 307); and where to a complaint for goods sold the defendant answered,—secondly, a denial that plaintiff ever sold any goods to defendant which had not been paid for by the defendant; and thirdly, that if plaintiffs ever sold any goods, to defendant they were sold on credit, and not to be paid for in nine years from the day of sale,—on motion these defences were struck out as neither amounting to a denial, nor to a statement of new matter (*Hamilton* v. *Hough*, 13 How. 14).

b. It is not essential to the sufficiency of an answer that it should constitute a defence or counter-claim to the whole of the complaint or of any single count. It is sufficient if it constitute a defence or counter-claim to so much as it professes to answer (*McKyring* v. *Bull*, 16 New York, 360; *Allen* v. *Haskins*, 5 Duer, 332; *Kneedler* v. *Sternberg*, 10 How. 68); but if it profess to answer an entire cause of action and in fact only answers a part it is insufficient and may be demurred to (*Foster* v. *Hazen*, 12 Barb. 547; *Beach* v. *Barons*, 13 Barb. 306; *Thumb* v. *Walrath*, 6 How. 196; *Willis* v. *Taggard*, *id.* 433; *Nichols* v. *Dusenbury*, 2 Coms. 283; *Howk* v. *Pollard*, 6 Blackf. 108; and see *Huckley* v. *Grosjean*, id. 35); if the defence professes to be part only of a cause of action without specifying what part, it is sufficient [although indefinite] if it is an answer to any part (*Cottingham* v. *The State*, 7 Blackf. 405); but it is said that if it specify the part to which it is intended as an answer it is limited to that part, although in fact an answer to the whole (*Cross* v. *Watson*, 6 Blackf. 129). The parts of the complaint to which the answer is intended to apply, should be so clearly defined as that the court, on looking at the complaint, can determine what parts are covered by it and what are not (*Davison* v. *Schermerhorn*, 1 Barb. 480). Where in an action for an assault and false imprisonment, the answer assumed to be to the whole complaint but justified only the imprisonment, it was on demurrer held bad (*Foster* v. *Hazen*, 12 Barb. 547). The answer must address itself to the complaint, and not to the bill of particulars (*Kreiss* v. *Seligman*, 8 Barb. 439; *Scovell* v. *Howell*, 2 Code R. 33).

c. "A defendant has a right to consider the complaint which is served upon him, or his attorney, as that alone which he is required to answer, and that it is upon the issues raised by his answer to this complaint that the cause is to be tried" (*Trowbridge* v. *Didier*, 4 Duer, 450; *Hughes* v. *Wood*, 5 *id.* 603, note; *Graham* v. *McCoun*, 5 How. 353; 1 Code Rep. N. S. 43; *Littlejohn* v. *Munn*, 3 Paige, 280).

d. **Several defendants.**—In actions against several defendants, it is sometimes better that each defendant answer separately as when in trespass for executing process, the officer and the plaintiff in the process are sued together (See 2 Saund. Pl. and Ev. 18, 19).

e. Semble, all dilatory defenses must be common to all, and pleaded by all the defendants (*Hurley* v. *Second B'ld'g Asso.* 15 Abb. 206, note).

f. In an action against several executors, such of them as are first served with process, or first appear, are entitled to answer for the estate, and one answer being in it is irregular for the other executor to answer (*Salters* v. *Pruyn*, 15 Abb. 224). But the plaintiff waives the irregularity by not returning the answer or moving to strike it out. (*Id.*) If there is any collusion between the plaintiff and the executor who first answers, the other executors should obtain leave to put in a separate answer. (*Id.*)

g. **Denials.**—A general and a specific denial of the same matter is not allowed (*Dennison* v. *Dennison*, 9 How. 246; *Blake* v. *Eldred*, 18 How. 240). One of such denials will be struck out as redundant. Defendant will have his option as to which he will retain. (*Id.*)

a. **General denial.**—A general denial is a denial in gross of all the allegations of the complaint, and a specific denial is a denial of one or of each allegation separately (*Dennison* v. *Dennison*, 9 How. 247; *Seward* v. *Miller*, 6 *id.* 312, and other cases). The usual form of general denial is, "the defendant denies each and every allegation of the complaint" (*Kellog* v. *Church*, 4 How. 339; *Radde* v. *Ruckgaber*, 3 Duer, 684). A defendant after expressly admitting some of the allegations of the complaint may make a denial "of all the allegations in the complaint not herein before specifically [expressly] admitted" (*Parshall* v. *Tillou*, 13 How. 7; *Genesee Mut. Ins. Co.* v. *Moynihen*, 5 *id.* 321; *Smith* v. *Wells*, 20 How. 158; 144; 6 *id.* 148). A statement that the defendant denies all those allegations which are contained within certain specified folios, is good as a general denial (*Gassett* v. *Crocker*, 9 Abb. 39; see *Blake* v. *Eldred*, 18 How. 240). Denying and saying he denies is different (*id.*; *Arthur* v. *Brooke*, 14 Barb. 535).

b. To a complaint for goods sold, alleging the sale and that the defendant is *now* indebted to the plaintiff therefor, the defendant answered admitting the sale, but alleging that the purchase was on a credit of six months, and that credit had not expired; held that the answer was a "*special* denial of the allegation in the complaint," that the defendant is *now indebted* to the plaintiffs (*Gilbert* v. *Cram*, 12 How. 455).

c. Where the allegations of a complaint are not directly denied, but the defendant states other facts inconsistent with those set forth by the plaintiff,—this will not be constructed as a denial so as to prevent the allegations of the complaint from being taken as true: merely making a counter-statement or giving a different version of the matter from that contained in the complaint, without denying the allegations of the complaint, is not *specifically* controverting such allegations (*Wood* v. *Whiting*, 21 Barb 190). Thus, where the complaint alleged that G delivered to the defendant for collection, certain accounts, for which defendant gave G a receipt and promised to pay over said money when received; that defendant collected said money and neglected to pay the same to said G, and that G had assigned his claim to the plaintiff,—an answer which stated that G was a partner of one B, as manufacturers of grain cradles, which were sold by them on credit, and the said amounts were demands of G. & B. and not of G, was held not to *specifically* controvert the allegations of the complaint. (*Id.*; see *Gilbert* v. *Cram*, 12 How. 455; *Hamilton* v. *Hough*, 13 How. 14; *Isles* v. *Tucker*, 5 Duer, 393; *Loosey* v. *Orser*, 4 Bosw. 392). To a complaint setting forth an agreement with several clauses between the plaintiff and defendant, the defendant answered that the agreement was "*incorrectly stated*" in the complaint, and then proceeded specifically to controvert several parts of it, and without any further or general denial,—it was held that the parts not specifically denied were admitted (*Levy* v. *Bend*, 1 E. D. Smith, 169). An allegation that defendant does not know of his information or otherwise that the plaintiff had commenced the action in the complaint mentioned, is not a denial (*Sayre* v. *Cushing*, 7 Abb. 371).

d. **Denial of any knowledge or information, &c.**—A denial as to a material allegation, or as to all the allegations of a complaint of any knowledge or information sufficient to form a belief, forms a complete issue, and in no case can an answer containing such a denial be successfully demurred to (*Livingston* v. *Hammer*, 7 Bosw. 670; *Ketcham* v. *Zerega*, 1 E. D. Smith, 554); nor *semble*, can judgment be given thereon as frivolous. (*Id.*) Such a denial may be struck out as false or sham in any case where it is to be plainly seen that defendant had, in fact, knowledge or information sufficient to form a belief (*Edwards* v. *Lent*, 8 How. 28; *Ketcham* v. *Zerega*, 1 E. D. Smith, 554; *Kellogg* v. *Baker*, 15 Abb. 287); or has ready means of obtaining the knowledge (*id.*; *Hance* v. *Reming*, 1 Code R. N. S. 204); or the fact is presumptively in his knowledge (*Sherman* v. *N. Y. Central Mills*, 1 Abb. 187; *Fales* v. *Hicks*, 12 How. 153); although the answer be verified (*Fales* v. *Hicks*, 12 How. 153; *Chapman* v. *Palmer*, 12 How. 38). Thus such a denial was struck out in an action for an assault where it was applied to the assault (*Richardson* v. *Wilton*, 4 Sand. 708); and so where the contents of an instrument executed by the defendant was thus denied, the denial was struck out (*Wesson* v. *Judd*, 1 Abb.

254; see, however, *Kellogg* v. *Baker*, 15 Abb. 287); and in an action against partners as makers of a promissory note, such a denial of making the note was struck out (*Mott* v. *Burnett*, 1 Code Rep. N. S. 225; 2 E. D. Smith, 50). In an action on a bond executed by the defendant as surety, conditioned to be void if the plaintiff recovered judgment against C., such a denial of the recovery of the judgment was struck out (*Hance* v. *Reming*, 1 Code Rep. N. S. 204; 2 E. D. Smith, 48). In an action against partners for goods sold and delivered, such a denial of the sale and delivery by one partner was struck out (*Chapman* v. *Palmer*, 12 How. 38). Such a denial of a judgment obtained against the defendant was struck out (*Ketcham* v. *Zerega*, 1 E. D. Smith, 555); and in an action for false imprisonment on process, such a denial of causing the process to issue was struck out as sham (*Lawrence* v. *Derby*, 15 Abb. 346, *n*). And such a denial of the transfer of a note by the defendant was struck out (*Fales* v. *Hicks*, 12 How. 153). But the maker of a promissory note, sued with the endorser in one action, may adopt this mode of denying that the other defendant endorsed the note, or its presentment for payment (*Flood* v. *Reynolds*, 13 How. 112; *Sherman* v. *Bushnell*, 7 *id.* 171; *Thorn* v. *N. Y. Central Mills*, 10 How. 20; *East River Bank* v. *Rogers*, 7 Bosw. 497; *Duncan* v. *Lawrence*, 6 Abb. 304; 3 Bosw. 103). A defendant is not presumed to know the date of an instrument not in his possession or control, and as to such date may deny any knowledge (*Kellogg* v. *Baker*, 15 Abb. 287). To a complaint by an administrator setting forth the death of the intestate, the granting of letters of administration to the plaintiff, and that he is informed and believes the defendant is indebted to him for coal sold by intestate to defendant, the defendant answered denying any knowledge or information, &c., whether he is indebted to plaintiff. The plaintiff moved to strike out the answer as frivolous; the motion was denied (*Morrow* v. *Cougan*, 3 Abb. 328); for although the defendant must have had knowledge as to the sale of the coal, yet he might well be ignorant of the death of the intestate, or the granting of letters of administration to the plaintiff. (*Id.*) [The decision was influenced by the vagueness of the complaint.]

a. The allegation of a defendant brought in by supplemental complaint, of his ignorance as to a fact admitted by the answer of the original defendant, to whose interest he has succeeded, does not put such fact in issue (*Forbes* v. *Waller*, 25 N. Y. 430).

b. In an action in which the complaint alleged the making a note by the defendants, and that they "*thereupon indorsed and delivered the same to the plaintiffs*," and that the plaintiffs were the lawful holders and owners of the note; the answer denied that the defendants ever indorsed the note to the plaintiffs, or ever delivered said note to them, and further denied any knowledge or information sufficient, &c., whether or not the plaintiffs are the lawful holders and owners of said note. This answer was held frivolous (*Kamlah* v. *Salter*, 6 Abb. 226; see, *contra*, *Temple* v. *Murray*, 6 How. 329; *Snyder* v. *White*, *id.* 321; *Genesee Mutual Ins. Co.* v. *Moynihen*, 5 *id.* 321; and see in note to section 247, *post*).

c. **Form of denial of any knowledge, &c.**—A denial of "any knowledge or information sufficient to form a belief," makes a complete denial; and the defendant need not and should not add "and therefore he denies the same" (*Flood* v. *Reynolds*, 13 How. 112; *Leach* v. *Boynton*, 3 Abb. 3; *Townsend* v. *Platt*, *id.* 325; *King* v. *Ray*, 11 Paige, 236; *Livingston* v. *Hammer*, 7 Bosw. 670). And it will be observed, that where the defendant has made an insufficient allegation of the want of any knowledge or information, and has followed such allegation by the further allegation "and therefore he denies," &c., this further allegation has been disregarded (see *Chapman* v. *Palmer*, 12 How. 38; *Edwards* v. *Lent*, 8 *id.* 28). A denial of knowledge, without adding information, would not be sufficient (*Edwards* v. *Lent*, *id.*; and see *The People* v. *McCumber*, 15 *id.* 189; *Ketcham* v. *Zerega*, 1 E. D. Smith, 554); nor is it sufficient for a defendant to say he is ignorant of whether or not the facts alleged against him are or not true (*Wood* v. *Staniels*, 3 Code Rep. 152). An answer that the defendant "is not informed and cannot state" whether or not the plaintiff was possessed,

&c. is not a sufficient denial for any purpose (*Elton* v. *Markham*, 20 Barb. 348). And so of an allegation that "the defendant does not know of his information or otherwise (*Sayre* v. *Cushing*, 7 Abb. 371). This form of denial (*i. e.*, of any knowledge or information sufficient to form a belief) is peculiarly proper in a system which requires pleadings to be verified under oath; but whether the answer is or is not verified does not affect a question on the sufficiency of the form of denial (*Snyder* v. *White*, 6 How. 324).

a. **Denial on information and belief.**—It has been doubted whether a defendant may make a denial on information and belief (see *Hackett* v. *Richards*, 3 E. D. Smith, 13; *Blake* v. *Eldred*, 18 How. 240).

b. The propriety or impropriety of alleging on information and belief has been supposed to depend on the question, whether the fact alleged was or was not within the defendant's own knowledge; thus, per Harris, J.: "The answer will be insufficient, if it denies merely upon information an allegation the truth or falsity of which is within the defendant's own knowledge" (*Edwards* v. *Lent*, 8 How. 28). In general, a defendant is permitted to allege that his denial is on or according to his information and belief (7 Abb. 371, note). And where an answer commenced, "The defendant verily believes, and therefore answers and says, that the plaintiff is not, &c.;" it was held sufficient (*Davis* v. *Potter*, 4 How. 155).

c. **Denial should be in the disjunctive.**—Where the complaint alleged that defendant "assaulted the plaintiff, and seized him by the collar and shook him violently," the answer, "denied that he, the defendant, did assault the said plaintiff, and seize him by the collar and shake him violently." On demurrer the answer was held insufficient. "The defendant has grouped three of the charges, and denied them under oath, in such a manner that if he should be guilty of two and not guilty of the other one, his answer would not be literally untrue. The denial should have been of each charge disjunctively, if the defendant intended to put the whole of them in issue" (*Hopkins* v. *Everitt*, 3 Code R. 150; 6 How. 159). [That case was decided under the code of 1848, which required a *specific* denial of each allegation.]

d. "The answer may deny all the allegations in the complaint, in such terms, that if any one is true, the denial is false, or it may deny specifically such allegations as the defendant intends to controvert on the trial. But it is not clear that anything in the code warrants the grouping of several material allegations and denying them as an aggregate, in terms which are not inconsistent with the truth of any one of them" (*Young* v. *Catlett*, 6 Duer, 443). And where in an action on promissory notes against the executrix of the endorser, she answered "that whether or not upon the maturity of the notes mentioned in the complaint, the same were or either of them was duly presented to the makers thereof for payment, and payment thereof demanded and refused, and thereupon said notes duly protested for non-payment, and notice of such presentment, refusal, and protest given to the said H. L., this defendant has no knowledge or information sufficient to form a belief." It was said that such a denial resembled what was formerly known as "a negative pregnant." It was a denial of the conjoined facts consistent with the existence and truth of any one of the separate facts. (*Id.*) And so where the complaint charges a breach of covenant in cutting and carrying away wood and timber, an answer denying that defendant cut and carried away any wood *and* timber would probably be indefinite or uncertain (*Beach* v. *Barons*, 13 Barb. 305). An answer is not frivolous merely because it denies the allegations of the complaint conjunctively instead of disjunctively (*Livingston* v. *Hammer*, 7 Bosw. 670).

e. **Denial should not be in the alternative.**—To a complaint which alleged that defendants purchased goods of the plaintiff, and that to obtain said goods and deceive plaintiff, defendant represented that he was in good circumstances and worth more than $3,000 over and above his debts, and that such representations were false, and were made to obtain possession of the goods, and to deceive the plaintiff, the defendant answered denying that, to obtain said goods and to deceive the plaintiff, he represented to the plaintiff that he was

in good circumstances or that he was worth more than $3,000 over and above his debts, or that the representations were false, or were made to obtain said goods. On motion to strike out parts of the answer, Shankland, J., said it was defective as denying "the allegations of the complaint in the alternative form—that he made his representation, or that, or that, or that,—and thus leaves it uncertain what he means to deny" (*Otis* v. *Ross*, 8 How. 193; *Gorbin* v. *George*, 2 Abb. 467. See note to section 165, *post*).

a. **Denial of part of a cause of action; or of one of several causes of action.**—Where the cause of action stated in the complaint is devisible, or where there are several causes of action stated, the defendant may by his answer deny part, or some, or one of the cause or causes of action and leave the residue unanswered (*Smith* v. *Shufeldt*, 3 Code Rep. 175; *Tracy* v. *Humphrey*, ib. 190; *Willis* v. *Taggard*, 6 How. 433; *Genesee Mut. Ins. Co.* v. *Moynihen*, 5 *ib.* 322; *Snyder* v. *White*, 6 *ib.* 321); or answer the residue by new matter or otherwise (*Longworthy* v. *Knapp*, 4 Abb. 115).

b. **What may be denied.**—A denial that the plaintiff is entitled to the sum of money demanded, is not a denial of a material allegation (*Drake* v. *Cockcroft*, 1 Abb. 208; 10 How. 377; 4 E. D. Smith, 39). In an action by two or more for an unlawful taking of property, the defendant answers that the plaintiffs are not joint owners of the property. The averment that plaintiffs are not joint owners is *material* (*Walrod* v. *Bennett*, 6 Barb. 144). In an action for detaining personal property, the value of the property is not the subject of an issueand should not be denied (*Connoss* v. *Meir*, 2 E. D. Smith, 314; *McKenzie* v. *Farrell*, 4 Bosw. 193; *Hackett* v. *Richards*, 3 *ib* 13; *Woodruff* v. *Cook*, 35 Barb. 505). Although the value is alleged in the complaint and not denied by the answer, the defendant may, on the trial, prove the true value (*Ib*). See, however *Archer* v. *Boudinet* (1 Code Rep. N. S. 373), where it is said the complaint having fixed the value of the property, and the answer not denying it, no other value could be adopted even by the jury. And where a complaint gives credit for a payment on account, that is not a traversable fact (*Hodgins* v. *Hancock*, 14 Mees. & W. 120). In *Gregory* v. *Wright* (11 Abb. 417), an action for goods sold and for services held that an answer which denied the value of the services raised a material issue. In *McKenzie* v. *Farrell* (4 Bosw. 193) it was decided that allegations of value need not be denied.

c. In an action for a breach of covenant, an averment in the complaint of the amount of damages, is not the proper subject of denial. It is not issuable matter and the defendant does not admit the amount alleged, by neglecting to deny it (*Hackett* v. *Richards*, 3 E. D. Smith, 13). Even on a default the amount of damage must be proved or the plaintiff take judgment for a merely nominal sum. (*Ib.*; and see *Gilbert* v. *Rounds*, 14 How. 49).

d. An answer that defendant is not indebted in manner and form as alleged, as it is but a denial of a conclusion of law, is not sufficient in any action (*Pierson* v. *Cooley*, 1 Code Rep. 91), except that where the plaintiff states as his cause of action that the defendant is indebted to the plaintiff, instead of setting forth the contract on which the cause of action arises, the defendant may take issue on indebtedness (*Morrow* v. *Cougan*, 3 Abb. 328). This accords with a decision of (*Anon.*, 2 Code Rep. 67), that when indebtedness is stated in a complaint as a matter of fact, an answer of not indebted, is sufficient. An allegation in an answer that the defendant never gave the plaintiff the note mentioned in the complaint, amounts to a denial of the making the note and plaintiff's ownership (*Sawyer* v. *Warner*, 15 Barb. 282); circumstances of aggravation are not traversable (*Gilbert* v. *Rounds*, 14 How. 49); nor are allegations of special damage (*Maloney* v. *Dows*, 15 How. 265); unless the special damage is the gist of the action, in which case it is traversable (*Perring* v. *Harris*, 2 M. & Rob. 5).

e. A fact *impliedly* averred may be traversed in the same manner as if it were expressly averred (*Haight* v. *Holley*, 3 Wend. 263; 11 East. 406; *Prindle* v. *Caruthers*, 15 N. Y. 429; *Bellinger* v. *Craigue*, 31 Barb. 534; *Lord* v. *Chesborough*, 4 Sand. 696; 1 Code R. N. S. 322); and if not denied it is admitted (*Anable* v. *Steam Engine Co.*, 16 Abb. 286).

a. Where a complaint charges a trespass on a particular day, if the answer set up an act on a previous day as a justification, it should traverse the commission of the trespass on any other day than the day mentioned in the answer (*Halliday* v. *Noble*, 1 Barb. 138). The *place where* an alleged trespass on land was committed is material, and must be proved as laid (*Dorman* v. *Long*, 2 Barb. 214); *semble*, it may therefore be denied, but query?

b. In an action for damages caused by the negligence of defendant in leaving a ditch open and unguarded in a highway, the complaint stated that plaintiff fell into it "without any fault or want of care on his part." The answer denied that "plaintiff, without any fault or want of care," did fall therein; held, that this put in issue, the falling into the ditch, as well as the exercise of proper care by plaintiff (*Wall* v. *Buffalo Water Works Co.*, 18 N. Y. 119; *Livingston.* v. *Hammer*, 7 Bosw. 670).

c. What is the true intent and meaning of a written instrument, is not matter of intrinsic averment, but in cases where there is no latent ambiguity, depends on the instrument itself; and no averment can be made which contradicts the language of the instrument (*U. S.* v. *Thompson*, 1 Gallis. 388). Thus, where the complaint alleged that D. executed his bond to the plaintiff, dated, &c., conditioned to be void on payment of a certain sum, with interest semi-annually, and with the further condition, "if any default should be made in the payment of said interest, or any part thereof, on any day whereon the same ought to be paid, and should the same remain unpaid for ten days, then, after the lapse of said ten days, the principal sum should immediately become due and payable," and the complaint further alleged, that as collateral security for the payment of said bond, the said D. executed to the plaintiff a mortgage, "with the same condition as the said bond," and then alleged a default in payment of interest. The answer of B., a defendant, admitted that D. made *a* mortgage to the plaintiff, dated, &c., alleged that it was the only mortgage made by D. to plaintiff, that it was conditioned for the payment of a certain sum and interest semi-annually, but that it did "not contain any condition or clause that in case the interest or any part thereof, on any day whereon the same was made payable, should remain unpaid for ten days, the principal sum should become due and payable immediately;" and the answer then denied any knowledge that the bond contained any such condition as was set forth in the complaint. To this answer the plaintiff demurred; and it was held in the court below, first at the special and afterwards at the general term, that the answer set forth a defence to the action, and the defendant had judgment. The plaintiff appealed to the court of appeals; and that court reversed the judgment, and gave judgment for the plaintiff; and per Denio, Ch. J.: The correct method for the defendant to have brought the question which he wishes to raise before the court, was to set out the mortgage *verbatim*, and then have stated the matter in avoidance, which, upon his construction of the mortgage, would have barred the action; or he might have denied the execution of the alleged mortgage. Either of these methods would have raised the question of law arising upon the instrument; but an averment that a certain clause is not contained in the mortgage, without giving its actual language, does not afford sufficient data for determining its legal effect (*Dimon* v. *Dunn*, 15 N. Y. 498).

d. The averment of plaintiff's belief is not traversable (*Radway* v. *Mather*, 5 Sand. 654; *Howell* v. *Fraser*, 1 Code R. N. S. 270). Thus, to an allegation plaintiff *believes* the note was presented for payment, the defendant could not oppose a denial "that plaintiff believes."

e. Persons who make contracts with a corporation *de facto*, cannot deny its legal existence (*White* v. *Ross*, 15 Abb. 66; *East River Bank* v. *Rogers*, 7 Bosw. 494; see *ante*, in note to § 142, *Corporations*, p. 212, *k*). Thus, in an action by a corporation (*i. e.* a building association) against one of its members or a party dealing with it, the defendant cannot be admitted to allege that the charter had become void before the commencement of the action by a non-compliance with the statutory provisions relating to moneyed corporations (*Mechanics' Building Association* v. *Stevens*, 5 Duer, 676). So in an action by a foreign cor-

poration to recover a sum of money loaned in this State, the defendant is not at liberty to avail himself of the defence that the plaintiff was precluded from the terms of its charter from making such loan. When it is a question of capacity to contract, a party who has had the benefit of the contract cannot be permitted in an action founded upon it to question its validity (*Steam Navigation Co.* v. *Weed*, 17 Barb. 378).

a. A positive denial in an answer will not prevail against facts admitted in or by the same answer which contradict such denial (*Robinson* v. *Stewart*, 10 N. Y. 189; and see *Storer* v. *Coe*, 2 Bosw. 662; *Manice* v. *N. Y. Dry Dock Co.*, 3 Edw. Ch. R. 146).

b. **What defences may be given in evidence under a general denial.**—Under an answer denying the allegations of the complaint, and denying that the plaintiff is indebted, the defendant may prove he was never indebted at all, or that he owes less than is claimed, that the services were rendered as a gratuity, either as to the whole or in part, or that the plaintiff had himself fixed a less price for his services than he claims to recover (*Schermerhorn* v. *Van Allen*, 18 Barb. 29); or may give any other evidence to disprove the allegations of the complaint (*Andrews* v. *Bond*, 16 Barb. 633). In an action for converting property, a general denial puts in issue the conversion and the plaintiff's title and admits evidence to disprove the plaintiff's title (*Robinson* v. *Frost*, 14 Barb. 536 [but this seems doubtful]; see *Ely* v. *Ehle*, 3 Coms. 510; *Jacobs* v. *Remsen*, 12 Abb. 390; *Beaty* v. *Swarthout*, 32 Barb. 293). In an action for a wrongful conversion of property, the complaint averred that the plaintiff was, at the time of the conversion, the *owner* and entitled to the immediate possession of the said property. The answer, among other things, denied that at the said time the plaintiff was the owner and entitled to the immediate possession of said property. On appeal, the court held that the plaintiff's title was put in issue (*Davis* v. *Hoppock*, 6 Duer, 256). In an action for a trespass upon land, unless the plaintiff's title is put in issue by new matter, it is to be taken as admitted, and the title is not put on issue by a general denial (*Squires* v. *Seward*, 16 How. 478; *Althouse* v. *Rice*, 4 E. D. Smith, 348; see *Ferris* v. *Brown*, 3 Barb. 105). Where the complaint is on a *quantum meruit*, not setting up a specific contract, in that case, under a general denial, the defendant may show that the work was unskillfully done, or was worth less than the amount claimed (*Raymond* v. *Richardson*, 4 E. D. Smith, 172; *Bellinger* v. *Craigue*, 31 Barb. 534; and see *Trimble* v. *Stilwell*, 4 E. D. Smith, 512); but if the complaint had been on a specific contract, it would be otherwise (*Kendall* v. *Vallejo*, 1 Cal. 371). In an action for seduction, assault or false imprisonment, evidence in mitigation of damages, not offered as a defence, may be given in evidence without beingpled (*Travis* v. *Barger*, 24 Barb. 614; *Hays* v. *Berryman*, 6 Bosw. 679; see however *Foland* v. *Johnson*, 16 Abb. 235). And when mitigating circumstances cannot properly be set up in the answer they may be given in evidence under a general denial (*Kneedler* v. *Sternberg*, 10 How. 68; *Dunlap* v. *Snyder*, 17 Barb. 561). To a complaint on a promissory note, which alleged the making of the note by the defendant and the delivery of it to the plaintiff, the answer alleged that "the defendant never gave the plaintiff the said note;" held that the answer was "a denial of the allegation in the complaint that the defendant made the note, so far as making includes delivery (*Russell* v. *Whipple*, 2 Cow. 256); and also of the further allegation that the defendant delivered the note to the plaintiff. The question to be tried on these allegations was whether or not the note was delivered to the plaintiff, as alleged by him" (*Sawyer* v. *Warner*, 15 Barb. 286).

c. Under a general denial in an action for slander, defendant may give in evidence the general bad character of plaintiff (Anon. 8 How. 434, contra, Anon. 6 How. 160); and in an action for malicious arrest, a general denial puts in issue the want of probable cause (*Rost* v. *Harris*, 12 Abb. 446; *Radde* v. *Buckgaber*, 3 Duer, 685; *Simpson* v. *McArthur*, 16 Abb. 302 note); so in an action on the case for keeping a ferocious dog which bit the plaintiff; *semble* the defendant may, on a general denial, avail himself of want of proof that he knew the dog was accustomed to bite (*Hogan* v. *Sharpe*, 6 Car. & P. 755).

d. An answer which alleges that the plaintiff "is not the *lawful* holder and

owner of the note" described in the complaint, is insufficient to admit evidence that the plaintiff is not the owner or holder (*Seeley* v. *Engell*, 17 Barb. 530; 3 Kernan, 542; *Brown* v. *Ryckman*, 12 How. 313; and see what is said *Hatch* v. *Peet*, 23 Barb. 582; not *contra* to *White* v. *Spencer*, 4 Kernan, 247; see, also, *Tamisier* v. *Cassard*, 17 Abb. 187; *Arrangois* v. *Frazer*, 2 Hilton, 244). But when in a complaint it was alleged that the plaintiff was the lawful holder and owner of the note, the subject of the action, but did not otherwise allege any transfer or delivery of the note to the plaintiff, it was held that under the peculiar form of the complaint it was allowable for the defendant to deny that the plaintiff was the holder and owner (*McKnight* v. *Hunt*, 3 Duer, 615; *Hull* v. *Wheeler*, 7 Abb. 412; *Metro. B'k.* v. *Lord*, 1 Abb. 185; *ante*, 203, *a*).

a. Where the contract, stated in the complaint, is not expressly alleged to be in writing, or subscribed by the defendant, but it is one which is not binding on the defendant unless it be in writing, or be subscribed by him, all that is necessary, in order to a complete defence, is to deny the existence of any contract (*Livingston* v. *Smith*, 14 How. 492; *Amburger* v. *Marvin*, 4 E. D. Smith, 393; *Champlin* v. *Parish*, 11 Paige, 408; and see *Haight* v. *Child*, 34 Barb. 191; *ante*, p. 204 *d*.) But in cases where there is a contract in fact, although not of any binding force, many might hesitate to verify an answer denying that any contract existed; in that event a complete defence may be set up, by alleging that the contract mentioned in the complaint was not in writing, or not subscribed, as the case may be, which, perhaps, is the better mode of stating the defence (*Id.*, citing *Cocine* v. *Graham*, 2 Paige, 181; *Ontario B'k.* v. *Root*, 3 *id.* 478; *Harris* v. *Knickerbacker*, 5 Wend. 638; 2 Sto. Eq. Pl. § 763). To a declaration in assumpsit the plea was, that the promise alleged was a special promise to answer for the debt and default of another, but there was no agreement in writing stating the consideration, and that the promise was in writing, as follows: I agree to see you paid within 3 months from date the 5*l.* due you from A., signed, &c. Held on demurrer that the plea was an answer to the action without stating there was no *other* consideration for the promise (*Clancy* v. *Piggott*, 4 N. & M. 496).

b. "The general denial allowed by the code corresponds very nearly with the general issue in actions of assumpsit, and of debt on simple contract, at common law" (*McKyring* v. *Bull*, 16 N. Y. 298).

c. "The only effect of a general or specific denial in an answer of the material allegations of the complaint, is to cast the burden of proof on the plaintiff; but where the necessary proof is given, if the answer contains nothing more than such a denial, the plaintiff is at once, and as a matter of course, entitled to a verdict of judgment" (*Texier* v. *Gowin*, 5 Duer, 392).

d. **What defences cannot be given in evidence under a general denial.**—Under a general denial, no defence which confesses and avoids the cause of action can be given in evidence (*McKyring* v. *Bull*, 16 N. Y. 297). Thus under a general denial, defendant cannot insist that plaintiff is a married woman and has not legal capacity to sue (*Dillaye* v. *Parks*, 31 Barb. 132; *Cal. Steam Nav. Co.* v. *Wright*, 8 Cal. 585); nor that there is a defect of parties plaintiff (*Abbe* v. *Clark*, 31 Barb. 238); nor set up a license to enter upon the premises of another (*Haight* v. *Badgeley*, 15 Barb. 499; *Beaty* v. *Swarthout*, 32 Barb. 293).

e. Usury (*Fay* v. *Grimstead*, 10 Barb. 321; *Gould* v. *Segee*, 5 Duer, 260); payment (*Field* v. *Mayor of N. Y.*, 2 Selden, 189; *Texier* v. *Gouin*, 5 Duer, 392; *Calkins* v. *Parker*, 21 Barb. 275); part payment (*McKyring* v. *Bull*, 16 N. Y. 297); coverture (*Castres* v. *Gavelle*, 4 E. D. Smith, 425); that the time for payment has been extended, and is not expired (*Newell* v. *Salmons*, 22 Barb. 647); an award, or a former recovery for the same cause (*Brazil* v. *Isham*, 2 Ker. 17; *Hendricks* v. *Decker*, 35 Barb. 298); any illegality in the contract (*Potts* v. *Sparrow*, 3 Dowl. P. C. 630; *Barnett* v. *Glossop*, id. 625); nothing which confesses and avoids the cause of action (*McKyring* v. *Bull*, 16 N. Y. 297); the corporate character of a *domestic* corporation plaintiff (*B'k. of Genesee* v. *Patchin B'k.*, 3 Kernan, 310; overruling *Stoddart* v. *Onon. Ann. Conf.*, 12 Barb. 576; *East River B'k* v. *Rogers*, 7 Bosw. 497); otherwise of a

foreign corporation (*Waterville Manuf. Co.* v. *Bryan*, 14 Barb. 182; see *ante*, note to section 140); that the plaintiff is not the real party in interest, *semble*, *Westervelt* v. *Alcock*, 3 E. D. Smith, 243; *Jackson* v. *Weedon*, 1 id. 142; *Savage* v. *Corn Exchange Ins. Co.*, 4 Bosw. 2); that the cause of action had not accrued before the commencement of the action (*Smith* v. *Holmes*, 19 N. Y. 271).

a. In an action by several plaintiffs for an unlawful taking of property, a defence that the plaintiffs are not joint owners (*Walrod* v. *Bennett*, 6 Barb. 144); that work done under a specific contract was done in an unworkmanlike manner (*Kendal* v. *Vallijo*, 1 Cal. 371); if the action had been on a *quantum meruit*, it would have been otherwise (*Raymond* v. *Richardson*, 4 E. D. Smith, 172; see, however, *Laraway* v. *Perkins*, 10 N. Y. 371; *Bellinger* v. *Craigue*, 31 Barb. 537). The fact that a mortgage has beeen foreclosed and the mortgaged property sold, and a part of the mortgaged debt thereby paid, cannot be made available to the insurer as a partial defence to an action on the policy, unless set up in the answer (*Grosvenor* v. *Atlantic Fire Ins. Co.*, 1 Bosw. 469); a claim of recoupment to be available must be set up in the answer (*Crane* v. *Hardman*, 4 E. D. Smith, 448; *Storp* v. *Harbutt*, id. 464). *Semble*, that mitigatory circumstances in an action for an assault, &c., must be pled (*Folard* v. *Johnson*, 16 Abb. 235; see *Mitigating Circumstances*, p. 278, *b*); and so must a defence arising out of the provision in section 3, ch. 355, of laws 1839, prohibiting banks from paying out or lending notes not received at par (*Codd* v *Rathbone*, 19 N. Y. 39). Under a plea of *non est factum* in an action of covenant, neither a mutual abandonment of the contract, nor nonperformance of conditions precedent by plaintiff, can be given in evidence (*Laraway* v. *Perkins*, 10 N. Y. 371).

b. Where a conductor upon a railroad is sued for a battery in forcibly ejecting a passenger from the cars, he cannot prove, in his defence, the existence of certain rules of the railroad company at the time; that such rules were reasonable, and that the acts of defendant complained of, were done in conformity with such rules, unless such a defence has been set up in the answer (*Pier* v. *Finch*, 29 Barb. 170).

c. In an action for converting personal property, a general denial will not anthorize the defendant to prove a special property in the goods; to defeat plaintiff's claim, such a defence must be specially pleaded (*Graham* v. *Harrower*, 18 How. 144). Thus, in such an action, it cannot be proved on the trial, unless set up by the answer, that one of the defendants had, as sheriff, levied an execution upon the property in suit, before plaintiff claimed title thereto (*Id.*); and as to defence in action for false imprisonment, see *Brown* v. *Chadsey*, (39 Barb. 263).

See, *New Matter*.

New Matter.

d. **New matter defined.**—New matter is that which admits and avoids the cause of action set up in the complaint, and constitutes defence (*Gilbert* v. *Cram*, 12 How. 455; *Radde* v. *Ruckgaber*, 3 Duer, 685; *Brazil* v. *Isham*, 2 Kernan, 17; *Bellinger* v. *Craigue*, 31 Barb. 537; *Carter* v. *Kæzley*, 14 Abb. 147; *Walrod* v. *Bennett*, 6 Barb. 144).

e. Matter "which merely negates the essential allegations of the complaint, or states circumstances which, if testified to by credible witnesses, would disprove them," is not new matter (*Radde* v. *Ruckgaber*, supra). Thus, in an action for a malicious arrest, where the complaint alleged the arrest to have been made without any reasonable or probable cause, a statement of facts in the answer, to show the existence of probable cause, is not new matter, but "only evidence that one indispensable allegation of the complaint is untrue," viz. the absence of probable cause (*Id.*; *Rost* v. *Harris*, 12 Abb. 447). In *Van Giesson* v *Van Giesson* (12 Barb. 520; 10 N. Y. 316; and see 16 N. Y. 304), it was held that to a complaint on a promissory note, which alleged that the note had not been paid, an answer that the note had been paid was not new matter, *calling for a reply* (the code then requiring a reply to new matter in

the answer); the decision proceeded on the ground that the allegations of non-payment in the complaint, and payment in the answer formed a complete issue.

a. A defendant may set up as a defence, matter which he has previously made the subject of an action, and which action is pending, and the court will not oblige him to elect on which he will rely, his action or his defence. Thus, where J. sued R., and afterwards and pending that action, R. sued J., and J. set up as a counter-claim the cause of action in his action against R., held that he might do so (*Fuller* v. *Read*, 15 How. 236; *Lignot* v. *Redding*, 4 E. D. Smith, 235). And the same rule applies to a set-off, even where the prior action has progressed to a verdict (*Naylor* v. *Schenk*, 3 E. D. Smith, 135), or where the defendant, in such prior action, paid the money into court. (*Id.*)

b. **New matter must be pleaded.**—The answer *must* allege all those *facts* which, when the case of the plaintiff is admitted or proved, the defendant must prove in order to defeat a recovery (*Catlin* v. *Gunter*, 1 Duer, 266; *Ayrault* v. *Chamberlain*, 33 Barb. 237; *Carter* v. *Koezley*, 14 Abb. 147; *Jacobs* v. *Remsen*, 12 Abb. 390; *Savage* v. *Corn Ex. Ins. Co.*, 4 Bosw. 2; *Beatty* v. *Swarthout*, 32 Barb. 293; *Pier* v. *Finch*, 29 Barb. 170). The words "must contain" are imperative (*McKyring* v. *Bull*, 16 N. Y. 297), and a defendant cannot give evidence of any defence of new matter not set up in his answer (*Diefendorff* v. *Gage*, 7 Barb. 18; *Kelsey* v. *Western*, 2 Coms. 501; *N. Y. Cent. Ins. Co.* v. *Nat. Pro. Ins. Co.*, 20 Barb. 468; *Baker* v. *Bailey*, 16 *id.* 57; *Dewey* v. *Hoag*, *id.* 365; *Fay* v. *Grimstead*, 10 *id.* 321; *Andrews* v. *Bond*, *id.* 633; *Walton* v. *Minturn*, 1 Cal. 362; *Field* v. *Mayor of N. Y.*, 2 Selden, 179; *McKyring* v. *Bull*, 16 N. Y. 297; *Buckman* v. *Brett*, 13 Abb. 119; *Sandford* v. *Travers*, 7 Bosw. 497; *Johnson* v. *McIntosh*, 31 Barb. 267; *Button* v. *McCauley*, 38 Barb. 413; *Wright* v. *Delafield*, 25 N. Y. 266). Even though such defence appear from the evidence offered by the plaintiff in support of his case (*Brazil* v. *Isham*, 2 Ker. 9; probably overruling *Richards* v. *Allen*, 3 E. D. Smith, 407). This differs from the case of a plaintiff voluntarily showing he never had a cause of action (*Ely* v. *Cook*, 2 Hilton, 406). See *post*, *What defences must be specially pleaded.* But if matter not pleaded or properly receivable in evidence under the pleadings, is in fact proved, without objection on the part of the plaintiff, it must be considered by the court in giving judgment (*N. Y. Central Ins. Co.* v. *Nat. Pro. Ins. Co.*, 4 Ker. 85). And an answer which would, if demurred to, have been deemed insufficient, may, nevertheless, if issue be taken on it, be sufficient to warrant the admission of evidence constituting a defence (*White* v. *Spencer*, 4 Kernan, 248). A statement of a general conclusion is not sufficient. Thus, to a complaint on a note, an answer that it "was obtained from the defendant by fraud and without consideration, and was void," was adjudged frivolous (*M'Murray* v. *Gifford*, 5 How. 14). So. an answer which avers that the note sued on was, by mistake, given for a greater sum than was due from the maker to the payee, to wit:—a sum sufficient to cancel the balance claimed to be due on the said note, is insufficient to admit evidence to show a mistake in the amount; the defendant alleging nothing but a conclusion of law, without setting out the facts by which it is supported (*Seeley* v. *Engell*, 17 Barb. 530.)

c. **Confessing and avoiding.**—A special plea had to confess and avoid expressly or impliedly, the cause of action set up in the complaint, and to which it professed to be an answer, and the same rule applies now to an answer of new matter (*Gregory* v. *Trainor*, 4 E. D. Smith, 58; and see *Annibal* v. *Hunter*, 6 How. 255; 1 Code Rep. N. S. 403; *Sayles* v. *Wooden*, 6 How. 84; 1 Code Rep. N. S. 409; *Porter* v. *McCreedy*, 1 Code Rep. N. S. 88; *Lewis* v. *Kendall*, 6 How. 59; *Arthur* v. *Brooks*, 14 Barb. 533). But in pleading new matter, it is sufficient to refer to the cause of action which it is intended to answer, as the *supposed* cause of action (*Eavestaff* v. *Russell*, 10 Mees. & W. 365), or even to say, The *supposed* cause of action, *if any such there be* (*McCormick* v. *Pickering*, 4 Coms. 280, which overruled some cases to the contrary). And so, it is sufficient to say, The sum "*claimed and demanded*" (*Scadding* v. *Eyles*, 15 Law Jour. Q. B. 364; 10 Jur. 945; *Margetts* v. *Bays*, 4 Ad. and El. 489). In *Conger*

v. *Johnston* (2 Denio, 96), it was held that a plea of the statute of limitations, which averred that "the several causes of action, if any such there were or still are, did not accrue, &c.," was held bad for not sufficiently admitting the cause of action. So in an action for slander, it is not a sufficient confession for the defendant to say that if he uttered the words he uttered them in reference to a certain contract (*Porter* v. *McCreedy*, 1 Code Rep. N. S. 88; *Sayles* v. *Wooden*, *id.* 409; 6 How. 84; *Buddington* v. *Davis*, *id.* 401; *Lewis* v. *Kendall*, *id.* 59; see, however, *Stiles* v. *Comstock*, 9 How. 48; *Butler* v. *Wentworth*, *id.* 228).

a. To a complaint which charged defendant with digging a ditch across the side-walk, and carelessly permitting same to remain open, and that in consequence the plaintiff's wife fell into said ditch,—the answer, beside a general denial, and as a separate defence, alleged that *if* said ditch was dug, it was done without his knowledge, and that said ditch, *if* any, was well guarded, and *if* plaintiff's wife fell in, it was her own fault. On motion, Harris, J., struck out such allegations, as being hypothetical and not amounting to a sufficient confession (*Wies* v. *Fanning*, 9 How. 543).

b. In an action to foreclose a mortgage, brought by the assignee of the mortgage, the defendants put in an answer, denying that the mortgagee, for a valuable consideration paid by the plaintiff, duly assigned the mortgage to the plaintiff; and alleged that the same, *if* ever sold by the mortgagee, was in fact sold to B., one of the defendants, and that *if* any assignment was ever executed by the mortgagee to the plaintiff, the same was only so in form, and that B. furnished the money to purchase the same; and that he was the true party in interest, and that the suit should have been brought in his name—held that the answer was defective, because it set up the matter in avoidance, without admitting that but for the avoidance the action could be sustained; because it was hypothetical; because it set up matter in avoidance, and at the same time denied the allegation it sought to avoid: and because it attempted to show, argumentatively, that the mortgage had been paid, without asserting the fact (*Arthur* v. *Brooks*, 14 Barb. 533).

c. Hypothetical pleading is objectionable; but there are cases in which a defendant may be permitted to answer in a hypothetical form, and indeed in which, being called upon to answer under oath, he can as a conscientious man answer in that form only without waiving one or more of his defences (*Ketchum* v. *Zerega*, 1 E. D. Smith, 560). In that case the answer, after a general denial, set up proceedings in bankruptcy, and averred that "the aforesaid judgments so by the plaintiff set forth in his complaint (if any such were by the plaintiff recovered as by the plaintiff is alleged);" and it was held that the answer was sufficient, *i. e. not insufficient;* and a demurrer to it was overruled. And in *Brown* v. *Ryckman* (12 How. 313), Brady J., held, on demurrer, that an answer which denied any knowledge of the note in suit, added as a separate defence—"if plaintiff is the owner of the note, he obtained it for a certain purpose,"—was not hypothetical.

d. To a complaint by a receiver for goods sold by G. C. & Co. to the defendant, it was answered: (1) a denial that plaintiff was receiver; (2) a denial that G. C. & Co. ever sold any goods to the defendant which had not been paid for; (3) if G. C. & Co. ever sold any goods to the defendant, they were sold on credit, and not to be paid for in nine years from the day of sale; and (4) general denial of each allegation of the complaint. On motion, the second and third defences were stricken out, as not amounting either to denials or allegations of new matter, and as being hypothetical (*Hamilton* v. *Hough*, 13 How. 14).

e. **Partial defence.**—The word "defence," in section 149, sub. 2, includes "a defence as to part," which is a defence *pro tanto* (*Houghton* v. *Townsend*, 8 How. 441; *Ross* v. *Longmuir*, 15 Abb. 326). The word defence "has ceased to mean a justification, and as now used it is applied to matters which go to the partial as well as total extinguishment of the plaintiff's claim" (*Bush* v. *Prosser*, 1 Kernan, 352). Thus, a defence of part payment on account *may* and must be pleaded (*Houghton* v. *Townsend*, 8 How. 441; *Foland* v. *Johnson*, 16 Abb. 235; *McKyring* v. *Bull*, 16 N. Y. 297; *Harter* v. *Crill*, 33 Barb. 284; *Kneedler* v. *Sternberg*, 10 How. 68).

a. Total or *partial* failure of the consideration for which a note was given, may be set up by answer either as an entire or partial defence; but such a defence does not amount to a counter-claim (*Gleason* v. *Moen*, 2 Duer, 640; *Barr* v. *Baker*, 9 Mo. R. 840), and so, in an action for rent of land, of a partial defence that the plaintiff falsely represented the quantity of land demised (*Van De Sande* v. *Hall*, 13 How. 458): and in an action for goods sold, the defendant may set up in diminution of plaintiff's claim, damages sustained by the defendant by the partial non-fulfillment on the part of the plaintiff of his contract (*Willis* v. *Taggard*, 6 *id.* 435); thus where the complaint was for bricks sold, the defendant answered that there was a special contract for plaintiff to supply brick of a particular quality, that the bricks supplied were not such as were contracted for, and that thereby the defendant in using such brick had to furnish more lime and brick, and pay more wages than if the bricks contracted for had been delivered; which he claimed was to his damage, and which damage he sought to set-off. On demurrer to the answer, it was objected that the defence was bad, as amounting to a partial defence only. The demurrer was overruled. [But was any answer necessary? The plaintiff did not claim under the contract, and he could not (if the answer was true) as he had not performed his part of it (*Oakley* v. *Morton*, 1 Kernan, 25). But as the defendant, although not compelled to do so, had in fact accepted and used the brick, he was bound to pay for them what they were worth. This could have been settled on the assessment of plaintiff's damages. If the defendant sustained any damage by voluntarily using brick of an unsuitable kind, he could not recover for it of the plaintiff (*Mondell* v. *Steele*, 8 M. & W. 858; *ante*).]

b. **Mitigating circumstances.**—The only case in which a defendant may set up mitigating circumstances in his answer, is an action for libel or slander. He cannot do it in an action for an assault and battery (*Rosenthal* v. *Brush*, 1 Code Rep. N. S. 228; and see *Schneider* v. *Shultz*, 4 Sand. 664; *Saltus* v. *Kip*, 5 Duer, 646; 12 How. 343; 2 Abb. 383; *Schnaderbeck* v. *Worth*, 8 Abb. 87; *Hays* v. *Berryman*, 6 Bosw. 679; *Gilbert* v. *Rounds*, 14 How. 46; *Lane* v. *Gilbert*, 9 How. 150, it has since been held otherwise; *Foland* v. *Johnson*, 16 Abb. 235 Gen. T. 3d dist.); nor for seduction (*Travis* v. *Barger*, 24 Barb. 614); nor for *crim. con.* (*Harter* v. *Crill*, 33 Barb. 283); nor for damages for killing plaintiff's dog (*Dunlap* v. *Snyder*, 17 Barb. 561).

c. **Prayer for relief.**—The answer need not contain any prayer for relief, unless *affirmative* relief is sought; and exemption from the plaintiff's demand is not affirmative relief. Nor is it necessary, after stating facts which (if proved) show the plaintiff ought not to recover, to add the reasons why he should not recover (*Bridge* v. *Payson*, 5 Sand. 210).

d. In an action to recover personal property, where the property has been taken from the defendant pursuant to the chapter for claim and delivery (§§. 206–217, *post*); the defendant to entitle him to damages for such taking should claim them in and by his answer (§ 261, *post*); and as a general rule under a claim for damages, the defendant may recover any *special* damage without claiming them in his answer (*Woodruff* v. *Cook*, 25 Barb. 512).

e. **Affidavit to be annexed to answer denying notice of non-acceptance, &c., of bill or note.**—By Laws of 1833, chapter 271, section 8, it is provided, that "The certificate of a notary, under his hand and seal of office, of the presentment of any note or bill for acceptance or payment, and of any protest of such bill or note for non-acceptance or non-payment, and of the service of notice thereof, on any or all of the parties to such bill or note, and specifying the mode of giving such notice, and the reputed place of residence of the party to whom notice was given, and the post-office nearest thereto, shall be presumptive evidence of the facts contained in such certificate; but this is not to apply where the defendant annexes to his answer an affidavit denying the fact of having received notice of non-acceptance or non-payment. An affidavit by indorsers denying, according to their knowledge, information, recollection, and belief, the receipt of any notice of protest, is a sufficient denial within the statute to prevent a notarial certificate from being presumptive evidence of the facts stated in it; and will throw upon the plain-

tiff the burden of proving demand and notice (*Barker* v. *Cassidy*, 16 Barb. 177). But an answer which denies that the indorser of a note received due notice that payment of it had been demanded and refused, does not make a notary's certificate of the facts inadmissible as evidence, although the answer be verified. To produce that result, an affidavit must be annexed to the answer, denying the receipt of notice of non-payment. A verified answer containing such a denial would not satisfy the statute (*Arnold* v. *Rock River Valley Union R. R. Co.* 5 Duer, 207; *Burrall* v. *De Groot*, id. 379; *Young* v. *Catlett*, 6 id. 437; *Harbeck* v. *Craft*, 4 id. 128; *Lansing* v. *Coley*, 13 Abb. 272).

a. **Action pending.**—Where there are two proceedings pending between the same parties for the same cause of action, the proceeding first commenced is a bar to the last. And it mattters not that the prior proceeding is not an action, and was instituted by the party who sets it up as a bar (*Groshon* v. *Lyon*, 16 Barb. 461). Thus, where a trustee presented a petition praying to be permitted to account as trustee, and to be discharged from the trust, and an order was made for him to account, it was held that this proceeding was a bar to an action by one of the *cestui que trust* against the trustee, praying his removal and for an account. An action is *between* the same parties, although those who are actors in one action are defendants in the other. (*Ib.*) To a complaint on a promissory note, given for a claim for work and materials in building a house belonging to the defendant, it is a good defence, that the plaintiff before he commenced the action on the note had commenced proceedings under the lien law, to enforce his lien on the premises on account of the same work and materials as those for which the note was given, and that such proceedings are still pending. The proceeding under the lien law is an action substantially for the same cause (*Ogden* v. *Bodle*, 2 Duer, 611; and see *Mills* v. *Block*, 30 Barb. 549).

b. Where pending an action for a divorce on the ground of adultery with a certain person at a certain time, the plaintiff brought a second action for adultery with the same person at a certain other time after the time of the adultery alleged in the first action, held that the plaintiff might do so, and that the pendency of the first action was not a bar to the second (*Cordier* v. *Cordier*, 26 How. 187).

c. An answer of another action pending, must allege or show that the two actions are for the same identical cause of action (*Kelsey* v. *Ward*, 16 Abb. 98; and see *Haire* v. *Baker*, 5 N. Y. 357); and between the same parties or their privies (*Goddard* v. *Benson*, 15 Abb. 191).

d. Whether is the pendency of an action by the assignor of a claim a defence to an action by his assignee for the same claim? (*Gardner* v. *Clark*, 21 N. Y. 399).

e. The pendency of a prior suit in the courts of the United States, or the courts of a sister State, never was a defence to an action in this State; and the code has not changed the rule in this respect (*Cook* v. *Litchfield*, 5 Sand. 330; *Burrows* v. *Miller*, 5 How. 51; *Republic of Mexico* v. *Arrangois*, 5 Duer, 643; *Williams* v. *Ayrault*, 31 Barb. 364; *Strong* v. *Stevens*, 4 Duer, 68). And the fact that in such prior suit an attachment issued and property has been levied upon sufficient to satisfy the demand, does not alter the rule (*Hecker* v. *Mitchel*, 5 Abb. 453). But where a party is suing in two courts for the same cause of action, he may be compelled to elect in which court he will proceed (*Hammond* v. *Baker*, 1 Code Rep. N. S. 105).

f. Where B, after setting up new matter in answer to an action by A, brought a cross action against A, founded on the same matter as his answer, and A moved in the first action that B should elect either to abandon his answer or his cross action,—held, that the motion should have been in the cross action for a reference to inquire whether the cross action was for the same cause as the new matter set up in the answer, and if so, then for an order dismissing the cross suit (*Farmers' Loan and Trust Co.* v. *Hunt*, 1 Code Rep. N. S. 1). Or plaintiff in the second action might have moved to stay proceedings in the first action until the second was tried (*Auburn City B'k* v. *Leonard*, 20 How. 193).

a. An answer which alleged, there is another action "now pending between the same parties for the same identical cause of action mentioned in the complaint in this action," on motion that the answer be made definite and certain, Harris, J., held that the answer was neither indefinite nor uncertain (*Ward* v. *Dewey*, 12 How. 196). Having alleged *the fact* that a prior action was pending between the same parties, he would be obliged to prove the allegation upon the trial in order to sustain his defence; but he could not be required to state more explicitly in his answer, the proof he intended to furnish. (*Ib.*)

b. A defence of another action pending, &c., may be defeated by a subsequent discontinuance of the former action (*Averill* v. *Patterson*, 10 How. 85; 10 N. Y. 500); but it seems the discontinuance of the first action must be before the second is noticed for trial (*Swart* v. *Borst*, 17 How. 71).

c. When an answer sets up among other defences, a prior action pending for the same cause &c., and on reference of the latter issue by consent, the referee reported upon it in favor of the defendant, the court ordered the complaint to be dismissed without a trial of the other issues, no exceptions being taken to the report of the referee (*Blydenburgh* v. *Borst*, 5 Duer, 657).

d. Where after an answer of another action pending a judgment is obtained in the first action, the defendant should obtain leave to set up the fact by an amended or supplemental answer (*Hendricks* v. *Decker*, 35 Barb. 298).

e. **Assault.**—The complaint alleged that "*on or about the* 18*th day of December*, 1849, at Marcellus, the defendant wrongfully made an assault on the said A. B." The answer denied "*that on or about the* 18*th day of December*, 1849, at the town of Marcellus, *or at any other place*, he, the defendant, wrongfully made an assault," &c. It was held that the answer was virtually an admission that the defendant made the assault, and was at most a denial of the time when, and the place at which, the assault was made (*Baker* v. *Bailey*, 16 Barb. 55), and see *ante*, page 221 *b*.

f. Where the answer admitted the assault, but denied that it was of the nature or extent stated, held this formed no issue (*Schnaderbeck* v. *Worth*, 8 Abb. 37; *Lane* v. *Gilbert*, 9 How. 150); and that plaintiff's remedy was to move for judgment on the answer as frivolous. (*Id.*) See, however, *Mitigating circumstances*, *ante*, p. 278, *b*.

g. An alleged assault by plaintiff on defendant at the same time as the assault alleged in the complaint, cannot be set up as a counter-claim (*Schnaderbeck* v. *Worth*, 8 Abb. 37; *Barhyte* v. *Hughes*, 33 Barb. 320).

h. **Discharge under insolvent or bankrupt act.**—A plea of discharge under an insolvent act must distinctly state every fact which was necessary to give the discharging officer jurisdiction in the first instance (*Salters* v. *Tobias*, 3 Paige, 338); and these essential requisites cannot be by mere recitals in the discharge set out in the plea (7 Johns. 75; 1 Cow. 316; 3 Wend. 247; 6 *id.* 433); and as to a discharge under the late bankrupt act, see *M'Cormick* v. *Pickering*, 4 Coms. 276; *Coates* v. *Simmons*, 4 Barb. 403; *Fox* v. *Woodruff*, 9 *id.* 498). An insolvent discharge obtained pending an action must be pleaded, if the defendant has an opportunity for so doing, and if he neglects to make such defence, and the plaintiff obtains judgment, the court will not, on motion, stay proceedings on the judgment (*Price* v. *Peters*, 15 Abb. 197).

i. **Goods sold.**—In an action for the price of goods sold, &c., against several defendants alleged in the complaint to be partners in business, one of the defendants answered that he "never was a co-partner" with the other defendants, naming them; and the answer was held sufficient to form an issue (*Corning* v. *Haight*, 1 Code Rep. 72). To a complaint for goods sold, the defendant answered that the plaintiff agreed to take his pay in brick from the yard of Van Cortland, that defendant accordingly purchased a quantity of brick, for a sum exceeding the demand of the plaintiff, at said yard; which was delivered "as directed by the plaintiff." Held that whether the answer was considered as a counter-claim or not, it constituted a defence (*Lewis* v. *Acker*, 11 How. 165).

j. As to a defence that the goods were of an inferior quality to those contracted for, see *Moffet* v. *Sackett* (18 N. Y. 644), *Hopkins* v. *Appleby* (1 Stark.

477; 2 Saund. Pl. and Ev. 117), and see *Berdell* v. *Johnson* (18 Barb. 559), *Bierne* v. *Dord* (1 Selden, 95), *Hargous* v. *Stone* (*id.* 72), *Allen* v. *Haskins* (5 Duer, 335), *Castles* v. *Woodhouse* (1 Code Rep. 72). As to a defence of breach of warranty, see *Lemon* v. *Trull* (13 How. 248), *Mondell* v. *Steele* (8 M. & W. 641), *Gillespie* v. *Torrance* (4 Bosw. 36; aff'd 25 N. Y. 306), *Nichols* v. *Boerum* (6 Abb. 290), in note to section 150, *post*.

a. To a complaint for goods sold and delivered, and work and labor, claiming $197, the answer was that the goods were furnished and labor performed, under a contract at stipulated prices, amounting to $181, but they were worth no more than $173; held that the defendant might reduce the recovery by evidence of defects in the goods, or work performed upon them, under the contract, *e. g.*, that a chandelier which the plaintiff sold, and agreed to hang, fell, from a defect in its construction, or of the skill in hanging it; and this, notwithstanding the defect, was not discovered until after issue joined (*Moffet* v. *Sackett*, 18 N. Y. 522).

b. **Judgment recovered.**—In an action against one of several joint-contractors, it is a good plea that judgment has already been obtained by the plaintiff against another joint-contractor for the same identical debt, although the plaintiff has obtained no fruits of his judgment. Such an answer is in bar, not in abatement (*King* v. *Hoar*, 1 New Pr. Cas. 72). So a recovery against one of two joint-debtors is a bar to an action against both (*Benson* v. *Paine*, 9 Abb. 28). A former recovery in an action by an agent, is a defence to an action by the principal (*Kent* v. *Hudson River R. R. Company*, 22 Barb. 278).

c. An answer intended to raise the defence that the cause of action in suit is the same as one on which a recovery has already been had, should in some form aver the identity of the causes of action (3 Chit. Pl. 928; *Philips* v. *Berick*, 16 Johns. 137; *Secor* v. *Sturges*, 16 N. Y. 553); and that the action was between the same parties or their privies (*Goddard* v. *Benson*, 15 Abb. 191).

d. To constitute a "recovery" which will be a defence to a subsequent action for the same cause, the recovery must be by the judgment of a court or other competent tribunal (*Cashman* v. *Bean*, 2 Hilton, 341). A payment after action commenced and before judgment is not such a recovery. (*Id.*) See, as to judgment in one action being a bar to another, *Colburn* v. *Woodworth*, 31 Barb. 381; *Bellinger* v. *Craigue*, *id.* 534; *Donovan* v. *Hunt*, 7 Abb. 29.

e. **Justification of arrest on justice's warrant.**—An answer justifying an arrest upon a warrant issued by a justice of the peace in a civil action, need not allege that the action in which the warrant was issued was brought before a justice of the town where either of the parties resided, or before a justice of the town in the same county next adjoining the residence of one of the parties, or that the defendant had absconded, &c., nor that at the time of issuing the summons in such action the defendant was a resident of the county in which the justice resided (*Foster* v. *Hazen*, 12 Barb. 547).

f. **Leave and license.**—A defence of leave and license must be pleaded (*Haight* v. *Badgeley*, 15 Barb. 499; *Beaty* v. *Swarthout*, 32 Barb. 293); it need not state any consideration (*Pierrepont* v. *Barnard*, 2 Selden, 288). Leave and license is no defence to an action on a breach of bond by a deputy-sheriff by neglecting to return a writ, &c. (*Hart* v. *Brady*, 1 Sand. 626; *Thomas* v. *Hubbell*, 18 Barb. 13).

g. **Matter occurring after action commenced.**—Where matter of defence occurs after the commencement of the action, and before answer, it may be set up by answer (2 Edw. Ch. R. 110; 3 How. 414). Thus, if intermediate the commencement of the action and the time of putting in the answer, the defendant has satisfied the plaintiff's claim [whether it be on contract or tort], he may set up this fact in his answer, as a defence to [the further maintenance of] the action (*Willis* v. *Chipp*, 9 How. 568). So if defendant is discharged under an insolvent act (*Price* v. *Peters*, 15 Abb. 197; and see *ante*, p. 280 *h*).

h. **Married woman.**—In an action against a married woman to charge her separate estate, and where her coverture is alleged in the complaint, an answer that she is a married woman, or denying that she is a married woman,

or had a separate estate, is, since the law of 1860, insufficient (*Aitken* v. *Clark*, 16 Abb. 328).

a. **Non-joinder of a party defendant.**—If a defendant insists that his liability is joint, and that others, who are jointly liable with him, should be joined in the action,—as he always may where such is the fact,—he must not only plead the non-joinder, but in so doing must point out in his answer all those who, he claims, should be made parties defendant (*Fowler* v. *Kennedy*, 2 Abb. 351); should allege that such persons are alive (*Wooster* v. *Chamberlain*, 28 Barb. 602), [and within the jurisdiction of the court]. But the defect is cured by proof on the trial, without objection, that the defendant non-joined is living. (*Id.*)

b. **Plaintiff not the real party in interest.**—To an action on a promissory note,—payee against maker,—the answer set up that "the plaintiff is not the sole owner and holder of the note but owns the same jointly with one A. C. W., and "therefore the plaintiff is not *individually* entitled to recover against the defendant,"—on motion the answer was adjudged "clearly frivolous," and that it ought to have gone on and negatived that the plaintiff was a trustee of an express trust as to A. C. W.'s interest, or otherwise entitled to sue without joining A. C. W, (*Tompkins* v. *Acer*, 10 How. 309); and an answer which stated that the plaintiff is not the holder or owner of the note sued on, and that E. F. B. is the owner and party in interest, was on demurrer held insufficient (*Brown* v. *Ryckman*, 12 *id.* 313; contra, see *Tamisier* v. *Cassard*, 17 Abb. 187; *Arrangois* v. *Fraser*, 2 Hilton, 244). So an answer which alleged that the plaintiff is not the real party in interest (*Foedick* v. *Groff*, 22 How. 158); or that the plaintiff "is not the *lawful* holder and owner of the note" is insufficient to admit evidence that the plaintiff is not the "holder and owner" (*Seeley* v. *Engell*, 17 Barb. 530); and so, too, an answer which alleged that the plaintiff is not the real party in interest therein, nor is he an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute to sue without joining with him the person for whose benefit the suit is prosecuted,—was on demurrer held insufficient for not stating the facts on which the defendant relied to show that the plaintiff was not the real party in interest (*Russell* v. *Clapp*, 3 Code Rep. 64; 4 How. 347; 7 Barb. 482; *Bentley* v. *Jones*, 4 How. 202). To a complaint by an assignee of a mortgage to foreclose same, the defendants answered denying that the mortgage was ever assigned to the plaintiff, and that if the mortgage was ever sold, it was sold to B., one of the defendants, and if it was ever assigned to the plaintiff it was in trust for B., and that B. was the true plaintiff in interest. On demurrer the answer was held insufficient, as avoiding without confessing the cause of action, as hypothetical, as avoiding and denying one and the same allegation, and for attempting to show payment argumentatively (*Arthur* v. *Brooks*, 14 Barb. 533).

c. **Divorce.**—To a complaint for a divorce by a wife against her husband charging cruelty, the defendant may in his answer show the provocation given by the wife, and which led to the alleged act of cruelty (*Devraismes* v. *Devraismes*, 2 Code Rep. 124; and see Supreme Court Rule 86).

d. In an action for divorce on the ground of adultery, defendant cannot interpose the defence of cruel and inhuman treatment and abandonment of defendant by plaintiff (*Griffin* v. *Griffin*, 23 How. 183); nor the defence of *physical incapacity* of plaintiff, where more than two years have expired since the marriage without any action for a dissolution on that ground. (*Id.*)

e. Can adultery of the plaintiff be interposed as an answer in an action for divorce on the ground of cruel and inhuman treatment. *Query.* (*McNamara* v. *McNamara*, 9 Abb. 18).

f. In an action for a divorce for adultery, an answer of adultery on the part of the plaintiff is a complete defence and ground for affirmative relief to defendant (Hoffman Referee, Anon. 17 Abb. 48).

g. **Escape.**—In an action against a sheriff for an escape founded on the statute and not merely for damages, the insolvency of the prisoner is no defence (*Barnes* v. *Willett*, 11 Abb. 226; 19 How. 564; aff'd 12 Abb. 448; 35 Barb.

514; and see *Renick* v. *Orser*, 4 Bosw. 384; *McCreery* v. *Willett*, *id.* 643; *Loosey* v. *Orser*, *id.* 391).

a. **Foreclosure.**—In a suit to foreclose a mortgage, the complaint alleged the making by the defendant of a bond conditioned for the payment of a certain sum and interest; and that if default should be made in payment of the interest, the principal should immediately become due; and that the mortgage contained the like conditions as that contained in the bond. The answer denied that the mortgage contained any such condition as alleged. It was held that the answer was insufficient, and that it did not take issue on a material allegation (*Dimon* v. *Dunn*, 15 N. Y. 498, reversing, S. C., *Dimon* v. *Bridges*, 8 How. 16). To have raised a material issue the defendant should have either denied the deed, or set out the condition verbatim for the judgment of the court (*id.*; see *ante*, p. 272 *c*).

b. Where the complaint falsely alleges that no proceedings at law have been had for the recovery of the debt secured by the mortgage, an answer that the plaintiff before the commencement of the action, recovered a judgment at law for the debt secured by the mortgage, would be sufficient, without a negative averment, that an execution had not been issued on such judgment, and returned unsatisfied (*N. River Bank* v. *Rogers*, 8 Paige, 648).

c. In an action to foreclose a purchase money mortgage, where no covenant in the conveyance to the mortgagor is broken and there is no fraud, it is no defence that at the time of the conveyance and mortgage the premises were encumbered by an unexpired lease thereon (*Sandford* v. *Travers*, 7 Bosw. 498).

d. A defendant against whom no personal claim is made cannot interpose a set off (*Nat. Fire Ins. Co.* v. *McKay*, 21 N. Y. 191).

e. A grantee of the mortgagor, subject to the mortgage, cannot allege usury in the mortgage (*Morris* v. *Floyd*, 5 Barb. 130).

f. In an action to foreclose a mortgage accrued due by nonpayment of interest, it is no defence that defendant was unable to find plaintiff to make the payment (*Dwight* v. *Webster*, 19 How. 349; and see *Ferris* v. *Ferris*, 16 *id.* 102). See, *Usury*.

g. **Eviction.**—An answer setting up an eviction as a defence, must state an eviction or expulsion of the defendant from the demised premises and the keeping him out of possession until after the rent became due (*Vernam* v. *Smith*, 15 N. Y. 333; *Edgerton* v. *Page*, 14 How. 116; 5 Abb. 1; and see *Peck* v. *Hiler*, 14 How. 155; *Carter* v. *Burr*, 39 Barb. 59). Not giving possession is not an eviction (*Hurlbut* v. *Post*, 1 Bosw. 28). See *Rent*.

h. **Equitable defences.**—Under the head of equitable defences are included all matters which would have authorized an application to the court of chancery for relief against a legal liability, but which at law could not have been pleaded in bar (*Dobson* v. *Pearce*, 2 Kernan, 166; 1 Abb. 108).

i. A defence purely equitable may be interposed to a cause of action strictly legal (*Foot* v. *Sprague*, 12 How. 355; *Hunt* v. *Farmers' Loan and Trust Co.*, 8 *id.* 418; *Burgett* v. *Bissell*, 5 How. 192; *Hinman* v. *Judson*, 13 Barb. 629); indeed a defendant *must* avail himself of such a defence in this way; for it is no longer allowable to bring an action merely for the purpose of restraining the prosecution of another action pending in the same court (*Id. Auburn City Bank* v. *Leonard*, 20 How. 193). A defence that a deed absolute on its face was intended as a mortgage, is available in any action (*Despard* v. *Walbridge*, 15 N. Y. 379).

j. **Defence to action on a judgment.**—In an action on a judgment the defendant can set up as a defence no matter which existed anterior to the judgment (*Biddle* v. *Wilkins*, 1 Peters, 686; 4 Abb. 293 *n*); he may set up as a defence that the judgment was obtained by fraud (*Dobson* v. *Pearce*, 2 Kernan, 156). The answer of no such record to an action on a judgment of a sister State, draws nothing into issue except the existence of the record (*Goodrich* v. *Jenkins*, 6 Ham. 43). Such an issue is for the court, not for a jury (*Barker* v. *McClure*, 2 Blackf. 14). A judgment of a State court has the credit, validity,

and effect, in every other State within the United States which it had in the State where it was rendered, and whatever pleas would be good to a suit thereon in such State, and none others, can be pleaded in any other court within the United States (*Hampton* v. *Cornell*, 4 Pet. Cond. R. 242; 3 Wheat. R. 234; *Mills* v. *Duryee*, 7 Cranch, 481; 2 Pet. Cond. R. 578).

a. **Fraud.**—To render a defence of false representations complete, it must be alleged in addition either that the defendant was misled by the representations, or that his belief in their truth induced him to enter into the contract (*Van de Sande* v. *Hall*, 13 How. 458). Where fraud is set up as a defence to an action on contract, the defendant must aver in his answer, that he has done all in his power to restore the plaintiff to his former condition, otherwise he cannot prove the fact on the trial (*Devendorf* v. *Beardsley*, 23 Barb. 657). If one, when sued for a breach of a contract to employ another, relies on the defence that he was induced to make the contract by fraud of the plaintiff, he should so state in his answer; if he discharged the employee for improper conduct he should state what that impropriety was; if for a failure to do the work contracted to be done he should state in what particular, and the work which he failed to do must appear to be such as is required by the contract *Sugg* v. *Blow*, 17 Mo. R. (2 Ben.), 359).

b. **Payment.**—The proper mode for a defendant to avail himself of the presumption of payment arising from lapse of time, is a plea of payment (*Henderson* v. *Henderson*, 3 Denio, 314; *Fellers* v. *Lee*, 2 Barb. 489; *Morey* v. *Farmer's Loan & Trust Co.*, 18 *id.*, 406; *Pattison* v. *Taylor*, 1 Code Rep. N. S. 174; *Martin* v. *Gage*, 5 Seld. 398; *N. Y. Life Ins. and Trust Co.* v. *Covert*, 29 Barb. 436). An answer of payment not stating when the payment was made, will be construed as a payment before the commencement of the action (*Boyd* v. *Weeks*, 2 Denio, 322). It should state that the payment was *after* the cause of action accrued, but the day of payment is not necessary to be stated (*Beesley* v. *Dolley*, 6 Bing. N. C. 37). An answer of payment to the wife of the plaintiff and acceptance by her in satisfaction, must allege that she was authorized by the plaintiff to receive payment (*Offley* v. *Clay*, 2 Man. and & G. 172; 2 Scott, N. R. 372). An answer that the defendant gave his check to the plaintiff for the amount due, that the plaintiff retains it, and it is still outstanding, does not amount to a payment nor to any defence. Such an answer to constitute a defence should also allege [that the check had been paid or] that the plaintiff had parted with the control of it (*Strong* v. *Stevens*, 4 Duer, 668; *Bradford* v. *Fox*, 16 Abb. 51; *Hoogland* v. *Wight*, 7 Bosw. 394). The giving a negotiable note, and its acceptance by the plaintiff, although not *payment* is suspension of the right to sue (*Geller* v. *Seixas*, 4 Abb. 103).

c. On each half-year's settlement for the rent due, the landlord's sewer rate, which had been paid by the tenant, was allowed as a part payment of the rent by the tenant, and a receipt given for the balance, expressing it to be such. Held that in an action for such rent, the tenant might plead payment, and give the foregoing facts in evidence (*Branston* v. *Robins*, 4 Bing. 11; *Wade* v. *Wilson*, 1 East, 200; *Waller* v. *Andrews*, 1 Horn & Hurl. 89).

d. In an action against the maker of a note, an answer which alleged that the note was paid and satisfied to plaintiff by a third person for whose accommodation it was made, will warrant evidence of any facts amounting to actual payment by such third person (*Farmers B'k of L. I.* v. *Sherman*, 6 Bosw. 181).

e. The answer of payment does not admit the amount due, as claimed, if the defendant does not prove his plea, the plaintiff must prove the amount due as on a judgment for default of an answer (*N. Y. Dry Dock Co.* v. *M'Intosh*, 5 Hill, 290).

f. Payment after action commenced, see 27 How. 187).

g. **Performance.**—Under an averment of performance by a defendant of his part of the contract, the breach of which is alleged as a cause of action, he cannot give evidence in excuse of non-performance (*Oakley* v. *Morton*, 1 Kernan, 33; *Crandall* v. *Clark*, 17 Barb. 169). A plea in excuse of performance may be pleaded (*Webb* v. *James*, 8 M. & W. 645; 1 Dowl. N. S. 36; *Clark* v. *Crandall*, 27 Barb. 73); but such a defence cannot be admitted under a plea

that the plaintiff was injured of his own wrong (*White* v. *Ansdell*, 1 M. & W. 350). See *Tender*.

a. **Statute.**—Where a statute is relied upon to defeat a common-law right, the facts rendering the statute applicable must be distinctly alleged, and not left to mere inference (*Miller* v. *Roessler*, 4 E. D. Smith, 234). "In setting up a defence under a public statute, it is not necessary that the pleader should set forth the statute in his plea, or that he should allege the existence of a statute of which the court is bound to take notice judicially. It is sufficient for him to state the facts which are necessary to bring the case within the operation of the statute. The court will then judicially notice the existence of the statute, and declare its legal effects upon the case as made by the pleadings" (*Bogardus* v. *Trinity Church*, 4 Paige, 197; and to the same effect is Mitf. Pl. 258; Beames Pl. 164)

b. **Statute of limitations.**—Where it appears on the face of the complaint that the period of limitation has elapsed, the defendant cannot demur for that cause, but should answer setting up the statute in bar (*Voorhies* v. *Voorhies*, 24 Barb. 150; see *ante*, § 74, and note).

c. An answer which stated that plaintiff ought not to have his action against defendant, "because the cause of action mentioned in the complaint did not occur to plaintiff at any time within six years next before the commencement of the action," held a sufficient answer (*Bell* v. *Yates*, 33 Barb. 627). An answer of the statute by an executor should not notice the eighteen months which by 2 R. S. 448, § 8 is in effect added to the six years limitation (*Benjamin* v. *De Groot*, 1 Denio, 151; see *ante*, p. 88 *e*).

d. **Tender.**—As a general rule a tender must be unconditional. But negotiable paper is an exception. The tender of payment of a negotiable note may be coupled with the condition of its delivery (*Wilder* v. *Seelye*, 8 Barb. 408).

e. An answer of tender before action should, besides alleging the tender and refusal, also allege that defendant is still ready, and that he has always been ready to pay (*Wilder* v. *Seelye*, 8 Barb. 408; *Kortright* v. *Cady*, 5 Abb. 358; 23 Barb. 490; *Livingston* v. *Harrison*, 2 E. D. Smith, 197; *Brown* v. *Ferguson*, 2 Denio, 196). And the amount tendered must be brought into court (*id.*; *Simpson* v. *French*, 25 How. 464; *Livingston* v. *Harrison*, 2 E. D. Smith, 157); but *semble*, the answer need not allege the payment into court (*Sheridan* v. *Smith*, 2 Hill, 540). But notice of the payment into court must be given to the plaintiff's attorney, or he will be justified in returning an answer setting up the defence of a tender before action (*Simpson* v. *French*, 25 How. 464). By bringing money into court a defendant does not waive a tender before action commenced, and which he sets up as a defence (*Wilder* v. *Seelye*, 8 Barb. 408;) but the plaintiff is in any event entitled to the amount tendered (*Wood* v. *Perry*, 1 Barb. 115; *Logue* v. *Gillick*, 1 E. D. Smith, 398); as to the tender on note payable in specific articles, see *Billings* v. *Vanderbeck*, 23 Barb. 546; *Simpson* v. *French*, 25 How. 464).

f. A defence of tender *after* action commenced, must state the amount tendered, which should include interest and costs to the time of the tender (*The People* v. *Banker*, 8 How. 258); and that amount must be paid into court. (*Id.*; and see 2 R. S., 553, §§ 20–23; see 2 Hill, 538; and see, *Payment into Court*, *supra*, *e*).

g. Evidence of the *waiver* of a tender by the opposite party is competent and sufficient to support the averment of a tender (*Holmes* v. *Holmes*, 5 Selden, 525). This, however, has relation to a tender forming no part of the contract, and to cases in which the tender is a substitute allowed by a law for an actual performance, prevented by act of the opposite party. But where a party covenants to make a tender, an allegation of performance of that covenant would not be sustained by evidence of a waiver (*Id.*; see *Oakley* v. *Morton*, 1 Kernan, 26).

h. **Usury.**—A defence of usury must aver clearly every particular necessary to establish the usury charged, and must distinctly negative every supposable fact which, if true, would render the transaction innocent or lawful (*Banks* v. *Van Antwerp*, 5 Abb. 411; 15 How. 29). In an action to foreclose a mortgage

an answer which alleged "that the mortgage, although dated on a certain day, was not executed until a certain other day thereafter, and that it was to secure a loan not made until the day it was executed, that it was so antedated for the purpose of reserving excessive interest, and plaintiff did thereby reserve excessive interest, but the answer did not aver that such excess of interest was ever *exacted* or *paid*, nor deny that the loan was engaged, and the money set apart by the lender for the borrower from the date of the mortgage, was held insufficient as a defence of usury (*id.*). The precision of statement formerly required has not beeen relaxed by the code (*Manning* v. *Tyler*, 21 N. Y. 567; *Cutler* v. *Wright*, 22 N. Y. 472). The answer should state the *terms* of the contract and the *quantum* of the usurious interest (*Gould* v. *Horner*, 12 Barb. 601; *Griggs* v. *Howe*, 31 Barb. 100). But an answer was held sufficient which stated an agreement to give more than legal interest, and that the lender deducted from the amount for which with interest, the note was made "about enough as he said to buy a barrel of flour, which amount, as defendant believes, was seven or eight dollars" (*Dagal* v. *Simmons*, 23 N. Y. 491).

a. To predicate the defence of usury in the transfer of a note to the plaintiff, the answer should show that the note sued on never had any valid existence as a contract, at the time it was discounted by plaintiff (*Burrall* v. *Bowen*, 21 How. 378). An allegation that the note never had any validity as against defendants is a conclusion of law merely (*id.*).

b. It is not sufficient to allege that "said note was usurious in its inception," and that the payee knew it was "executed to *sell* usuriously above the rate of 7 per cent. per annum" (*Gould* v. *Horner*, 12 Barb. 601; *Curtis* v. *Masten*, 11 Paige, 15). Nor would it be sufficient to allege that the note was negotiated at a rate of interest exceeding $7 per annum upon the one hundred dollars, and that the plaintiff took the said note at such usurious rate of interest (*Morris* v. *Slattery*, 6 Abb. 75). And where the defendant wishes to set up the defence of usury upon the ground that the securities alleged to be usurious were first sold in another State, in violation of the laws of that State, he must allege what those laws were at the time of such a sale, and the facts which rendered the transaction usurious under those laws (*Curtis* v. *Masten*, 11 Paige, 15; *Cutler* v. *Wright*, 22 N. Y. 472).

c. Corporations, which includes all associations and joint-stock companies having any of the powers and privileges of a corporation not possessed by individuals or partnerships, are forbidden to interpose the defence of usury (Laws 1850, p. 334). Since that statute a receiver of a corporation appointed under the statute, "concerning proceedings against corporations in equity," cannot set up the defence of usury in any stage of the cause, not even at the final hearing, although such defence was alleged in pleading, and was established by proofs before that act was passed (*Curtis* v. *Leavitt*, 15 N. Y. 13, 296). The statute prevents corporations recovering back usurious premiums paid by them on the loan or forbearance of money (*Butterworth* v. *O'Brien*, 16 How. 503; 28 Barb. 187; 7 Abb. 456; 23 N. Y. 275). The statute is retrospective, and applies to foreign corporations (*So. Life Ins. Co.* v. *Parker*, 17 N. Y. 51). The statute does not prevent *indorsers or sureties* for a corporation setting up the defence of usury (*Hungerford B'k.* v. *Potsdam R. R. Co.*, 19 How. 39; 10 Abb. 24; 30 Barb. 626; reversing 9 Abb. 124).

d. A certificate given by the maker of a promissory note, at the time of the making, and annexed thereto, stating that the note was given for value and would be paid when due, will estop him from setting up the defence of usury against a holder of said note for value (*Mechanics' Bank of Brooklyn* v. *Townsend*, 29 Barb. 569; 17 How. 569; see *Bossange* v. *Ross*, *id.* 578).

e. **Undertaking.**—It is no defence to an action on an undertaking on an appeal, that the judgment was a lien on real property sufficient to satisfy same, or that execution had been issued prior to the giving such undertaking, and levied on property sufficient to satisfy same (*Heebner* v. *Townsend*, 8 Abb. 234). See, *Complaint on Undertaking*, *ante*, page 242 *k*.

f. **Alien enemy.**—An answer that the plaintiff is a citizen of Florida, a State engaged in war against the United States, sets up a good defence (*Sanderson* v. *Morgan*, 25 How. 144).

a. **Carrier.**—Answer by carrier of a contract restricting his liability (*Boswell* v. *Hudson River R. R. Co.*, 10 Abb. 442).

b. **Covenant.**—An answer in action on a covenant that defendant has in all things well and truly kept and performed all the covenants and conditions in the lease contained, is bad (*Beach* v. *Barons*, 13 Barb. 306). It should state facts showing how he kept and performed said covenants. (*Id.*)

c. **Rent.**—In an action for rent against a tenant who has occupied the demised premises, the defendant cannot claim, in abatement or extinguishment of the rent, that the premises are unfit for habitation, or for the purposes intended by him at the time of the hiring (*Academy of Music* v. *Hackett*, 2 Hilton, 218).

d. *Semble*, that in an action for rent, a denial of every allegation whereby defendant is charged with liability to plaintiffs for rent or any sum being due from him to them, puts in issue the allegation that the rent was, after it became due, duly demanded (*Academy of Music* v. *Hackett*, 2 Hilton, 218).

e. **Specific performance of contract.**—Answer in action for (*Haight* v. *Child*, 34 Barb. 191).

f. **Stamp.**—*Semble*, that an answer that an instrument is invalid for want of a United States revenue stamp must state facts: to say it "was not *duly* stamped," would at least be indefinite (see *Howard* v. *Smith*, 4 Bing. N. S. 684; 6 Sc. 438). After an instrument has been read, it cannot be objected to for want of a stamp (*Foss* v. *Wagner*, 6 Ad. & Ell. 116).

g. **Subrogation.**—A surety sued for the default of his principal, may, by his answer, demand to be subrogated to the place of the plaintiff (*Bank of Toronto* v. *Hunter*, 20 How. 292).

§ 150. [129.] (Am'd 1849, 1852.) *Counter-claim. Several defences.*

The counter-claim mentioned in the last section, must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:—

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

The defendant may set forth by answer, as many defences and counter-claims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, and refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished.

h. **Counter-claim, when allowed.**—This section, it seems, authorizes two kinds of counter-claim, (1) a counter-claim in an action on contract (subd. 2); and (2) a counter-claim in *any other action*, *i. e.* an action other than on contract, which must be in tort. From this it would seem to follow that there may be a counter-claim in an action for a tort *when* the claim arises out of the transaction set forth in the complaint as the foundation of the plaintiff's

claim, or is connected with the subject of the action. But the decisions are that there can be no counter-claim in an action for a tort (*Ashens* v. *Hearns*, 3 Abb. 187; *Pattison* v. *Richards*, 22 Barb. 146). In *Jellerman* v. *Dolan*, 7 Abb. 395 *n*) a counter-claim was set up in an action for slander; and per Daly, J., "If slander could be the subject of a counter-claim, which I very much doubt, it must appear that it arose out of the transaction the foundation of the plaintiff's claim, or was connected with the sub ject of the action." Again in *Gotler* v. *Babcock* (7 Abb. 392 *n*), an action in the nature of trover, on its being insisted that a defence of lien was a counter-claim, Brady, J., deciding it was not, said, "It is an action of tort, in which set-off was not allowed and is not now allowed;" and in *Donohue* v. *Henry* (4 E. D. Smith, 162), an action for converting personal property, per Ingraham First J.: "In an action of this kind no set-off is admissible." See also *Drake* v. *Cockroft*, 10 How. 382; 1 Abb. 203; 4 E. D. Smith, 34; *Page* v. *Edgerton*, 14 How. 116; aff'd 18 How. 359; and see *De Leyer* v. *Michaels*, 5 Abb. 203; *McKensie* v. *Farrell*, 4 Bosw. 193; *Bissell* v. *Pearce*, 21 How. 130; *Kurtz* v. *McGuire*, 5 Duer, 660, and other cases). In *Drake* v. *Cockroft*, Woodruff, J., said "If the code extends the right of recoupment to cases not within the law of set-off (*which I doubt*)," &c. In none of these cases, however, as it would seem, was the language of this section very strictly analyzed; and the first case in which the question appears to have been carefully considered, is *The Xenia Branch B'k* v. *Lee* (7 Abb. 372). That was an action in the nature of trover, for the conversion of certain bills of exchange; it was held by the general term of the superior court that the defendant might set up title in himself as the plaintiff's indorsee, and by way of counter-claim demand judgment against the plaintiff as indorser of the bills in question; and Woodruff, J., in delivering the opinion of the court, reviewing section 150, says, "This division of the section shows *there may be a counter-claim when the action itself does not arise on contract.* * * * * The first subdivision would be unmeaning as a separate definition, if it neither contemplated cases in which the action was not brought on the contract itself * * * nor counter-claims which did not themselves arise on contract." (*Id.* 389.)

a. In *Brown* v. *Buckingham*, 21 How. 190; 11 Abb. 387, it is said that a counter-claim may be pled in an action to recover possession of personal property where it is shown that the alleged counter-claim arose out of the transaction set forth in the complaint. In an action for an assault on plaintiff by defendant, the defendant cannot counter-claim in respect of a contemporaneous assault on defendant by plaintiff (*Schnaderbeck* v. *Worth*, 8 Abb. 37).

b. The counter-claim is undoubtedly broader and more comprehensive than set-off or recoupment (*Vassar* v. *Livingston*, 3 Kernan, 256; *Beardsley* v. *Stover*, 7 How. 294). It embraces both set-off and recoupment (*Pattison* v. *Richards*, 22 Barb. 146). It secures to the defendant the full relief which a separate action at law, or a bill in chancery, or a cross-bill would have secured him on the same state of facts (*Gleason* v. *Moen*, 2 Duer, 642). It may be for either liquidated or unliquidated damages (*Schubart* v. *Harteau*, 34 Barb. 447), and for unliquidated damages arising on a contract different from the contract on which the action is brought (*Lignot* v. *Redding*, 4 E. D. Smith, 285); see, however, what is said as to an unliquidated demand (*Cummings* v. *Morris*, 3 Bosw. 560). A counter-claim may be of an equitable or legal defence (*Currie* v. *Cowles*, 6 Bosw. 453). But it must be something which resists or modifies the plaintiff's claim (*Nat. Fire Ins. Co.* v. *McKay*, 21 N. Y. 196; *Pattison* v. *Richards*, 22 Barb. 143). And the right of plaintiff to claim and defendant to counter-claim must be reciprocal (*Mayor of N. Y.* v. *Parker Vein Steamship Co.*, 12 Abb. 300; 21 How. 289). For strictly there can be no counter-claim where the plaintiff has no claim (*Bellinger* v. *Craigue*, 31 Barb. 534). A counter-claim to be available to a party must afford him protection in some way against the plaintiff's demand for judgment either in whole or in part. It must therefore consist in a set-off or claim by way of recoupment, or be in some way connected with the subject of the action. It must present an answer to plaintiff's demand * * * must operate in some way to defeat in

whole or in part plaintiff's right to recover (*Mattoon* v. *Baker*, 24 How. 332). There are many causes of action which cannot be used as counter-claims (*Ives* v. *Miller*, 13 Barb. 197). The prohibition (§ 71) against bringing suit upon a judgment without leave of the court, does not extend to a counter-claim, and the defendant may without leave of the court set up a judgment as a counter-claim (*Wells* v. *Henshaw*, 3 Bosw. 625; *Clark* v. *Story*, 29 Barb. 295). A *joint* debt cannot be set off or counter-claimed against an *individual* debt (*Campbell* v. *Genet*, 2 Hilton, 290; *Compton* v. *Green*, 9 How. 228; and see *La Farge* v. *Halsey*, 4 Abb. 397; 1 Bosw. 171; *East River B'k* v. *Rogers*, 7 Bosw. 493; *Newell* v. *Salmons*, 22 Barb. 647). An action for selling pledged stock, without notice to the pledger, is in contract and admits of a set-off (*Seaman* v. *Reeve*, 15 Barb. 454).

a. Where a claim has been made the subject of a set off or counter-claim in one action, and properly excluded, the fact that it was so set up does not prevent such claim being the subject of another action or of a set off or counter-claim in another action (*Ives* v. *Goddard*, 1 Hilton, 435). But where a defendant set up a defence of set off or counter-claim proper to be allowed if proved, and the court or jury pass upon it and disallow it, such demand is barred (*Hatch* v. *Benton*, 6 Barb. 28).

b. The bringing an action and recovery of a judgment on a promissory note, does not extinguish the note as to any parties to it not parties to the action; and it is a good subject of counter-claim as against parties not parties to the action in which judgment was obtained upon the note (*Kelsey* v. *Bradbury*, 21 Barb. 540; see *Ives* v. *Goddard*, 1 Hilton, 435; *Lowell* v. *Lane*, 33 Barb. 292).

c. Where a debtor has a set off equally applicable to two demands against him, it is not for him but for the court to elect which demand he shall satisfy (*Tallmadge* v. *Fishkill Iron Co.*, 4 Barb. 383).

d. A defendant cannot prove damages by way of recoupment, where no claim to recoup is set up in the answer (*Crane* v. *Hardman*, 4 E. D. Smith, 448; *Storp* v. *Harbutt*, id. 464).

e. A claim for damages for the conversion of property, arises in tort, and cannot, even by waiving the tort, be made the subject of a counter-claim (*Mayor of N. Y.* v. *Parker Vein Steamship Co.*, 12 Abb. 300; 21 How. 289). At least where the cause of counter-claim is alleged in form as a tort. (*id.*)

f. Where a claim was submitted to arbitration and bonds executed and delivered, but pending the arbitration one party revoked his submission and brought an action on such claim, held, that in such action the defendant might counter-claim on the arbitration bond the expenses of the arbitration (*Curtis* v. *Barnes*, 30 Barb. 225).

g. **Defendant's option to sue or set up counter-claim.**—A defendant is not bound when sued in an action, in any of the superior courts of record, to set up by way of counter-claim, any demand he may have against the plaintiff. He may at his option prosecute a cross-action for such demand (*Lignot* v. *Redding*, 4 E. D. Smith, 285; *Halsey* v. *Carter*, 1 Duer, 667; *Welch* v. *Hazleton*, 14 How. 97; *Lorraine* v. *Long*, 6 Cal. 452; *Gillespie* v. *Torrance*, 25 N. Y. 306). It is no defence, therefore, that an action is pending by the defendant against the plaintiff, and that if the plaintiff's alleged claim has any existence, he could set it up as a counter-claim in such action (*Lignot* v. *Redding*, 4 E. D. Smith, 285; and see *Barth* v. *Burt*, 17 Abb. 349). Nor is the pendency of an action for damages a bar to the setting up of the same demand of damages as a counter-claim, in an action *afterwards* brought against the plaintiff in the first action by the defendant therein (*Wiltsie* v. *Northam*, 3 Bosw. 162).

h. Where a defendant sets up a counter-claim in his answer, and afterwards commences a cross-action for the recovery of the same cause of action as that constituting the counter-claim, he may be made to elect on which he will rely, his answer or his cross-action (*Fabricotti* v. *Launitz*, 1 Code Rep. N. S. 121; 3 Sand. 743; *Hammond* v. *Baker*, 1 Code Rep. N. S. 105; *Wiltsie* v. *Northam*, 3 Bosw. 162; but see *Harris* v. *Hammond*, 18 How. 124; *Wright* v. *Delafield*, 11 How. 465). Where B., after setting up new matter in his answer to an ac-

tion by A., afterwards sued A. for the same matter as that set up in his answer, held, that A. might move in the action by B. for a reference to inquire if the cross-action was for the same cause as the matter set up in the answer in the first action, and if the report was in the affirmative, that A. would be entitled to an order dismissing B.'s cross-action (*Farmer's Loan and Trust Co.* v. *Hunt*, 1 Code Rep. N. S. 1). See p. 289, *h*, *ante*.

a. A defendant in a justice's court must, in certain cases, set up his demand or forfeit the right to sue on it. An answer, setting up as a defence, that the cause of action might have been set off in a suit between the parties in a justice's court, must state the facts which bring the case within the statute (*Welch* v. *Hazleton*, 14 How. 97).

b. **Sufficiency of answer constituting a counter-claim.**—The code prescribes no rule by which to determine the sufficiency of an answer intended as a counter-claim, except that it must state facts sufficient to constitute a cause of action in favor of the defendant and against the plaintiff, and that it be one of the several causes of action defined by section 150 (*Allen* v. *Haskins*, 5 Duer, 332; *Merritt* v. *Millard*, 5 Bosw. 645). One way of testing the sufficiency of a counter-claim in an action on contract is to inquire whether or not the facts stated, if found in a complaint, would constitute a cause of action on contract. See *Vassear* v. *Livingston*, 3 Kernan, 252; *McKenzie* v. *Farrell*, 4 Bosw. 193). If the facts set up as a counter-claim are insufficient to constitute a counter-claim, or to bar a recovery by the plaintiff, or affect the amount of recovery, then the plaintiff should have judgment, notwithstanding the facts set up as a counter-claim are not replied to, or if put in issue are found by a jury to be true (*Van Valen* v. *Lapham*, 13 How. 243; 5 Duer, 689).

c. "When the facts alleged in an answer may possibly constitute a counter-claim, but are such as always constituted a flat bar, at law, to the plaintiff's right to recover, by showing, if true, that he never had any cause of action, they should be deemed to be set up as a defence merely, unless the answer expressly states that they are set up by way of counter-claim" (*Burrall* v. *De Groot*, 5 Duer, 382; see, also, *Bates* v. *Roseekrans*, 23 How. 98).

d. An allegation in a defence intended as a counter-claim, that all the matters set up in such defence are connected with the subject of the plaintiff's action, does not require the court to consider it so connected, but the court will determine from the facts stated whether or not it is so connected (*Fellerman* v. *Dolan*, 7 Abb. 395, *note*); and so of an allegation that the alleged counter-claim arose out of the transaction set forth in the complaint (*Brown* v. *Buckingham*, 21 How. 190); and as to when a cause of action arises out of the contract or transaction set forth in the complaint, or is connected with the action, see *Burns* v. *Nevins*, 27 Barb. 493; *Lyman* v. *Newman*, 29 Barb. 162; *Bogardus* v. *Parker*, 7 How. 303; *Askins* v. *Hearns*, 8 Abb. 184.

e. If the counter-claim contain irrelevant or redundant or indefinite matter, the remedy is by motion not demurrer (*Mattoon* v. *Baker*, 24 How. 329; *Currie* v. *Cowles*, 6 Bosw. 453).

f. Where a counter-claim is comprised of several demands, each demand need not be set up separately; the whole constitute *one counter-claim* (*Ranney* v. *Smith*, 6 How. 420).

g. **A counter-claim must be one existing in favor of a defendant, and against the plaintiff in the action.**—"The language of the code is so precise as to leave no room for interpretation." But its effect is qualified by § 112 (*Merrick* v. *Gordon*, 20 N. Y. 98; and see *Duncan* v. *Stanton*, 30 Barb. 536; *Schubart* v. *Harteau*, 34 id. 447; *Tyler* v. *Willis*, 33 id. 328; *Chaffee* v. *Cox*, 1 Hilton, 82; *Wiltsie* v. *Northam*, 3 Bosw. 162; *Lowell* v. *Lane*, 33 Barb. 292; *Cummings* v. *Morris*, 3 Bosw. 560; *La Farge* v. *Halsey*, 4 Abb. 397; 1 Bosw. 171; *East River Bank* v. *Rogers*, 7 Bosw. 493; see *Newell* v. *Salmons*, 22 Barb. 647; and see in *note* to § 112). Where goods are sold by one, in fact, a broker, to a person not knowing or having reason to know the seller is acting as

broker, the purchaser when sued by the principal for the price of such goods can set off a debt due him from the broker (*Bliss* v. *Bliss*, 7 Bosw. 339); but otherwise where the sale is made by a broker as broker (*id.*). In an action on a note by a transferee or assignee, a cause of action existing only against the payee cannot be set up as a counter-claim, although the plaintiff received the note from the payee after its maturity. But perhaps if the note was not valid in the hand of the payee, either from want or failure of consideration, or otherwise; such a counter-claim would be allowed against one who took the note after its maturity (*Wiltsoe* v. *Northam*, 3 Bosw. 162, and see *Cummings* v. *Morris*, 3 Bosw. 560). Until a demand becomes mature, a set-off or counter-claim may be defeated by the assignment by the opposite party of his claim, though the latter be insolvent and his demand has not become payable when assigned (*Myers* v. *Davis*, 22 N. Y. 489). Where the plaintiff on 18th October purchased of S. a note of defendant's, then over due, at that time defendant held a note of S.'s, also over due, and which on 20th October defendant put in suit against S. and recovered judgment on 29th October. Defendant had no notice of the purchase of his note from S. by plaintiff; held in an action on the note so purchased of S. that defendant could not set off or counter-claim the note of S. because it was merged in the judgment, and he could not set off or counter-claim his judgment against S. because it was not obtained until after plaintiff purchased the note in suit (*Lowell* v. *Lane* 33 Barb. 292; see *Ives* v. *Goddard*, 1 Hilton, 435; *Kelsey* v. *Bradbury*, 21 Barb. 540).

a. **The claim must also be in favor of a defendant and against a plaintiff, between which plaintiff and defendant a several judgment may be had.** (*Davidson* v. *Remington*, 12 How. 310; *Gillespie* v. *Torrance*, 4 Bosw. 36; *Merritt* v. *Millard*, 5 Bosw. 645; *Compton* v. *Green*, 9 How. 228; *Campbell* v. *Genet*, 2 Hilton, 290; *La Farge* v. *Halsey*, 4 Abb. 397; 1 Bosw. 171). In an action by a wife to recover a debt due her as her separate estate, the defendant cannot counter-claim in respect of a debt due him from the husband of the plaintiff (*Paine* v. *Hunt*, 40 Barb. 75). In an action against several defendants *jointly and severally* liable, any one of them may avail himself of a claim on contract in his favor individually against the plaintiff (*Parsons* v. *Nash*, 8 How. 454; *Briggs* v. *Briggs*, 20 Barb. 477). But if the defendants are jointly liable, as copartners, one of them cannot avail himself of a claim on contract in his favor individually against the plaintiff (*Peabody* v. *Bloomer*, 3 Abb. 353; 5 Duer, 678; 6 *id.* 53; *Mott* v. *Burnett*, 2 E. D. Smith, 50; *Pinkney* v. *Keyler*, 4 *id.* 469). So, a demand against the several members of a copartnership is not available as a counter-claim in an action by a member of such copartnership, for a demand due him individually (*Ives* v. *Miller*, 19 Barb. 196). Prior to the code it was held that in an action by all the partners of a firm, the defendant might set off a debt due him by the ostensible partner alone, upon the ground that such partner had misled the defendant into the belief that he had no partner. (See *Valen* v. *Russell*, 13 Barb. 592.) In an action upon a promissory note signed by two persons, one as principal and the other as surety, a set-off of an indebtedness from the plaintiff to the principal may be allowed (*Newell* v. *Salmons*, 22 Barb. 647; *contra*, *La Farge* v. *Halsey*, 4 Abb. 397; see *East River B'k* v. *Rogers*, 7 Bosw. 493). And in an action by several plaintiffs a defendant may set up as a defence that one only of the plaintiffs named is the real party in interest, and as to that one set up a counter-claim (*Cowles* v. *Cowles*, 9 How. 361).

b. Where a partnership give their note to one of its members for money advanced to the firm, and such member endorses said note for value to a third party after it becomes due, to an action on such note by such endorsee the firm cannot counter-claim a demand against the member to whom the note was given (*Sherwood* v. *Barton*, 23 How. 533).

c. Where a claim is presented by a plaintiff against a defendant, who sets up as a counter-claim a demand which is against the plaintiff and others, and the plaintiff does not demur to such counter-claim or set up by a reply that the claim is against him and others jointly liable with him, the defendant is entitled to be allowed such counter-claim on the trial (*Schubart* v. *Harteau*, 34 Barb. 447).

a. **The counter-claim must, inter alia, be an existing claim in favor of the defendant at the commencement of the action** (*Heidenheimer* v. *Wilson*, 31 Barb. 636); and this must appear on the face of the answer; or the answer will be subject to demurrer (*Rice* v. *O'Conner*, 10 Abb. 362). Thus where the defence setting up the counter-claim commenced with the allegation that "plaintiff *is* indebted to defendants," and concluded "that said sum is now due defendants from plaintiff," on demurrer it was held insufficient for not alleging that the indebtedness existed "before and at the time of the commencement of the action" (*id.*). The allegations of a pleading refer to the time it is verified or served (see in note to section 159, *post*); and thus where the alleged counter-claim is a note made by the plaintiff payable to a third person and indorsed to the defendant, the answer must allege the indorsement to have been made prior to the commencement of the action (*Van Valen* v. *Lapham*, 5 Duer, 689; 13 How. 240; *Chambers* v. *Lewis*, 11 Abb. 213; 2 Hilton, 591; *Rice* v. *O'Conner*, 10 Abb. 362). Such prior indorsement is not sufficiently alleged by stating such note to be a counter-claim and cause of action existing against the plaintiff at and before the commencement of the action. (*Id.*) The answer was amended and the issues tried. On the trial it appeared that the indorsement of the note to the defendant was *after* the commencement of the action; and thereupon judgment was given for the plaintiff (*id.* 591; note 13 How. 240; and see *Lemon* v. *Trull*, 13 How. 249; 16 *id.* 576, *note*; *Gage* v. *Angell*, 8 *id.* 337; *Weeks* v. *Pryor*, 27 Barb. 79). And if a defendant at one time *had* a claim against the plaintiff (the subject of a counter-claim) and before the commencement of the action he has parted with it, he cannot avail himself of such claim as a counter-claim (*Belknap* v. *McIntyre*, 2 Abb. 366; but see *Robinson* v. *Howes*, 20 N. Y. 84).

b. In *Butterworth* v. *Fox* (15 How. 545), it was held that a defendant sued by the receiver of an insolvent bank, upon his note payable to the bank, could not set up as a defence or counter-claim, that the note became due before the receiver was appointed, that the bank at the time held shares of the bank belonging to the defendant as collateral security, exceeding in value the amount of the note, and which the bank by its acts had depreciated (and see *U. S. Trust Co.* v. *Harris*, 2 Bosw. 76; *Devin* v. *Phelps*, 34 Barb. 224).

c. **Counter-claim in an action on contract.**—A demand [legal or equitable] on contract, on which *the defendant* at the time of the commencement of the action could have maintained an action against the plaintiff, is a counter-claim (see *Gleason* v. *Moer*, 2 Duer, 642; *Spencer* v. *Babcock*, 22 Barb. 335; *Weeks* v. *Pryor*, 27 *id.* 81; *Kingston B'k* v. *Gay*, 19 *id.* 461; *Nichols* v. *Boerum*, 6 Abb. 290; *Lemon* v. *Trull*, 13 How. 248; 16 *id.* 576, *note*; *Kneidler* v. *Sternberg*, 10 *id.* 72; *Silliman* v. *Eddy*, 8 *id.* 123; *Roscoe* v. *Maison*, 7 *id.* 123; *Williams* v. *Upton*, 8 *id.* 205; *Lignot* v. *Redding*, 4 E. D. Smith, 285).

d. A bank having discounted a customer's note, may on such note being protested, and on its holding such note, set off such note against the customer's deposit (*Robinson* v. *Howes*, 20 N. Y. 84).

e. A demand assigned to the defendant before the commencement of the action may be set off, though he has not actually paid for it, but only agreed to pay (*Everit* v. *Strong*, 5 Hill, 163).

f. In an action arising on contract, the defendant cannot interpose a counter-claim arising out of a tort, *e. g.* a conversion of personal property (*Piser* v. *Stearns*, 1 Hilton, 86).

g. In an action for the recovery of the stipulated price for building a steam engine, boilers, &c., the defendants cannot recoup the gains and profits which would have arisen from the use of the engine, &c., had the same been delivered at the time agreed, and which gains and profits the defendants have been prevented from receiving, by the failure of the plaintiff to perform his contract within the time (*Griffin* v. *Colver*, 22 Barb. 587; 16 N. Y. 489). But the defendants may recoup the loss of the value of the use of their machinery, but not the profits of running it in their ordinary business. (*Id.*)

a. **Counter-claim in an action for tort.**—In an action for tort the defendant cannot set up as a counter-claim an independent tort committed by the plaintiff, and not connected with the transaction out of which the plaintiff's action arose (*Murden* v. *Priment*, 1 Hilton, 75). Thus, in an action for the wrongful detention of personal property, it was held that the defendant could not set up, by way of counter-claim, a cause of action which he had against the plaintiff for the wrongful detention of other personal property belonging to him, the defendant (*Askins* v. *Hearns*, 3 Abb. 187).

b. A counter-claim on contract cannot be interposed as a defence to an action for converting personal property (*Chambers* v. *Lewis*, 2 Hilton, 591; 11 Abb. 210).

c. **Statute bar to counter-claim.**—The statute of limitation is not a bar to a set-off or counter-claim, unless the period of limitation has expired before the action is brought (*Walker* v. *Clements*, 9 Eng. L. and Eq. R. 332; 15 Q. B. Rep. 1046; and see *Van Allen* v. *Schermerhorn*, 14 How. 287).

d. **Judgment on a Counter-claim.**—Where the defendant establishes a counter-claim exceeding the amount established as due the plaintiff the court can award the defendant judgment for the difference (*Ogden* v. *Coddington*, 2 E. D. Smith, 317). See § 246.

e. **Amendment by adding counter-claim.**—In *Beardsley* v. *Stover* (7 How. 294), the defendant was allowed to amend his answer by adding a counter-claim, although the action was to recover unliquidated damages for the breach of a special contract, and the ground of the alleged counter-claim was, "that the plaintiff was indebted to the defendant for a cause of action arising on contract existing at the commencement of the action."

f. **Set off.**—The provision in the revised statutes, precluding a party from any right of action on a claim which he might have made the basis of a claim of set off, extends only to such rights of action as were the subjects of set off under the revised statutes (*Welch* v. *Hazelton*, 14 How. 99; see *ante*, p. 289, *g*, *h*). Set-off implies a cross-demand, and payment cannot be given in evidence under that plea (*Cooper* v. *Morecraft*, 1 Horn & Hurl. 105). An answer of set off must allege not only that plaintiff was indebted, but that he still *is* indebted (*Dendy* v. *Powell*, 3 M. & W. 442; and see *ante*, 292 *a*).

g. **Counter-claim in action by assignee.**—In an action by the assignee of a claim, a demand existing prior to the assignment in favor of the defendant and against the assignor, is unavailable as a counter-claim (*Dillaye* v. *Niles*, 4 Abb. 253; *Ferreira* v. *Depew*, id. 131; *Davidson* v. *Remington*, 12 How. 310; *Van de Sande* v. *Hall*, 13 *id.* 458; *Spencer* v. *Babcock*, 22 Barb. 327; *Duncan* v. *Stanton*, 30 *id.* 536; *Tyler* v. *Willis*, 33 *id.* 332; *Heidenheimer* v. *Wilson*, 31 *id.* 636; and see *Crosbie* v. *Leary*, 6 Bosw. 312). Such a demand, set up as a defence constituting a counter-claim, needs no reply, but may be demurred to. (*Id.*) Such a demand, although not available as a counter-claim, is a good defence as a set off (*Ferreira* v. *Depew*, supra; *Duncan* v. *Stanton*, 30 Barb. 536). In an action by an assignee of a demand for engraving plates, the defendant, by his answer, denied the allegations of the complaint, and as a further defence alleged that by a contract between him and the plaintiff's assignor, the plates were to be furnished by a specified time, and that the assignor made default, whereby the defendant sustained damages to the amount of the plaintiff's claim, and which he asked to have set off,—held that this new matter, if proved, would have been sufficient to bar the plaintiff's claim, but that it did not constitute a counter-claim or call for a reply, and was not admitted by not being replied to (*Vassear* v. *Livingston*, 3 Kernan, 252). So in an action on a promissory note, endorsee against maker, the note having been endorsed to the plaintiff after it became due, the defendant may set off (but not counter-claim) a demand existing in his favor, and against the plaintiff's endorser before the endorsement of the note to the plaintiff (*Wolfe* v. ——, 13 How. 84).

a. In an action by an assignee of a chose in action to entitle a defendant to avail himself of a demand against the plaintiff's assignor (as a set-off) he must show that such demand existed in his favor prior to his having notice of the assignment to the plaintiff (*Solomon* v. *Holt*, 3 E. D. Smith, 139); and *semb.*

such demand must be both due and payable before notice of such assignment (*Id.;* but see *Filkin* v. *Ferris*, 18 Barb. 582; *Wells* v. *Stewart*, 3 Barb. 40; *Smith* v. *Brinkerhoff*, 8 Barb. 519). Query—might a demand which accrued to the defendant after the assignment to the plaintiff but before notice thereof to the defendant, be used as a counter-claim (*Solomon* v. *Holt*, *supra*). In *Martine* v. *Willis* (2 E. D. Smith, 524), an action by an assignee, it was held that notes of the plaintiff's assignor not due and not in the possession of the defendant at the time of the assignment, but subsequently indorsed to him, could not be set off. The same was held in *Van Valen* v. *Lapham*, 5 Duer, 689; 13 How. 240; and see *United States Trust Company* v. *Harris*, 2 Bosw. 76; *Butterworth* v. *Fox*, 15 How. 545.

a. **Building society.**—A stockholder in a building company formed under laws of 1851, ch. 122, who has made advances for the company, may, when called on to respond for his satutory liability, set off such advances (*Remington* v. *King*, 11 Abb. 278).

b. **Divorce.**—In an action by a husband against his wife for a divorce on the ground of adultery, the defendant cannot set up by way of counter-claim the cruel and inhuman treatment of the plaintiff (*Diddell* v. *Diddell*, 3 Abb. 167).

c. **Dower.**—In case of a widow suing to recover her dower in the real estate of her late husband, the defendant cannot set up, by way of counter-claim, that the plaintiff has, since the death of her husband, received the rents of such real estate. *Semble*, however, that if the plaintiff had claimed damages for the detention of her dower, the rents received by her since the death of her husband, would have constituted a counter-claim (*Bogardus* v. *Parker*, 7 How. 303; and see *Elliott* v. *Gibbons*, 30 Barb. 498).

d. **Executor.**—In an action by an executor on a cause of action which arose after the death of the testator, defendant cannot set off a demand against the testator, even though it existed at the time of his death (*Merritt* v. *Seaman*, 6 Barb. 330).

e. **Landlord and tenant.**—In an action to recover possession of premises for non-payment of rent reserved (2 R. S. 505, § 30), the tenant may show a partial eviction from the easement by way of counter-claim (*Blair* v. *Claxton*, 18 N. Y. 529).

f. Rent due on a lease could not be set off against a judgment for damages for breach of a covenant in the same lease for quiet enjoyment (*Schermerhorn* v. *Anderson*, 2 Barb. 584).

g. In an action by a lessor for the rent reserved, the defendant may recoup damages sustained by a breach of an implied covenant for quiet enjoyment (*Mayor of N. Y.* v. *Mabie*, 3 Kernan, 151; *Harger* v. *Edmonds*, 4 Barb. 256; *McCullough* v. *Cox*, 6 Barb. 386). But *semble* not for a mere trespass (*Id.;* *Drake* v. *Cockroft*, 10 How. 377; 1 Abb. 203; 4 E. D. Smith, 34; *Edgerton* v. *Page*, 14 How. 116; aff'd 18 How. 359; 20 N. Y. 281; and see *McKenzie* v. *Farrell*, 4 Bosw. 193). A landlord suing as assignee of a lease, for rent accruing subsequent to the assignment to him, is not liable to a counter-claim in respect of a demand in favor of the tenant, against the assignor of the landlord which arose and was existing prior to the assignment to the plaintiff (*Peckham* v. *Leary*, 6 Duer, 494). *Semble* in an action for rent, the tenant may recoup or counter-claim the damages sustained by an unlawful eviction, subsequent to the accrual due of such rent (*La Farge* v. *Halsey*, 1 Bosw. 171; 4 Abb. 397). But in such a case the sureties of the tenant could not avail themselves of any such defence, unless the tenant had assigned to them the cause of action for such eviction. (*Id.*)

h. In an action by lessors on a bond to secure rent, defendants cannot set up as a counter-claim a claim against plaintiffs for improperly removing from the demised premises the tenants' fixtures. The lease containing no provisions as to such fixtures (*Mayor of N. Y.* v. *Parker Vein Steamship Co.*, 12 Abb. 300; 21 How. 289).

i. **Lien.**—In an action to recover *possession* of a chattel, where the plaintiff has had the chattel delivered to him under the proceeding known as "claim and delivery," an answer which merely sets up a lien upon the chattel, and

under which the defendant claims to hold the chattel and claims damages for the taking of the chattel from him in the action, does not set up a counter-claim (*De Leyer* v. *Michaels*, 5 Abb. 203; and see *Goller* v. *Babcock*, 7 Abb. 392, *n*; *Bissell* v. *Pearce*, 21 How. 130; *contra*, see *Brown* v. *Buckingham*, 21 How. 190; 11 Abb. 387; *Townsend* v. *Platt*, 3 Abb. 327).

a. **Mortgagor and mortgagee.**—A purchaser of land subject to a mortgage cannot, in an action to foreclose such mortgage, set up as a counter-claim or recoupment, a fraud practised upon him by the mortgagor after the mortgage was given (*Reed* v. *Latson*, 15 Barb. 9). As to a counter-claim in foreclosure, see *Nat. Pro. Ins. Co.* v. *McKay*, 21 N. Y. 191; *Fowler* v. *Poling*, 2 Barb. 301).

b. In an action to foreclose a mortgage, a defendant not personally liable for any deficiency, cannot set up a counter-claim arising out of matters unconnected with the subject of the action (*Agate* v. *King*, 17 Abb. 159).

c. **Premium insurance note.**—The maker of a promissory note given to an insurance company for premiums, may set off against such note, even if in the hands of a receiver, debts due him from the corporation (*Berry* v. *Brett*, 6 Bosw. 627; see *Lawrence* v. *Nelson*, 21 N. Y. 158).

d. **Principal and surety.**—In an action against a surety, he cannot avail himself of a claim in favor of his principal against the plaintiff by way of counter-claim (*La Farge* v. *Halsey*, 4 Abb. 397; *contra*, *Newell* v. *Salmons*, 22 Barb. 647); unless perhaps where the principal is insolvent (*East Riv. B'k* v. *Rogers*, 7 Bosw. 493).

e. **Vendor and purchaser.**—In an action on contract for goods sold, defendant may, *without* leave of the court, set up by way of counter-claim a judgment recovered by him against the plaintiff, notwithstanding the prohibition against suing on a judgment without leave of the court (*Wells* v. *Henshaw*, 3 Bosw. 625; *Clark* v. *Story*, 29 Barb. 295).

f. The plaintiff, "A," sued on a note for $100. Defendant, "B," answered that the note was given for the price of a horse sold by plaintiff, "A," to him, which plaintiff, "A," warranted sound, a breach of the warranty and damages to the amount of $100. Afterwards, and pending the suit on the note, the defendant, "B," sued the plaintiff, "A," for said breach of warranty, and recovered judgment for $100. Held, that the plaintiff, "A," was entitled, on this state of facts, to an order striking out B.'s answer and for judgment on the note, although he had appealed from the judgment obtained by B. in the action for the breach of warranty (*Harris* v. *Hammond*, 18 How. 123; see *Wiltsie* v. *Northam*, 3 Bosw. 162).

g. An accommodation indorser of a bill or note given for the price of goods sold, cannot set up as a defence or counter-claim a breach of a warranty on the sale of the goods (*Gillespie* v. *Torrance*, 7 Abb. 462).

h. In *Lemon* v. *Trull* (13 How. 248; affirmed in court of appeals; see 16 How. 576, *note*), an action for goods sold, an answer setting up a breach of warranty as to the quality of the goods, and claiming to recoup to that extent, was held to constitute a counter-claim (see *Warren* v. *Van Pelt*, 4 E. D. Smith, 202). In a subsequent case, an action on a promissory note, the defendant answered that the note was made by him, and delivered to the plaintiff in payment for goods sold him [defendant] by the plaintiff, with a warranty of their quality, that the goods were not of the quality warranted, and claimed damages for the breach of such warranty; held that such a defence was not a counter-claim (*Nichols* v. *Boerum*, 6 Abb. 291). [This, although a decision at special term, was said to embody the views of all the judges of the first district. It was decided on the authority of *Vassear* v. *Livingston* (3 Kernan, 248). It is respectfully submitted that the court overlooked the fact, that the reason for holding the answer in *Vassear* v. *Livingston* to be a defence not constituting a counter-claim, was that the action was by the assignee of the cause of action. If the action had been by the plaintiff's assignor, the answer would have constituted a counter-claim, but of course Vassear, by becoming assignee, did not incur a liability to Livingston, nor did he by bringing suit render himself liable to an action by Livingston, and therefore not subject to a *counter-claim*, although liable to be defeated by Livingston's setting up as a *defence*

matters which he might have used as a counter-claim against the claim in the hands of the plaintiff's assignor.]

a. In an action to recover the price of goods sold, a counter-claim of a loss sustained by the defendant upon a quantity of pork previously sold them by the plaintiffs, as inspected, sour mess-pork of good quality, which turned out to be of bad quality, and tainted and rotten, was on demurrer held bad (*Berdell* v. *Johnson*, 18 Barb. 559).

b. **Duplicity.**—This section is a statutory prohibition against duplicity (*Boyce* v. *Brown*, 7 Barb. 87). But a defence is not double because it denies two allegations of the complaint, both of which are necessary to make a cause of action (*Otis* v. *Ross*, 8 How. 193); and probably this section does not apply to defences consisting of mere denials. (*Id.*) Where the answer first denied each and every allegation in the complaint, and then, in successive paragraphs, separately numbered, admitted in terms many averments of the complaint. Plaintiff moved to strike out as false either the general denial or the admissions; held, there was no propriety in permitting two statements in a pleading in direct conflict with each other, and ordered that the general denial be struck out, unless the defendants withdrew the paragraphs containing the admissions (*Willett* v. *Metrop. Ins. Co.*, 2 Bosw. 679). A general and a specific denial are not permitted to the same part of a complaint; but an answer may specifically deny one part and generally deny the remainder (*Blake* v. *Eldred*, 18 How. 240); and a defendant may make one defence to one part of a cause of action, and another defence to another part of the same cause of action (*Longworthy* v. *Knapp*, 4 Abb. 115).

c. **Each defence must be complete within itself.**—The separate defences separately stated, take the place of separate pleas (*Cobb* v. *Frazee*, 4 How. 418; 8 Code Rep. 43). Each defence or counter-claim is to be regarded as if it stood alone (*Swift* v. *Kingsley*, 24 Barb. 541; *Hamer* v. *McFarlin*, 4 Denio, 511; *Newton* v. *Holfred*, 1 New Pr. Cas. 137; *Ayres* v. *Covill*, 18 Barb. 264), and was the sole defence (*Twemlow* v. *Askey*, 1 Horn & Hurl. 173; *Fischer* v. *Aide*, *id.* 168), and should be complete in itself, without reference to others (*Spencer* v. *Babcock*, 22 Barb. 335; *Bridge* v. *Payson*, 5 Sand. 210; *Sinclair* v. *Fitch*, 3 E. D. Smith, 389; *Loosey* v. *Orser*, 4 Bosw. 392; *Zenia Branch Bank* v. *Lee*, 2 Bosw. 694; 7 Abb. 387; *Benedict* v. *Seymour*, 6 How. 298), and be an answer to the cause of action to which it is addressed (*Brown* v. *Ryckman*, 12 How. 314; *Kneedler* v. *Sternberg*, 10 *id.* 68; 8 *id.* 242; 4 Sand. 210). A defence cannot be made out nor defeated by connecting two or more separate defences together, more than it could formerly by connecting together two or more special pleas (*Spencer* v. *Babcock*, *supra*; *Ayrault* v. *Chamberlain*, 33 Barb. 237; *Ritchie* v. *Garrison*, 10 Abb. 246 and note; *Landau* v. *Levy*, 1 Abb. 376; *Sinclair* v. *Fitch*, 3 E. D. Smith, 677; and see note to § 168, *post*). *Semble*, a defendant, to avoid repetition, may aver once certain facts alike applicable to several defences, and, having averred them in one defence or by way of introduction to all, may refer to them in any other defence or subsequently, intelligibly and distinctly so as by reference to clearly include them in each (*Xenia Branch Bank* v. *Lee*, 7 Abb. 387; 2 Bosw. 694; and see *Ayres* v. *Covill*, 18 Barb. 261; *Sinclair* v. *Fitch*, 3 E. D. Smith, 677). Where there are several defences, an admission implied by not denying in one defence is not available to the plaintiff in respect of another defence not containing any such admission, in the same answer (*Swift* v. *Kingsley*, 24 Barb. 541; *Ayres* v. *Covill*, 18 *id.* 264).

d. Where in one defence the note sued on is described or mentioned, a reference in a subsequent defence to the *said note* sufficiently points out the note in suit (*Williams* v. *Richmond*, 9 How. 523).

e. **Several defences, how stated.**—*Each defence must be separately stated and plainly numbered* (Rule 19).—No formal commencement or conclusion is required to mark each separate defence (*Bridge* v. *Payson*, 5 Sand. 210); and it has been said, there is only "one safe rule in stating actions or defences, and that is to indicate distinctly by fit and appropriate words where each statement of a cause of action or defence commences, and where it concludes (*Lip-*

pincott v. *Goodwin*, 8 How. 242). To commence each separate defence with the words "And the defendant further says," was held not to be sufficient (*id.*); but to commence with the words "And for a further defence," would be sufficient (*Benedict* v. *Seymour*, 6 How. 298; and see Rule 19, Supreme Court, and note).

b. **What defences may be pleaded together.**—A general denial and infancy (*Mott* v. *Burnett*, 2 E. D. Smith, 52); a general denial and a release (*Kellogg* v. *Baker*, 15 Abb. 287). In an action for an assault: a general denial; *son assault demesne;* and *molliter manus* (*Lansing* v. *Parker*, 9 How. 288). To an action for false representations: a general denial; and that the alleged representations were true (*Otis* v. *Ross*, 8 *id.* 193). To an action for slander: a denial of speaking the words; and that the alleged words were true (*Buhler* v. *Wentworth*, 17 Barb. 649; 9 How. 282; *Hollenbeck* v. *Clow*, 9 How. 289; *Ormsby* v. *Douglass*, 5 Duer, 665; *contra*, by Slosson, J. S. C. 2 Abb. 407; see *infra*). To an action for personal property (replevin): a denial of the taking; and a justification of the taking (*Hackley* v. *Ognum*, 10 How. 44; and see *Hellebrant* v. *Booth*, 7 Texas, 499); a denial of any knowledge or information sufficient to form a belief as to the plaintiff's title; and a claim of lien on the property in suit (*Townsend* v. *Platt*, 3 Abb. 327). To an action for a malicious prosecution, a general denial and facts to constitute a probable cause (*Semble*, *Radde* v. *Ruckgaber*, 3 Duer, 684). A denial of the amount claimed, an admission of a certain amount due, and a tender of that amount, held to be but one defence (*Spencer* v. *Tooker*, 12 Abb. 353; 21 How. 338).

a. Under the former practice, the defendant might plead as many separate matters as he should think necessary to his defence, subject to the power of the court to compel him to elect by which plea he would abide, in cases where he should plead inconsistent pleas (2 R. S. 352; Graham's Pr. 244; see, however, *Wilkinson* v. *Small*, 3 Dowl. Pr. Cas. 564). But there is no provision in the code which allows answers [defences] to be struck out on the specific ground of inconsistency as such (*Ostrom* v. *Bixby*, 9 How. 59; *Hollenbeck* v. *Clow*, id. 290; *Smith* v. *Wells*, 20 How. 158). And "when the court assumes to compel the defendant to elect between inconsistent defences, it must do so on the ground that, from the very nature of the case, it is impossible that the defendant can have two such defences." (*Id.* Harris, J.) Defences which were not inconsistent under the former practice, should not be considered inconsistent under the present system of pleading (*Lansing* v. *Parker*, 9 How. 288). The defendant cannot be required, as a condition of answering new matter, to make an admission which shall preclude him from denying the allegations of the complaint on the trial (*Ketcham* v. *Zerega*, 1 E. D. Smith, 553; *Brown* v. *Ryckman*, 12 How. 317; *Hollenbeck* v. *Clow*, 9 *id.* 290; *Stiles* v. *Comstock*, 9 How. 48; *Lansing* v. *Parker*, 9 *id.* 288; *Hackley* v. *Ognum*, 10 *id.* 44; *Mott* v. *Burnett*, 2 E. D. Smith, 52; 1 Code Rep. 134). "He should never be required to elect between a denial of a material allegation of a complaint and new matter constituting a defence" (*Hollenbeck* v. *Clow*, supra). The distinction between pleas in abatement and in bar is abolished, and therefore a defence of defect of parties may be united with a defence on the merits (*Mayhew* v. *Robinson*, 10 How. 164; *Sweet* v. *Tuttle*, id. 40; affirmed 4 Kernan, 465; *Bridge* v. *Payson*, 5 Sand. 210; *Gardner* v. *Clark*, 21 N. Y. 399, reversing 6 How. 449). The authorities the other way are *Stone* v. *Miller*, 7 Barb. 368; *King* v. *Vanderbilt*, 7 id. 385; *Buskirk* v. *Roberts*, 14 id. 61; and a dictum, *Zabriskie* v. *Smith*, 8 Kernan, 337.

b. **What defences may not be pleaded together.**—To an action against a carrier by water, (1) a denial of being the owner of the vessel; (2) a denial that the property was delivered to him (*Arnold* v. *Dimond*, 4 Sand. 664). To an action for an assault, a general denial and *son assault demesne* (*Schneider* v. *Schultz*, 4 Sand. 664; *Roe* v. *Rogers*, 8 How. 356) [probably the preceding cases would be decided otherwise at this day]; a general denial and a tender (*Livingston* v. *Harrison*, 2 E. D. Smith, 197).

151. *Demurrer and answer.*

The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue.

a. Where a defendant demurs and answers to the same cause of action, or to the whole of a complaint, the plaintiff cannot treat the demurrer as a nullity, nor move for judgment; but he should move to strike out the answer and demurrer, or that the defendant elect by which he will abide (*Spellman* v. *Weider*, 5 How. 5; *Howard* v. *Michigan Southern R. R. Co.*, id. 206; and see *Clarkson* v. *Mitchell*, 3 E. D. Smith, 269; *Bolton* v. *Gardner*, 3 Paige, 273; *Clarke* v. *Phelps*, 6 Johns. Ch. 214; *Samuel* v. *Atkinson*, 11 Ir. Law. R. 50; and note to section 143, p. 256 *e*).

§ 152. (Am'd 1851.) *Sham and irrelevant answers and defences.*

Sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose.

b. This section "confers no new power, but is simply declaratory of a power the courts before possessed to prevent the abuse" of the forms of pleading (*Manuf. B'k of Rochester* v. *Hitchcock*, 14 How. 406).

c. **Sham answer.**—There is a distinction between a *false* answer and a frivolous answer (*Hecker* v. *Mitchell*, 5 Abb. 455; *Hull* v. *Smith*, 8 How. 150; *Davis* v. *Potter*, 4 How. 155; 2 Code Rep. 99). Again it is said, a false answer, not verified, is a sham answer (*Stock* v. *Cotton*, 2 E. D. Smith, 398). The essential element of a sham answer is its falsity (*Nichols* v. *Jones*, 6 How. 257; *Ostrom* v. *Bixby*, 9 *id.* 57; *Brown* v, *Jennison*, 1 Code Rep. N. S. 156; *Walker* v. *Hewitt*, 11 How. 398; *Hull* v. *Smith*, 8 *id.* 150). It may be good in form. (*Id.*) A sham answer is one that is false (*Leach* v. *Boynton*, 3 Abb. 1; *Littlejohn* v. *Greely*, 22 How. 345). The words *sham* and *false* applied to such an answer are synonymous (*The People* v. *McCumber*, 18 N. Y. 320). It was held in a number of cases that an answer consisting only of denials, *cannot* be struck out as sham, whether verified or unverified (*White* v. *Bennett*, 7 How. 59; *Winne* v. *Sickles*, 9 *id.* 219; *Livingston* v. *Finkle*, 8 *id.* 485; *Benedict* v. *Tanner*, 10 *id.* 455; *Stiles* v. *Comstock*, 9 *id.* 48; *Grant* v. *Power*, 12 *id.* 500; *Goedell* v. *Robinson*, 1 Abb. 116; *Farmers & Mechanic's B'k.* v. *Smith*, 15 How. 329; *Grey* v. *Reader*, id. 371; *Caswell* v. *Bushnell*, 14 Barb. 395; 7 How. 17; *Mier* v. *Cartledge*, 8 Barb. 75; 2 Code Rep. 125; *Mussina* v. *Stillman*, 13 Abb. 93; *Sherman* v. *Bushnell*, 7 How. 171; *Davis* v. *Potter*, 4 id. 155; 2 Code Rep. 99; *Gregory* v. *Wright*, 11 Abb. 418). It is now however settled that when an answer or defence, although verified and consisting of a denial only, is sham or false, it will be struck out (*The People* v. *McCumber*, 18 N. Y. 316: 15 How. 186; *Corbett* v. *Eno*, 13 Abb. 65; *Elizabethport Manufac. Co.* v. *Campbell*, 13 Abb. 86; *Lawrence* v. *Derby*, 24 How. 134; *Butterfield* v. *McComber*, 22 How. 150; *Struver* v. *Ocean Ins. Co.*, 2 Hilton, 475; 9 Abb. 23; *Lund* v. *Seaman's Savings' B'k.*, 37 Barb. 129; 23 How. 258; *Butterfield* v. *McComber*, 22 How. 150; *Conklin* v. *Vandervoort*, 7 How. 483; *Mier* v. *Cartledge*, 4 How. 115). Still the general term in the first district refused to strike out a general denial as false (*Mussina* v. *Stillman* 13 Abb. 93). An answer which is so framed that it does not set up a valid defence, but which states facts that may, by being properly averred, constitute a defence, will not be struck out as sham, irrelevant, or frivolous (*Alfred* v. *Watkins*, 1 Code Rep. N. S. 343; *Struver* v. *Ocean Ins. Co.*, 2 Hilton, 475; 9 Abb. 23; but it may be demurred to. (*Id.*)

d. To a complaint on a promissory note, remote indorsees against maker, the defendant answering that the note was made without consideration therefor was obtained from him by fraud of A. B. & C., and alleging "upon informa-

tion and belief" that plaintiffs gave no value for the note, and "are not *bona-fide* holders thereof." The plaintiffs, on an affidavit that they were the *bona-fide* holders of the note for a valuable consideration, paid in cash upon the maturity of the note, and without notice of the want of consideration or fraud alleged in the answer, and stating admissions and promises to pay by the defendant,—moved to strike out the answer as sham. The defendant did not fully deny the allegations in the plaintiff's affidavits. The motion was denied. The court said the answer was not shown to be untrue, but the plaintiff's affidavits stated facts which avoided the answer (*Wirgman* v. *Hicks*, 6 Abb. 17).

a. In an action by an indorsee against the defendant as maker of the promissory notes, the subjects of the action, the complaint alleged the making of the notes, that the plaintiff was "*the lawful owner and holder of the notes.*" The answer denied that the plaintiff was "*the lawful owner and holder of the notes,*" &c.: and was struck out as sham (*Seeley* v. *Engell*, 17 Barb. 530). So in *Catlin* v. *Gunter* (1 Duer, 265), one of the defences consisted of a denial that the plaintiff was the lawful owner and holder of the note sued on, and that the defendant was indebted to him thereon in the sum claimed to be due, or in any sum whatever; and in reference to this the court say, "We are in the constant habit of striking out such a denial as irrelevant and frivolous;" and to the same effect in *Witherspoon* v. *Van Doler* (15 How. 266). An answer, verified, which alleged—as to the averment in the complaint that the plaintiff is the lawful holder and owner of said promissory note, and that the defendant is indebted to him thereon in the sum of $—— and interest—the defendant has no knowledge or information sufficient to form a belief, and can therefore neither admit nor deny the same—was struck out as sham (*Fleury* v. *Roger*, 9 How. 215; *Flammer* v. *Kline*, id. 216; *Fleury* v. *Brown*, id. 217).

b. In an action on a promissory note against indorsee, the answer denied any knowledge &c. of presentment and notice of non-payment, the plaintiff moved to strike out the answer as false on affidavit of the notary of presentment and notice of non-payment. The defendant made an affidavit that his answer was put in in good faith and that it was true to the best of his knowledge and belief, but stated no facts warranting such belief, the motion was denied (*Bailey* v. *Lane*, 13 Abb. 354).

c. In an action on a promissory note the complaint alleged that plaintiff was the holder and owner of the note, and the answer denied that allegation, on motion to strike out the answer as sham it appeared that plaintiff held the notes as assignee for the benefit of creditors and the motion was granted (*Butterfield* v. *McComber*, 22 How. 150).

d. In an action for false imprisonment, an answer denying any knowledge or information sufficient to form a belief as to the allegation that defendants caused to be issued the writ on which the plaintiff was arrested was struck out as sham (*Lawrence* v. *Derby*, 15 Abb. 346, *note*; 24 How. 134).

e. In an action on a promissory note, a defence of an agreement contemporaneous with the making of the note, to renew the note at maturity is frivolous (*Bailey* v. *Lane*, at General Term, 13 Abb. 359; at Special Term, 21 How. 475); and may be struck out on motion (*id.*); and see *Shoe & Leather B'k* v. *Camp*, 21 How. 443).

f. A defence of usury stricken out as sham it appearing that the alleged excess of interest was taken by a mistake (*Bailey* v. *Lane*, 21 How. 475; and at General Term, 13 Abb. 354).

a. An answer denying knowledge of a judgment in an action in which the defendant appeared struck out as sham and false (*Beebe* v. *Marvin*, 17 Abb. 194).

g. Where an answer states a sufficient defence on the knowledge of the defendant, it would be unsafe to strike it out as sham (*Miller* v. *Hughes*, 21 How. 442; 13 Abb. 93 *note*).

h. Where a defendant applies on notice for leave to put in an amended answer and serves with his motion papers a copy of his proposed answer as amended, no objection being made that the proposed answer was sham or false,

leave was given him to serve such amended answer, held that the plaintiff could not afterwards have it struck out as false (*Mussina* v. *Stilman*, 13 Abb. 93).

An answer denying a material allegation in the complaint may be stricken out as sham (*The People* v. *McCumber*, 18 N. Y. 315).

b. **Irrelevant Pleading.**—A pleading is irrelevant, which has no substantial relation to the controversy between the parties to the action. A general denial by one party of a material allegation of his opponent, cannot be considered as irrelevant; although it may be informal, or even unavailable, by reason of some statutory restriction (*Seward* v. *Miller*, 6 How. 313). Irrelevancy comprehends both prolixity or needless details of material matter and also matter out of which no cause of action or defence could arise between the parties (*Lee Bank* v. *Kitching*, 11 Abb. 435; *Struver* v. *Ocean Ins. Co.*, 2 Hilton, 476; 9 Abb. 23). An answer should be palpably irrelevant to warrant its being stricken out (*Littlejohn* v. *Greeley*, 22 How. 345; 13 Abb. 311); if not palpably irrelevant the plaintiff should demur (*id.*; *Struver* v. *Ocean Ins. Co.*, 9 Abb. 23; 2 Hilton, 475; see however *Lee Bank* v *Kitching*, 11 Abb. 439). Where the complaint for goods sold and delivered and for labor alleged that said goods were sold and delivered at the times, and were of the value therein specified, and also alleged that the labor was performed at the time, and was of the value therein specified and the answer denied that the goods were sold &c. at the time, and were of the value specified and made a like denial as to the labor, held that the denial of the time was immaterial but that the denial of the value raised a *material* issue (*Gregory* v. *Wright*, 11 Abb. 410). To determine whether statements in an answer are relevant or not is to enquire if they tend to constitute a defence, if they do, they are not irrelevant (*Dovan* v. *Dinsmore*, 33 Barb. 86). The power to strike out irrelevant defences includes irrelevant matter pleaded in mitigation of damages in an action for libel or slander (*Herr* v. *Bamberg*, 10 How. 128). To a complaint for use and occupation, an answer which, without denying any *fact* stated in the complaint, merely alleged, "The defendant denies that the plaintiff is entitled to the sum of money demanded in this action, or any part thereof," was struck out on motion, the report does not state on what ground: it is presumed, as irrelevant (*Drake* v. *Cockcroft*, 10 How. 337; 1 Abb. 203; 4 E. D. Smith, 34). New matter which is palpably no defence, either total or partial, nor a counter-claim, may be struck out as irrelevant (*Kurtz* v. *McGuire*, 5 Duer, 660).

c. In an action by the holder, against the first indorser of a note, the answer alleged that plaintiff was not the real party in interest, nor the owner of the note. That it belonged to one R. the second indorser, who at the time he owned it was indebted to the maker, and that the maker had notified defendant not to pay the note, held that said answer, except that part which alleged that plaintiff was not the real party in interest nor the owner of the note, was irrelevant (*Arrangois* v. *Frazer*, 2 Hilton, 244; and see *Tamisier* v. *Cassard*, 17 Abb. 187).

d. **Motion to strike out.**—An entire answer or an entire defence, may be struck out under this section; but not a part of a defence (*Slack* v. *Cotton*, 2 E. D. Smith, 398; *Bell* v. *Ogden*, 13 Abb. 93 note; *Littlejohn* v. *Greeley*, 13 Abb. 311). But in the case of a joint answer it may be adjudged sham as to some defendants, and valid as to the others (*Burrall* v. *Bowen*, 21 How. 378). The right to demur to an answer, and to move to strike it out as irrelevant, are not optional with the plaintiff; where the irrelevancy of an answer or defence is not palpable, the plaintiff should demur (*Littlejohn* v. *Greeley*, 13 Abb. 311; 22 How. 345). The power to strike out should be cautiously exercised (*The People* v. *McCumber*, 15 How. 186; 18 N. Y. 325; *Webb* v. *Van Zandt*, 16 Abb. 190; *Manuf. B'k. of Rochester* v. *Hitchcock*, 14 How. 406). *Semble*, that on a motion to strike out an answer as false, it must be shown affirmatively by affidavit, other than the verification of the complaint in the ordinary form, that the answer is false (*White* v. *Bennett*, 7 How. 59; *Kellogg* v. *Baker*, 15 Abb. 287). *Semble*, that an averment in the complaint being absolute, and supported by an oath of positive knowledge, and that in the answer being merely on

information sufficient to form a belief, the defendant is bound, on a motion to set aside the answer as sham, to support it by the oath of a party having knowledge, that is, it is a case where the defendant is bound to seek fo knowledge (*The People* v. *McCumber*, 15 How. 186; 18 N. Y. 316).

a. Slight circumstances indicating good faith, are sufficient to prevent a de fence being struck out as sham (*Munn* v. *Barnum*, 1 Abb. 281; 12 How. 563). And the truth or falsity of a pleading will not usually be tried on a motion, when it is positively sworn to be true (*Catlin* v. *McGroarty*, 1 Code Rep. N. S. 291; *Miln* v. *Voss*, 4 Sand. 660). On a motion to strike out a pleading as sham, the pleader is not obliged to disprove the allegations of the affidavit of the moving party respecting matters not presumed to be within the pleader's knowledge, even though the matters are such as if proved will avoid the defence set up (*Wirgman* v. *Hicks*, 6 Abb. 17). Where the motion is not opposed, or is not met by affidavit, showing that the answer or defence was put in in good faith, together with an affidavit of merits, it should be granted. But where the defendant, by affidavit, substantially reaffirms the truth of his answer, and makes an affidavit of merits, the answer should stand (*Farmers & Mechanics' B'k. of Rochester* v. *Smith*, 15 How. 329; *The People* v. *McCumber*, 18 N. Y. 325). And where the allegations of the answer, or the affidavit in support of it are on information and belief, it should state the source of information and grounds of belief (*Corbett* v. *Eno*, 13 Abb. 67; and see *Miller* v. *Hughes*, 13 Abb. 93 note; 21 How. 442).

b. A plaintiff may in one motion ask (1) to strike out defences as sham and irrelevant, (2) for judgment on a demurrer as frivolous, (3) to strike out irrelevant and redundant matter, and (4) to have the allegations made definite and certain (*The People* v. *McCumber*, 15 How. 186; 18 N. Y. 315).

c. Where the motion is to strike out several defences as sham and frivolous, the notice of motion, need not necessarily, but should properly, specify which defence is alleged to be sham, and which frivolous (*Bailey* v. *Lane*, 13 Abb. 354).

d. Pending a motion to strike out a defence as sham, it is irregular to move to strike out the same defence, on the ground that defendant has not complied with an order requiring him to make said defence more definite and certain (*Kellogg* v. *Baker*, 15 Abb. 286).

e. Where a defendant applied for leave to serve an amended answer, and upon the motion served a copy of his proposed answer to which no objection was made, held that the plaintiff was precluded from afterwards moving to strike it out as false (*Mussina* v. *Stillman*, 13 Abb. 93).

f. It is no sufficient objection to a motion to strike out an answer as sham that the plaintiff has obtained an order for time to reply (*Miln* v. *Voss*, 4 Sand. 660); or has given notice of trial (*Beebe* v. *Marvin*, 17 Abb. 194).

g. Where a motion to strike out an answer as sham and irrelevant is denied, on the ground that it is neither, but the answer is insufficient on other grounds, the plaintiff will be allowed to demur, although the time for serving a demurrer may have expired (*Seward* v. *Miller*, 6 How. 312), unless the pleading be so utterly frivolous that the party ought not to be put to a demurrer (*Miln* v *Voss*, 4 Sand. 660.)

h. After an order has been made to strike out an answer as sham and irrelevant, the plaintiff may enter judgment in the same manner as though no answer had been put in (*Aymar* v. *Chase*, 1 Code Rep. N. S. 141). There is no answer in the case to be amended after an order has been made to strike it out, and consequently the defendant has no right to amend, although he may apply for leave to put in a new answer; or such leave may be reserved in the order striking out the former answer (*Burrall* v. *Bowen*, 21 How. 378).

i. No appeal lies to the court of appeals from an order striking out an answer as sham or irrelevant (*Briggs* v. *Bergen*, 23 N. Y. 162).

Chapter IV.

The Reply.

Section 153. Reply, demurrer to answer.
154. Motion for judgment upon answer.
155. Demurrer to reply.

§ 153. [131.] (Am'd 1849, 1851, 1852, 1855, 1857, 1860.) *Reply. Demurrer to answer.*

When the answer contains new matter constituting a counter-claim, the plaintiff may, within twenty days, reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defence to such new matter in the answer; and the plaintiff may in all cases demur to an answer containing new matter, where upon its face it does not constitute a counter-claim or defence; and the plaintiff may demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims.

And in other cases, when an answer contains new matter, constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's motion, require a reply to such new matter; and in that case, the reply shall be subject to the same rules as a reply to a counter-claim.

a. **Reply.**—No reply is allowed unless to a counter-claim, and a reply im properly pleaded will be struck out on motion (*Devlin* v. *Bevins*, 22 How. 290). In an action to recover *possession* of a chattel, an answer which merely sets up a lien upon the chattel, and claims damages for the taking of the chattel from him in the action, does not set up a counter-claim, and no reply is requisite (*De Leyer* v. *Michaels*, 5 Abb. 203; *McKenzie* v. *Farrell*, 4 Bosw. 198).

b. A statement in a reply that the plaintiff denies all those allegations which are contained within certain specified folios, is good as a general denial (*Gassett* v. *Crocker*, 9 Abb. 39).

c. Where a plaintiff elects to reply, he cannot answer an objection to its regularity, by saying he was not bound to reply (*Roscoe* v. *Maison*, 7 How. 121).

d. **New Assignment.**—A new assignment is not allowable or requisite in the present system of pleading (*Stewart* v. *Wallis*, 30 Barb. 344).

e. **Reply to amended answer.**—Where an answer and demurrer on one paper—the demurrer immediately following the answer—were served, and a reply served to the answer, and the demurrer noticed for argument; but be-

fore the expiration of the twenty days from the service of the reply what purported to be an amended answer was served, it was an exact copy of the original, except the demurrer, which was left out,—held that the plaintiff was not bound to reply to the amended answer. The reply already served was sufficient—the answer in fact was not amended (*Howard* v. *Michigan Ins. Co.*, 3 Code Rep. 215).

a. **Amendment by adding a Reply.**—Where a complaint and answer formed an issue of law which did not bring up the merits, the plaintiff's attorney alleged that through mistake he omitted to reply, he was allowed to reply, (on terms), after the cause had been heard by a referee (*Merritt* v. *Slocum*, 1 Code Rep. 68). Where a plaintiff had leave to reply on payment of $10 costs, and instead of serving a reply and paying the costs he noticed the cause for trial at the circuit, held, on motion for judgment for want of a reply, that the plaintiff, on payment of the costs of the circuit, the $10 previously ordered to be paid, and $10 costs of that motion, might serve a reply within three days (*Montecarbole* v. *Mundel*, 16 How. 141).

b. **Counter-claim in reply.**—A question has arisen whether or not, where a counter-claim is set up in the answer, it may be met by a counter-claim in the reply. That it may, see *Miller* v. *Losee*, (9 How. 356); that it may not, see *Stewart* v. *Travis* (10 *id.* 148; and see *Hudnall* v. *Scott*, 2 Ala. 569; *Alrich* v. *Berger*, 4 Watts & S. 19; 2 Parsons on Contracts, 247, *note* e). [We think not. There is no authority for it in the code; and since the code, parties must find their authority for pleading in the code, and it is irregular to put in pleadings not authorized by the code (*White* v. *Joy*, 3 Kernan, 90).]

c. **Demurrer to Answer.**—A demurrer does not lie to an answer which sets up no new matter, but merely denies the allegations of the complaint (*Smith* v. *Greening*, 2 Sand. 702; *Ketcham* v. *Zerega*, 1 E. D. Smith, 557; *Thomas* v. *Harrop*, 7 How. 57; *People* v. *Barker*, 8 *id.* 261; *Reilay* v. *Thomas*, 11 *id.* 266; *Lund* v. *Seaman's Sav'gs B'k*, 37 Barb. 129; 23 How. 258; *Rice* v. *O'Conner*, 10 Abb. 362). The case of *Hopkins* v. *Everett*, 6 How. 159, to the contary, is in effect overruled. Irrelevancy, redundancy, or uncertainty do not furnish ground for a demurrer *Ketcham* v. *Zerega*, 1 E. D. Smith 554; *Smith* v. *Greening*, 2 Sand. 702; *Watson* v. *Husson*, 1 Duer, 242; *Richards* v. *Edick*, 17 Barb. 261; 23 N. Y. 491). An answer which professes to set up new matter as a defence and does not state facts which constitute a defence, may be demurred to for insufficiency (*Merritt* v. *Millard*, 5 Bosw. 645). Where matter which constitutes a defence is pleaded as a counter-claim, plaintiff cannot demur (*Wait* v. *Ferguson*, 14 Abb. 379). A demurrer to an answer that defendant was civilly dead, was sustained (*Freeman* v. *Frank*, 10 Abb. 370).

d. Where pending a trial the answer is amended to conform to the proofs, the plaintiff cannot demur to the answer for insufficiency (*Therasson* v. *Peterson*, 22 How. 98).

e. Where a plaintiff selected from the answer several sentences forming a part of the statement of one entire ground of defence, and demurred to them, and replied to the residue of the answer, it was held that such a demurrer would not lie, because a demurrer will not lie to a part of an entire defence in an answer (*Cobb* v. *Frazee*, 3 Code Rep. 43; 4 How. 413; *Welch* v. *Hazelton*, 14 How. 97).

f. An objection, not that unimportant matter or matter having no bearing on the controversy is mixed up with or stated in addition to that which is material but that the whole is entirely unavailing, is an objection that can only be taken by demurrer (*Fabricotti* v. *Launitz*, 1 Code Rep. 122; *Rice* v. *O'Conner*, 10 Abb. 362).

g. The demurrer to an answer must state the grounds of demurrer (*Ketcham* v. *Zerega*, 1 E. D. Smith, 554).

h. On a demurrer to an answer, the sufficiency of the complaint may be considered to show that the court has no jurisdiction of the action, or that the complaint does not state facts sufficient to constitute a cause of action (*The People* v. *Banker*, 8 How. 261; *Fry* v. *Bennett*, 1 Code Rep. N. S. 288; *Schwart* v.

Furniss, id. 342; *Stoddard* v. *Onondaga Ann. Conf.*, 12 Barb. 575; *Noxon* v. *Bentley*, 7 How 316). But query, whether the same rule applies on a demurrer to a counter-claim (*Graham* v. *Dunnigan*, 6 Duer, 629; 4 Abb. 426). On demurrer to a counter-claim the allegations of the complaint not inconsistent with the counter-claim are to be taken as admitted. (*Id.*)

a. In a demurrer to an answer on the ground of insufficiency, it is enough to allege generally, that the answer is insufficient, or that the facts stated therein do not constitute any defence, and under such an allegation the plaintiff can avail himself of any insufficiency which goes to the merits of the answer (*Arthur* v. *Brooks*, 14 Barb. 533; *Hyde* v. *Conrad*, 5 How. 112).

b. Where there are several defences each to the whole complaint, and one defence is demurred to, on a decision upholding such demurrer, the defendant is entitled to a final judgment (*Wightman* v. *Shankland*, 18 How. 79).

c. An appeal lies from an order overruling a demurrer to one of several alleged defences, with liberty to reply to such defence (*Mattoon* v. *Baker*, 24 How. 329).

d. **Consequences of omitting to demur.**—After voluntarily forming an issue, the plaintiff is not at liberty as of course at the trial to amend or disregard that issue, and to insist that the issue is on an immaterial allegation of his complaint (*Livingston* v. *Miller*, 4 Selden, 289). An answer in an action for flowing land which set up the possession and enjoyment during twenty years of an easement to do so, without averring that it was exercised *adversely* to the owner of the land, would be bad on demurrer, but would if issue is taken on it be sufficient to allow evidence of the adverse user on the trial (*White* v. *Spencer*, 4 Kern. 248; and see *Ritchie* v. *Davis*, 5 Cal. 453; *N. Y. Cent. Ins. Co.* v. *Nat. Pro. Ins. Co.*, 4 Kern. 85; *St. John* v, *Northrup*, 23 Barb. 26; *Cady* v. *Allen*, 22 id. 394). A plaintiff by going to trial upon the answer of the defendant, admits it to be true so far as the mater is set out issuably. But that admission does not aid a defect of substance, or prevent the plaintiff from taking advantage of it upon the trial. If a good defence be defectively set out, as in *White* v. *Spencer*, supra, the plaintiff cannot take advantage of it on the trial. But where in truth there is no defence, the case is different; and although the allegations of the answer may be proved, yet if they constitute neither defence nor counter-claim, the defendant cannot have any benefit from them (*Boyce* v. *Brown*, 7 Barb. 81; *Van Valen* v. *Lapham*, 13 How. 243).

§ 154. (Am'd 1863.) *Motion for judgment on answer.*

If the answer contain a statement of new matter constituting a counter-claim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move, on a notice of not less than ten days, for such judgment as he is entitled to upon such statement, and if the case require it, a writ of inquiry of damages may be issued.

e. All the papers needed for a motion under this section are, summons, complaint, and answer, and the notice of motion. The motion, clearly, can only be made in a case where the answer relies on new matter, which constitutes a defence [of counter-claim] (*Brown* v. *Spear*, 5 How. 147). The motion must be to the court; a judge at chambers cannot grant it (*Aymar* v. *Chace*, 12 Barb. 301).

f. A party, by not availing himself of the remedy prescribed by this section, does not waive his right to take advantage, on the trial, of admissions made by the pleadings (*Bridge* v. *Payson*, 5 Sand. 217).

§ 155. *Demurrer to reply.*

If a reply of the plaintiff to any defence set up by the answer of the defendant be insufficient, the defendant may demur thereto, and shall state the grounds thereof.

a. The term "insufficient" here used, "has reference to the matter stated in the replication, and whether the facts there stated constitute a good answer to the facts stated in the answer" (*White* v. *Joy*, 3 Kernan, 89).

b. If a defendant thinks a reply insufficient, he has a right by demurrer to raise that question, stating the ground thereof, that is, wherein it is insufficient. If no grounds of insufficiency are stated, or if it be stated the reply "is in other respects defective, insufficient and informal," the plaintiff may move to have such demurrer made more definite, or struck out. (*Id.*)

c. Departure is when a party quits or departs from the case he has first made and resorts to another. It can only occur in a reply, and does not of itself cause the reply to be *insufficient.* But a reply which is a departure is irregular, and may be struck out on motion (*White* v. *Joy*, 3 Kernan, 83). Where a plaintiff, a receiver, complained on a promissory note, but did not complain *as* receiver, and the answer alleged that the note was the property of a receiver, without naming him, and the reply stated that the plaintiff was the receiver mentioned in the answer, and as such sought to recover, the defendant demurred,—held, that the reply was a departure, but not therefore insufficient; and the demurrer was overruled. (*Id.*)

d. On demurrer to a reply, if the answer is bad in substance, the plaintiff is entitled to judgment (*Halliday* v. *Noble*, 1 Barb. 138).

CHAPTER V.

General Rules of Pleading.

SECTION 156. Pleadings to be subscribed and verified.
157. Pleadings, how verified.
158. How to state an account in pleading.
159. Pleadings to be liberally construed.
160. Irrelevant or redundant matter to be stricken out, and indefinite matter made more definite.
161. Judgments, how to be pleaded.
162. Conditions precedent, how to be pleaded.
163. Private statutes, how to be pleaded.
164. Libel and slander, how stated in complaint.
165. Answer in such cases.
166. Answer in actions to recover property distrained for damage.
167. What causes of action may be joined.
168. Allegation not denied, when to be deemed true.

§ 156. [133.] (Am'd 1849, 1851.) *Pleadings to be subscribed and verified.*

Every pleading in a court of record must be subscribed by the party, or his attorney; and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also.

b. **Subscription.**—The signature of a defendant to a verification to a pleading, without more, is sufficient subscription to the pleading (*Hubbell* v. *Livingston*, 1 Code Rep. 63); and where an infant is a party suing or defending by guardian, the attorney who conducts the suit may subscribe the pleadings (*Hill* v. *Thacter*, 2 Code Rep. 3; 3 How. 409; and see *Anable* v. *Anable*, 24 How. 92).

c. An attorney in fact not an attorney at law cannot subscribe a pleading as attorney for plaintiff or defendant (*Dixey* v. *Pollock*, 8 Cal. 570).

d. If a pleading is served which does not appear to have been subscribed by the name of the party or his attorney, it should be returned with notice of the defect (*Ehle* v. *Haller*, 10 Abb. 287; 6 Bosw. 661).

e. It is too late on an appeal from an order sustaining a demurrer to a complaint, to object that the demurrer was not subscribed by the defendant or his attorney (*Ehle* v. *Haller*, 6 Bosw. 661; 10 Abb. 287; see, *ante*, note to § 128).

f. **Verification.**—The verification is no part of a pleading (*George* v. *McAvoy*, 6 How. 200). The effect of omitting to verify the complaint, or of a defective verification of the complaint, is merely that the defendant may answer without verification: it does not render the complaint irregular (*Quin* v. *Tilton*, 2 Duer, 648; and to the like effect see *Fitch* v. *Bigelow*, 5 How. 237; *Mason* v. *Brown*, 6 *id.* 48; *Stannard* v. *Mattice*, 7 *id.* 4; *Treadwell* v. *Fassett*, 10 *id.* 184; *Lane* v. *Morse*, 6 *id.* 395; *Waggoner* v. *Brown*, 8 *id.* 212; *Straus* v. *Parker*, 9 *id.* 343; *Williams* v. *Riel*, 11 How. 376; *Webb* v. *Clark*, 2 Sand. 647).

g. If a defendant either omit to verify his answer, or verify it defectively in a case in which a verified answer is required, and the answer is served without a verification, it may be returned, and the plaintiff may proceed for want of an answer (*Strout* v. *Curran*, 7 How. 36). The proper mode to test the question, is by a motion for judgment for want of an answer (*Moloney* v. *Dows*, 2 Hilton, 247; *Hull* v. *Ball*, 14 How. 305). An answer for two defendants verified by one only, cannot be returned; it is good as to the defendant who has verified it, but if the plaintiff intends to insist that the answer is defective as to the party who has not verified it, he should give *prompt* notice of such his intention to the defendant's attorney. By keeping the answer forty days without any such notice, he waives his right to insist on the defect (*Hull* v. *Ball*, 14 How. 305). Where the answer was served without a verification, in a case in which it ought to have been verified, and the plaintiff's attorney kept the answer nineteen days, and then returned it as defective, but without pointing out the defect, and afterwards moved for judgment for default of an answer,—it was objected that after the plaintiff had kept the answer so long he could not treat it as a nullity, and that he had no right to return it unless he pointed out the defect. The objection was held well taken (*White* v. *Cummings*, 1 Code Rep. N. S. 107; 3 Sand. 716).

h. Where an answer requires to be verified, a copy of the verification, and of the signature of the person before whom the affidavit was sworn, must be served with the copy answer, or the service will be irregular; and the party on whom it is served may either return it, or move to set it aside. He has a right to assume that the original is not sworn (*Graham* v. *McCoun*, 5 How. 353; 1 Code Rep. N. S. 43; *Littlejohn* v. *Munn*, 3 Paige, 280). The copy should include verification, and the name of the officer before whom sworn; and if it omit to state the name of the officer before whom sworn, it may be treated as an unverified pleading (*Graham* v. *McCoun*, 5 How. 353; 1 Code Rep. N. S. 43; *Hughes* v. *Wood*, 5 Duer, 603, note; *Trowbridge* v. *Didier*, 4 *id.* 450).

i. The practice of moving to set aside a pleading for want of a sufficient verification, is not to be commended, although it may not be improper (*Wilkin* v. *Gilman*, 13 How. 225). If it be doubtful whether the verification is sufficient or not, it is better generally to make no question about it, and treat it as sufficient. If the verification is clearly defective, the better practice is promptly to return it, with the reasons for not receiving it. (*Id.*)

j. The term "subsequent pleading," means subsequent in order of pleading, not subsequent in order of time [when pled]; therefore, an amended com-

plaint, served *after* an answer has been put in, is not a subsequent pleading to the answer. If the complaint is not verified, and after answer the plaintiff serves an amended complaint, that does not render it incumbent on the defendant to verify his answer (*Hempstead* v. *Hempstead*, 7 How. 8; *White* v. *Bennett*, ib. 59). The facts in the latter case were these: the action was on several promissory notes. The complaint was *not* verified; but the paper served, which purported to be a copy of the complaint, indicated that the complaint had been verified. The defendant, however, served an answer without a verification; afterwards the plaintiff verified his complaint and served a copy, and then moved to strike out the answer for not being verified. The motion was denied.

a. If the complaint be not verified, yet defendant may verify his answer; and if he do so, the reply, if any, must be verified (*Lin* v. *Jacquays*, 2 Code Rep. 29; *Levi* v. *Jacquays*, 4 How. 126).

§ 157. [133.] (Am'd 1849, 1851.) *Pleadings, how verified.* The verification must be to the effect, that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true, and must be by the affidavit of the party, or if there be several parties united in interest, and pleading together, by one at least of such parties acquainted with the facts, if such party be within the county where the attorney resides, and capable of making the affidavit. The affidavit may also be made by the agent or attorney, if the action or defence be founded upon a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge, or the grounds of his belief on the subject, and the reasons why it is not made by the party. When a corporation is a party the verification may be made by any officer thereof; and when the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts. The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. And no pleading can be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

b. So much of this section as relates to the verification is modified by a law (Laws of 1854, p. 153) by which it is enacted that "the verification of any pleading in any court of record in this State may be omitted in all cases where the party called upon to verify would be privileged from testifying as a witness to the truth of any matter denied by such pleading."

a. **When the verification may be omitted.**—It should be observed that the defendant is not in any case exempted from the necessity of answering: the exemption extends only to the verification. The defendant must in every case make his answer conform to the requirement of section 149. The case of *Scovill* v. *New* (12 How. 319) was an action for a libel. The complaint, verified, alleged that the libel was published in a newspaper called *The Switch*, and that the defendant was the publisher of such paper. The defendant put in a verified answer, as is presumed, the report being silent as to that. The answer denied each and every allegation of the complaint, "except the allegation that the defendant is the publisher of *The Switch*, which allegation he declines to answer on oath, on the ground that an answer to that allegation might subject him to a criminal prosecution." A motion requiring the defendant to make his answer more definite by either admitting or denying that he was the publisher of *The Switch*, was denied by Harris, J., on the ground that the answer, by not denying, admitted that the defendant was the publisher of the *The Switch*; and, referring to the law of 1854, *supra*,—said, "If the allegation be such that the party being a witness would not be obliged to answer to its truth, he may, when pleading, deny the allegation and omit to verify." Under the law of 1854, if any one of the matters denied by the answer, is matter as to which the defendant would be privileged from testifying as a witness, then the defendant may entirely omit the verification of the answer. Thus in libel, the publication is matter as to which the defendant would be privileged from testifying; in such case, therefore, if the answer denies the publication, no verification is required (*Blaisdell* v. *Raymond*, 5 Abb. 144; 6 Abb. 148; and see *Re Tappan*, 9 How. 394; *Moloney* v. *Dows*, 2 Hilton, 247; *The People* v. *Kelly*, 24 How. 369).

b. [As the court can usually judge from the nature of the allegation whether or not a party would be privileged as a witness from testifying to the truth of it, and as the existence or non-existence of such privilege is a question of law, it is presumed that a party who omits a verification under this provision, need not, either in his pleading or any other manner, state any reason for the omission. The decisions prior to the law of 1854 (*Thomas* v. *Harrop*, 7 How. 57) do not apply to the existing state of the law.] *Lynch* v. *Todd* (13 How. 546) was an action to recover money received by the defendant contrary to the statute against betting and gaming. The complaint alleged that the defendant received the money, contrary to the provisions of the statute, but did not state whether he received it as winner or stakeholder. The complaint was verified. The defendant answered denying the allegations of the complaint. The answer was not verified. The plaintiff's attorney returned the answer, and entered judgment as for want of an answer. A motion to set aside the judgment was denied, for the reason that as it was not to be presumed the action was against the defendant as winner it did not appear on the face of the pleadings that he would have been privileged from testifying as a witness to the truth of the matter denied by his answer, and therefore, *prima facie*, his answer without a verification was irregular. That if from any cause not appearing upon the face of the pleadings the defendant was privileged from verifying his answer he should have made that appear by affidavit "and the motion founded upon it." That if the complaint had alleged the defendant won the money, then he would have been justified in answering as he did; winning by play or betting $25 or more within the space of twenty-four hours, being a misdemeanor. For whenever, from the inspection of the pleadings themselves, the court can see that an admission of an allegation in the complaint would subject the defendant to a criminal prosecution, obviously nothing further can be required. Where that is not the case, the party claiming the exemption, must establish his right to it in some other sufficient manner, as by affidavit; and such affidavit should be served with the pleading (*Blaisdell* v. *Raymond*, 5 Abb. 144; *Springsteed* v. *Robinson*, 8 How. 41). And where it can be seen on the face of the complaint that the defendant would be privileged from testifying as a witness to the truth of its allegations, the defendant may serve his answer without a verification, and without any affidavit stating the grounds for omitting the verification (*Wheeler* v. *Dixon*, 14 How. 151). The

affidavit, when necessary, need only to state generally, that an admission of the allegations of the complaint might subject him to a prosecution for a felony; he need not state the particular facts and circumstances which lead to that conclusion (*Springsteed* v. *Robinson*, 8 How. 41).

a. Whether or not in an action for divorce, charging adultery, the complaint being verified, the answer must be verified is doubtful,—Marvin, J., and Peckham, J., holding that it need not (*Sweet* v. *Sweet*, 15 How. 169; *Anable* v. *Anable*, 24 How. 92); and Clerke, J., holding that it must be (*Olney* v. *Olney*, 7 Abb. 350; see 2 R. S. 144, § 39).

b. Where the copy complaint served, has a form of verification underwritten, but without the name of any affiant or officer before whom sworn, the defendant has the right to presume that the complaint has not been verified, and may put in an unverified answer (*Hughes* v. *Wood*, 5 Duer, 603, *note*).

c. The privilege of a party from testifying as a witness, extends to the following cases:

1. Where the answer will have a tendency to expose the witness to a penal liability, or to any kind of punishment, or to a criminal charge (*Clapper* v. *Fitzpatrick*, 1 Code Rep. 69; 3 How. 314). If the fact to which he is interrogated forms but one link in the chain of testimony which is to convict him, he is privileged; and the witness need not explain how he might be criminated by the answer. If the prosecution to which he might be exposed is barred by lapse of time, the privilege ceases and the witness must answer (*Henry* v. *Salina Bank*, 1 Coms. 86). So, if the prosecution be under a foreign law (*King of the Two Sicilies* v. *Willcox*, 15 Jurist, 214). Or if the witness has been protected by statute against the use of his testimony on a trial against himself (*The People* v. *Kelly*, 24 How. 369; *Re Hackley*, 24 N. Y. 74; *Byass* v. *Smith*, 4 Bosw. 679). A defendant is not excused from verifying his answer by the complaint charging him with fraud in making the assignment; it is the object of the action to have set aside (*Wolcott* v. *Winston*, 8 Abb. 422).

2. Where the answer will subject him to a civil action, or pecuniary loss, or charge him with a debt, or would establish facts which would work a forfeiture of a debt he claims to be due to him, or subject him to a forfeiture of his estate (*Henry* v. *Salina Bank*, 1 Coms. 86). [This is modified by the provisions of the code permitting parties to the action to be witnesses.—*Ed.*] (See 2 R. S. 405.)

3. Where the answer has a direct tendency to degrade the character—[this is doubtful where the matter is material to the issue]—the privilege exists as to collateral matter (*The People* v. *Gay*, 3 Selden, 382; 15 How. 170).

e. **When the Agent or Attorney may make the Verification.**—The intention of the legislature was, that during the absence or incapacity of his client, a pleading may be verified by the affidavit of the attorney, stating only his information and belief (*Latson* v. *Lefever*, 5 Sand. 650), though the action or defence be not founded on a written instrument in the possession of the attorney, and though all the material allegations of the pleading may not be within the personal knowledge of the attorney (*Stannard* v. *Mattice*, 7 How. 4). It had been previously held, in *Hunt* v. *Meacham* (6 *id.* 400), that where a defence is not founded upon a written instrument for the payment of money only, in the possession of the attorney, he must have personal knowledge of all the material allegations of the answer, to justify a verification by him; and in *Roscoe* v. *Maison* (7 *id.* 121), it was held that the attorney can verify a pleading (giving sufficient reasons) instead of the party, whenever the party is absent from the county where the attorney resides; and such absence is itself a sufficient reason. The attorney may verify the complaint in two cases: (1) when the action is founded on a written instrument in his possession; and (2) when all the material allegations of the pleading are within his personal knowledge (*Mason* v. *Brown*, 6 *id.* 484). The attorney having possession of the notes sued upon, is sufficient to authorize him to verify the complaint (*Treadwell* v. *Fussett*, 10 *id.* 184), whether the plaintiff be within the same county or not (*Wheeler* v. *Chesley*, 14 Abb. 441). The guardian or the attorney for the guardian of an infant plaintiff may or should, it seems, verify the complaint (*Hill* v. *Thacter*,

2 Code Rep. 3; 3 How. 409; *Anable* v. *Anable*, 24 How. 92; *Rogers* v. *Cruger*, 7 Johns. 581).

a. **Verification by party to the action.**—Verifications in the forms following, have been held defective: "That he has read the foregoing complaint and knows the contents thereof, and that the same is true." It omits to state that the affiant has any knowledge whether the complaint is true or not (*Williams* v. *Riel*, 11 How. 375; 5 Duer, 601); and to the like effect is *Tibbals* v. *Selfridge* 12 How. 64. See *post*, page 313, *a*)—"A. B., the above named plaintiff, being duly sworn, says the above complaint is substantially true of his own knowledge" (*Waggoner* v. *Brown*, 8 How. 212);—that the party had read the pleading, and "the same is true, according to the best of his knowledge and belief" (*Van Horn* v. *Montgomery*, 5 *id.* 238).

b. The preceeding decisions probably overrule *Southworth* v. *Curtis* (1 Code Rep. N. S. 412; 6 How. 271). In that case the verification was as follows: P. F. S., one of the plaintiffs, being sworn, says, "That he has heard the foregoing complaint read, and that it is true, &c." To this it was objected, that the verification should have stated that the complaint was "true to the knowledge of deponent;" but the verification was held sufficient, and per Hubbard, J.: "It seems clear that when a party swears positively that a pleading is true, he must be understood as swearing that he knows it to be true."

c. The verification need not state that the deponent has read the pleading (*Patterson* v. *Ely*, 19 Cal. 28.)

d. Where all the allegations in a pleading were made on information and belief, a verification in which it was stated that the affiant "believes it to be true, all the allegations therein being made on information and belief," was held to be sufficient (*Harnes* v. *Tripp*, 4 Abb. 232).

e. Where in a pleading all the allegations are positive, and are none of them stated to be on information and belief, the verification that it is *true to his knowledge*, without adding the words, "except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true," is a sufficient verification (*Kinkaid* v. *Kip*, 1 Duer, 692; and see *Ross* v. *Longmuir*, 24 How. 49; and S. C. on appeal, 15 Abb. 326). The form of verification by a party does not imply that it appears on the face of the pleading what matters are stated on personal knowledge and what on information and belief (*Truscott* v. *Dole*, 7 How. 221).

f. When two defendants put in a joint answer, one defendant cannot swear to the want of information sufficient to form a belief on the part of his co-defendant (*Kinkaid* v. *Kipp*, 1 Duer, 692). But where in an action against two defendants they answered, "As to each and every allegation of the complaint they say they have no knowledge or information thereof sufficient to form a belief," the verification was in the following form: The defendants, "being severally sworn, says, each for himself, that the foregoing answer is true to his own knowledge, except so far as the same alleges want of sufficient information to form a belief *on the part of the other defendant*, that as to such allegation he believes the same to be true." On motion to strike out the answer on the ground of a defect in the verification, Emmet, J., denied the motion; and see *Patterson* v. *Ely*, 19 Cal. 28.

g. The preceding cases seem to be authorities for saying that the form of verification prescribed by the code need not be strictly followed; and in *Radway* v. *Mather*, (5 Sand. 655), Duer, J.,—Oakley Ch. J., concurring,—said, "I am far from admitting, that the form of verification prescribed by the code must be *literally followed*." And see *Harnes* v. *Tripp* (4 Abb. 232). But in *Waggoner* v. *Brown* (1 How. 212), it is said, The statute, as to every thing material should be strictly followed, and parties not be permitted to evade it by qualifications or reservations of any kind. The substitution of the word "*facts*" for "*matters*" in the verification would not, it seems, render the verification defective (*Whelpley* v. *Van Epps*, 9 Paige, 333).

h. **Verification out of the State.**—Where the affidavit of verification is sworn out of the State, it must (it is supposed) be authenticated as follows:—

1. It must be certified, by some judge of a court having a seal, to have been

subscribed and taken before him, specifying the time and place where and when taken.

2. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof (2 R. S. 396, §. 25; 12 Wend. 225; 3 Hill, 463).

a. An answer put in by a defendant residing out of the State must be sworn before a judge of some court having a seal, who is actually a member of such court. And that fact must be certified by the clerk of such court. A master extraordinary in England, has no power to take the oath of a person residing there, to an answer in an action pending in this State (*Lahens* v. *Fielden*, 1 Barb. 22).

b. **Verification, before whom.**—The affidavit of verification should not be sworn before the attorney in the action of the party making the verification, (*Gilmor* v. *Hempstead*, 4 How. 153; *Anon.*, *ib.* 290; see *Post* v. *Coleman*, 9 How. 64). It should be subscribed by the party making it (*Laimbeer* v. *Allen*, 2 Code Rep. 15; 2 Sand. 648); but irregularity in both the respects above named, will be waived by retaining the pleading, or omitting to move at the earliest opportunity to set it aside (*id.*); but where the verification was without a venue in the margin, and the residence of the commissioner was not stated, nor was there anything to show where it was sworn, it was held that the verification was a nullity (*Lane* v. *Morse*, 6 How. 394).

c. **Verification by attorney or agent.**—Where the verification is by the attorney, he must set forth in the affidavit of verification, his knowledge, or the grounds of his belief on the subject, and the reason why it was not made by the party (*Stannard* v. *Mattice*, 7 How. 4; *Fitch* v. *Bigelow*, 5 *ib.* 237; *Dixwell* v. *Wadsworth*, 2 Code Rep. 1; *Treadwell* v. *Fassett*, 10 How. 184; *Hubbard* v. *Nat. Pro. Ins. Co.*, 11 *id.* 149; *Bank of Maine* v. *Buel*, 14 *id.* 311; *Boston Locomotive Works* v. *Wright*, 15 *id.* 253; *Soutler* v. *Mather*, 14 Abb. 440; contra, *Smith* v *Rosenthal*, 11 How. 442; *Myers* v. *Gerrits*, 13 Abb. 106). Except that a managing agent of a corporation upon whom a summons is served, is such an officer of the corporation as is authorized to verify the answer. The verification in such case by the agent is the verification by the corporation, and need not state the deponent's grounds of belief or sources of knowledge (*Glaubensklee* v. *Hamburg & American Packet Co.*, 9 Abb. 104).

d. In *Dixwell* v. *Wordsworth* (2 Code Rep. 1), a verification by an attorney in the form following, was held sufficient: "Says he is attorney for the defendant above-named, and resides at Hyde Park in the county of Dutchess, and that said defendant resides in, but is now absent from, the said County of Dutchess (being engaged in business at Yonkers, in the county of Westchester, at which place he now remains), which absence of the defendant is the reason why this verification is not made by him. That from the information furnished this deponent by the said defendant, and from his representations (which are the grounds of this deponent's knowledge and belief in the matter), he believes the foregoing answer to be true," and see *Wheeler* v. *Chesley*, 14 Abb. 441.

e. In *Fitch* v. *Bigelow* (5 How. 237), the verification was by the attorney, and omitting the commencement, was in these words: "That the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true." It was held to be insufficient.

f. In *Mason* v. *Brown* (6 How. 481), the complaint was on a promissory note, the verification to the reply was by the attorney, and stated "that the reply is true of the deponent's own knowledge, except as to the matters stated on information and belief, and as to those matters he believes it to be true; that the ground of his belief is information derived from W. L., the payee of the note mentioned in the complaint, and which he believes to be true; that the action is founded upon a written instrument, which is in the possession of the attorney; that the reason why the affidavit was not made by the plaintiff was,

that he resided at Nashua, in the State of New Hampshire, and was not present to make it." It was held to be sufficient.

a. In *Stannard* v. *Mattice* (7 How. 4), the report does not state the nature of the action, but we infer it was based on a deed in some way; the complaint was verified by the attorney, and stated, that he "has read the foregoing complaint, and that he knows the contents thereof, and knows the same to be true, except as to the matters therein stated to be on information and belief, and as to those matters he believes the same to be true. That the reason the plaintiff does not make this affidavit is, that he resides in Albany county; deponent has more knowledge of the record, evidence, and proceedings than the plaintiff; that he, deponent, has been the plaintiff's attorney in all the proceedings set out in the complaint, and knows the existence thereof as therein stated of the deed in the clerk's office; heard the defendant admit the fact that the said deed was executed when he was not present, and when said Henry Mattice was on his way off to leave this State. Deponent knows the fact from information that Henry Mattice was unembarrassed, and owed no debts, and was in easy circumstances, in January, 1850; and that the plaintiff is a poor man, and that it will be an unnecessary expense to send to him to make oath to this complaint." It was held to be sufficient.

b. "In every case where the verification is not made by the party, the agent or attorney making it, so far as he speaks of his own knowledge he must state what knowledge he has, and when he speaks of his belief he must state the grounds of his belief. This is expressly required by the code, and we are not at liberty to dispense with it," Harris, J., *Treadwell* v. *Fasset*, (10 How. 184). Thus, where the verification of the complaint was, W. L., one of the plaintiff's attorneys, being duly sworn, says, that "the foregoing complaint is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true; and that the promissory notes mentioned in the said complaint are in the possession of the said attorneys," the verification was held insufficient; the allegation that the notes were in the attorney's possession was sufficient to authorize him to make the verification, but he ought to have gone further and stated the *grounds of his belief* in the truth of the complaint (*id;* and see *Soutter* v. *Mather*, 14 Abb. 440; *Wheeler* v. *Chesley*, 14 Abb. 441; *Myers* v. *Gerritt*, 13 Abb. 106); and where the verification was, "that the action is founded on an instrument for the payment of money only, which instrument was in his possession as attorney for the plaintiffs, neither of whom were residents of Erie county, where the attorney resided, nor was either of them capable of making the affidavit verifying the complaint,—held insufficient, for omitting to set forth his knowledge or the ground of his belief on the subject (*Hubbard* v. *Nat. Pro. Ins. Co.*, 11 How. 149). A different opinion was expressed by T. R. Strong, J. (*Smith* v. *Rosenthal*, 11 *id.* 442). That case was an action on a promissory note, against the defendant as maker; the complaint was upon information and belief. The verification was by one of the attorneys of the plaintiffs, who stated, in addition to what is required in an affidavit of verification by a party, that he "has in his possession the promissory note on which the action is brought." That was all that the verification stated, and it was held sufficient, and that it was to be implied from his statement that the possession of the note furnished the ground of his belief, and the reason why the verification was not made by the party.

c. A verification as follows was held sufficient: A. L. M. "says that the above complaint is true to his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true. That the plaintiff is now absent from this State, which is the reason why this verification is not made by him; that deponent's knowledge is derived from possession of the notes and from other sources" (*Myers* v. *Gerritts*, 13 Abb. 106).

d. Where the verification was by the attorney, and stated "that said plaintiff is not now within the county of Albany, where deponent resides; that this action is founded on a written instrument for the payment of money only,

to wit, the promissory note set forth and described in the foregoing complaint, and which note is now in the possession of deponent as such attorney; that the said complaint is true of deponent's own knowledge, except," &c.—it was held insufficient, because it did not state the grounds of the deponent's knowledge (*Meads* v. *Gleason*, 13 How. 313).

a. A verification, "that he is attorney of the plaintiffs in this action; that he knows the contents of the foregoing complaint, and that the same is true except as to matters stated on information and belief, and as to those matters he believes it to be true; that the grounds of deponent's knowledge are the admissions of the defendant to him, as also from other persons; and that the reason why the plaintiffs did not verify this complaint is that they are absent from this county,"—held insufficient for not saying the complaint was true to the knowledge of the deponent, and that the absence of that allegation was not supplied by the subsequent statement of the grounds of his knowledge (*Tibballs* v. *Selfridge*, 12 How. 64).

b. Where the verification was by an agent, who swore that the facts set forth were true of his own knowledge, and that the reason of his making the affidavit was that the facts were fully known to him, and but partially to the plaintiff, the verification was held sufficient, and that it was not necessary to aver the absence of the party when the pleading is verified by an agent having a full knowledge of the facts, and that such an averment was only necessary when the affidavit is made by the agent on information and belief (*Gourney* v. *Wersuland*, 3 Duer, 613; *Ross* v. *Longmuir*, 24 How. 49, rev'd 15 Abb. 326).

c. Where a verification is made by an agent of the party, and it appears the party has several agents, there is nothing which renders it imperative that the verification should be made by the agent who knows most about the matter (*Drevert* v. *Appert*, 2 Abb. 165). The attorney in the action may verify on behalf of his non-resident client, although it appear that the client has a resident agent, and that it is through him the attorney has obtained his instructions (*Id.*).

d. The attorney verified the answer, and stated that "deponent's *knowledge* of all the material allegations in the answer is founded upon communications made to him by the defendant through his son," that the answer was true of deponent's own knowledge, except, &c.—Harris, J., denied a motion to set aside the answer, on the ground that it was defectively verified, for the reason that where it is doubtful whether the verification is sufficient or not, the better plan is to make no question about it and treat it as sufficient (*Wilkin* v. *Gilman*, 13 How. 225).

e. A verification as follows was held sufficient: F. C. B. "says he is attorney for plaintiff in the above action, that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true. That the reason why this verification is not made by plaintiff is that the action is founded on a written instrument for the payment of money only, and such instrument is in the possession of deponent, and that his knowledge is derived from said instrument and from information received by deponent from plaintiff, and that the grounds of deponent's belief are the statements of plaintiff to deponent" (*Wheeler* v. *Chesley*, 14 Abb 442).

f. A verification as follows was held insufficient: J. W. B. "says he is one of the firm of B. & B. attorneys for plaintiff in this action, that the foregoing complaint is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. That this action is founded on a written instrument for the payment of money only, namely a promissory note, and such instrument is in possession of deponent's firm, as attorneys for plaintiff" (*Soutter* v. *Mather*, 14 Abb. 440).

g. A verification as follows was held sufficient: A. B. says "he is agent for defendant in this action, that the foregoing answer is true to his own knowledge (except as to those matters therein stated on information and belief, and as to those matters he believes it to be true). That the reason why the verification is not made by defendant is that all the allegations in the answer are within the personal knowledge of deponent, and not within the personal

knowledge of defendant" (*Ross* v. *Longmuir* 15 Abb. 326, rev'g 24 How. 49). The verification would have been sufficient without the words in parenthesis (15 Abb. 327, *note*).

a. In *Bank of Maine* v. *Bull*, 14 How. 311, the complaint was verified by the attorney, and after the usual form of verification by a party; to the verification was added: "And deponent further says that the drafts or bills of exchange set out in the complaint are both in the possession of deponent, and *he has heard defendant in talking of the same* admit or at least assume that they were genuine, and that he had had the money thereon from the plaintiff, *and the same information* has been communicated to the deponent by the plaintiff;" held by Gould, J. to be insufficient. It gave *some* grounds of belief, but for *parts* of the complaint essential to the plaintiff's right of action, he did not profess to give any grounds of his belief.

b. Where the verification of a complaint was by the attorney, and stated that the action was on the official bond of the defendant Allen, as sheriff, &c., that a certified copy of the bond was in the possession of the deponent, that the plaintiff was not within the county of the deponent's residence, but resided in the county of M. and was not capable of making the verification, that deponent had read the complaint and knew the contents thereof; that the same was true of his own knowledge except as to the matters stated on information and belief, and as to those matters he believed it to be true, it was held insufficient because it did not set forth the deponent's knowledge of the facts stated in the complaint, or the grounds of his belief on the subject (*The People* v. *Allen*, 14 How. 334). In a subsequent case (*Boston Locomotive Works* v. *Wright*, 15 How. 253), an action on a promissory note against the makers and indorsers, the answer was verified by two defendants on their own behalf, and by one of those two, W. H. R. on behalf of M. R., the third defendant, as follows: "says he is agent for said M. R. and has the charge of said M. R.'s business in said county, that said M. R. does not reside in and is not now within said county, and deponent is more familiar with the matter upon which this action is founded than said M. R.; deponent's knowledge, information, and belief therein being founded in communication with the plaintiff's attorney and others, and it is for the reason above mentioned that this answer is not verified by said M. R. in person." The plaintiff's attorney gave notice that he deemed the verification insufficient, disregarded the answer, for such insufficiency, and entered judgment. On motion to set aside that judgment, E. Darwin Smith, J., held the verification insufficient, because, (1) it did not show in what way or to what extent W. H. R. was agent of M. R. or for what purpose; (2) W. H. R. did not profess to have any knowledge, or did not state any in respect to the material allegations of the pleading.

c. **Verification by all plaintiffs or defendants.**—Where several join as plaintiffs, all not united in interest should verify the complaint, to render it complete as a verified complaint (*Gray* v. *Kendall*, 5 Bosw. 666; 10 Abb. 70). The rule is the same with respect to a complaint as to an answer. (*Id.*) Where one of several parties united in interest makes the verification, he should state that he is acquainted with the facts (*Kelly* v. *Bowman*, Transcript, 18 July, 1861; see, *contra*, 6 How. 278). Where the maker and indorser of a promissory note are sued together, the complaint being verified, if they put in a joint answer, it must be verified by both, or the answer will on motion be held to be only the answer of the defendant who verified it; because the defendants are not united in interest, so that a verification by one would be sufficient for both (*Andrews* v. *Storms*, 5 Sand. 609; *Alfred* v. *Watkins*, 1 Code Rep. N. S. 343; *Hull* v. *Ball*, 14 How. 305; and see *Reed* v. *Butler*, 2 Hilton, 589).

d. And in an action against husband and wife, where the complaint is verified, unless the wife is a mere nominal party, she should join with the husband in verifying the answer (*Youngs* v. *Seely*, 12 How. 397; *Reed* v. *Butler*, 2 Hilton, 589).

e. **Writing, numbering, and indorsing pleadings.**—Pleadings are to be in the English language (2 R. S. 275, § 9), legibly written, and the folios, where the pleading exceeds two folios in length, distinctly marked (Rules 20 and 56); the attorney's name and residence are to be indorsed. (*Id.* 10.)

§ 158. [135.] (Am'd 1849, 1851.) *Items of account. Particulars.*

It shall not be necessary for a party to set forth in a pleading, the items of an account therein alleged; but he shall deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath, or that of his agent or attorney, if within the personal knowledge of such agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge, may order a "further account," when the one delivered is defective; and the court may in all cases order a bill of particulars of the claim of either party to be furnished.

a. "The use of a bill of particulars is to apprise a party of the specific demands of his adversary, when the pleadings are general and leave uncertain what is particularly demanded" (*The People* v. *Monroe*, Com. Pleas, 4 Wend. 200). "It should in general contain a precise and detailed account of the several items which constitute the ground of the plaintiff's demand, specifying the dates, somewhat in the nature of tradesmen's bills; and where there have been mutual dealings, or payments have been made on account, the particulars for which it is intended to give credit, and the balance for which the plaintiff seeks to recover, should also be stated" (Bagley's Pr. 204). It "has the effect to restrict the proofs and limit the recovery to the matters set forth in it. It is regarded as an amplification of the pleading to which it relates, and it is to be construed as *forming a part of it.* No proof should be allowed of matters not within the bill of particulars" (*Bowman* v. *Earle*, 3 Duer, 694). "A bill of particulars is indeed considered, in some respects, an amplification of the declaration, but it is considered sufficient if it fairly apprise the opposite party of the nature of the claim, so that there can be no surprise" (*Brown* v. *Williams*, 4 Wend. 368.) [Except in the sense that the bill of particulars gives a certainty to the pleading, it can scarcely be regarded as forming a part of it; see *Booth* v. *Howard* (5 Dowl. 438), and see *Farey* v. *Lee*, 10 Abb. 143, in note to § 160, *post.*]

b. It is not the office of a bill of particulars to state the grounds upon which the plaintiff claims to recover, but only to point out the items and particulars embraced in his claim, so as to identify them (*Seaman* v. *Low*, 4 Bosw. 338). It is sufficiently specific if it apprizes the opposite party of the evidence to be offered (*Smith* v. *Hicks*, 5 Wend. 48). The several items should be given with all practicable particularity,—the date and amount and general character of each, as proposed, to be established by proof on the trial (*Kellogg* v. *Paine*, 8 How. 329).

c. A bill of particulars as follows: to the first count damages $5,000; balance due on settlement, $5,000; money received at New Orleans on account of plaintiff, $5,000, without specifying any date, held insufficient (*Wetmore* v. *Jennys*, 1 Barb. 53).

d. In an action for converting plaintiff's goods, the defendant is not entitled, as of course, to be furnished by plaintiff with a particular statement of the goods alleged to have been converted; but the court may, in its discretion, order the plaintiff to furnish such a statement (*Blackie* v. *Neilson*, 6 Bosw. 681). The court, however, will not order such a statement where it appears the plaintiff has already furnished the best description in his power, and that the defendant has better knowledge on the subject than the plaintiff. (*Id.*)

a. In an action to recover the deposit upon the purchase of an estate, the defendant is entitled to particulars of the objections to the title arising from matters of fact, but not those which are matters of law (*Robson* v. *Rowland*, 1 Horn & Hurl. 105). In an action for a breach of warranty of soundness, order for particulars of unsoundness refused (*Pylie* v. *Stephen*, 8 Dowl. Pr. Cas. 771; 6 M. & W. 814).

b. After a dissolution of a partnership and an action brought by the partner entrusted with the settling of the business, against his co-partner for an account, the court will not order a general bill of particulars to be furnished. But if in such a case the complaint states claims not evidenced by the books of the firm, and particulars of such claims are sought, the application should be special, and directed to the specific transactions of which particulars are sought, and the moving affidavits should state the grounds creating the necessity for the application (*Depew* v. *Leal*, 5 Duer, 663).

c. A plaintiff is not bound to furnish particulars of set-offs, or payments by defendant, with which he (plaintiff) volunteers to credit him (defendant) in his complaint (*Williams* v. *Shaw*, 4 Abb. 209; *Giles* v. *Betz*, 15 Abb. 285), and where, from the nature of the action, the knowledge of the facts on which the plaintiff's claim rests is more with the defendant than with the plaintiff, the latter will not be required to furnish a bill of particulars (*Young* v. *De Mott*, 1 Barb. 30). In an action to recover damages for causing death by wrongful act, the court refused to order the plaintiff to furnish a bill of particulars (*Murphy* v. *Kipp*, 1 Duer, 659).

d. An order on the plaintiff to deliver a bill of particulars of the account mentioned in the complaint within a time specified, and with a stay of proceedings, does not operate *per se* to extend the defendant's time to answer (*Platt* v. *Townsend*, 3 Abb. 9; 5 Duer, 668).

e. The further account which this section permits to be called for, may be enforced by motion after all the pleadings are put in, and any time before trial (*Yates* v. *Bigelow*, 9 How. 186).

f. After a demand of a copy of the account and one is delivered, if the defendant is not satisfied therewith, he should move for a further account; but he cannot then move to have the complaint made definite and certain (*McKinney* v. *McKinney*, 12 How. 22).

g. When an account is furnished in pursuance of a demand which is deemed defective, the order requiring a more particular statement of the account, should point out the parts or items in respect to which a further account is required (*Kellogg* v. *Paine*, 8 How. 329).

h. The better practice is, for a party who intends to preclude his adversary from proving an account on the ground that he has not complied with a demand or an order for the particulars of such account, to apply for an order to that effect *before the trial*, so as to have the question settled prior to the trial. (*Id.*)

i. A party claiming on an account stated who refuses to furnish the items of his demand, should be precluded from giving evidence of such items further than may be necessary to prove the settlement of the sum due (*Goings* v. *Patten*, 17 Abb. 339).

j. The refusal of the court to allow a party to serve a bill of particulars after his time to do so has expired is not reviewable on appeal. (*Id.*)

k. A bill of particulars forms no part of the record (*Kreiss* v. *Seligman*, 8 Barb. 440).

§ 159. [136.] *Pleadings, how construed.*

In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view of substantial justice between the parties.

a. The code by requiring pleadings to be liberally construed does not mean that substantial averments may be omitted and the omission disregarded (*Koenig* v. *Nott*, 2 Hilton, 324; *Spear* v. *Downing*, 34 Barb. 523; 12 Abb. 437). A verified pleading must be construed so as to make all its parts, if possible, harmonize with each other (*Ryle* v. *Harrington*, 4 Abb. 421).

b. Words used in a pleading, as in a contract, should be construed according to their popular sense (*Woodbury* v. *Sackrider*, 2 Abb. 405; *Mann* v. *Morewood*, 5 Sand. 557); but a pleading must be construed according to what it says, and not what the pleader intended (6 Hill, 240; *Gould* v. *Glass*, 19 Barb. 185). "The law does not presume that a party's pleadings are less strong than the facts of the case will warrant" (*Cruger* v. *The Hudson River R. R. Co.*, 2 Kernan, 201; *Koenig* v. *Nott*, 2 Hilton, 324); and where the plaintiff so frames his complaint as to render it doubtful whether he intends to rely on a cause of action on tort or contract, that construction should prevail which is most unfavorable to the plaintiff (*Ridder* v. *Whitlock*, 12 How. 212; see *Munger* v. *Hess*, 28 Barb. 75); when the statement of facts in a complaint will support either of two actions, and it is doubtful which the pleader intended, the demand for judgment and and the summons may be consulted with a view of ascertaining which action was intended (*Rodgers* v. *Rodgers*, 11 Barb. 596; *Chambers* v. *Lewis*, 2 Hilton, 591; 10 Abb. 206; 11 Abb. 210; *Cornes* v. *Harris*, 1 Coms. 223). And where the complaint was so framed that it was a matter of doubt whether it was intended as consisting of one or of two causes of action, but it contained allegations constituting a cause of action on contract and a cause of action for a tort, held that all the allegations not material to the cause of action on contract might be struck out as irrelevant or redundant (*Hunter* v. *Powell*, 15 How. 221). Generally where an equivocal or ambiguous expression is used, it is to be construed against the party using it (13 Eng. Com. Law. Rep. 175; 30 *id.* 243; *Bates* v. *Roeskrans*, 23 How. 98; *Beach* v. *Bay State Co.*, 10 Abb. 71); but if the opposite party pleads over, then that construction is to be adopted which will support the previous pleading. (*Id.*) In *Allen* v. *Patterson* (3 Selden, 480), the court remarked, "It is said that every thing shall be taken most strongly against the party pleading, or rather that if the meaning of the words be equivocal they shall be construed most strongly against the party pleading them; for it is to be intended that every person states his case as favorable to himself as possible. This must be taken with some qualification; for the language of a pleading is to have a reasonable intendment and construction; and when a matter is capable of different meanings, that shall be taken which will support the pleading, and not the other which will defeat it;" and see *Sheddon* v. *Patrick* (28 Eng. Law and Eq. R., 68). It is not competent to the party pleading to insist, to the prejudice of his opponent, upon a construction that will make his pleading bad (*Moore* v. *Forster*, 5 Com. B. 220; and see 5 Beav. 41; 3 *id.* 284; 2 Myl. & Cr. 145). The law will not assume in favor of a party anything he has not averred (*Cruger* v. *Hudson River R. R. Co.*, 2 Kernan, 201).

c. Where the parties go to trial on an issue of fact, the pleadings objected to will be construed with greater liberality than where the objection has been pointed out by demurrer (*St. John* v. *Northrup*, 23 Barb. 26; and see *Cady* v. *Allen*, 22 Barb. 394; see *ante*, p. 304 *d*); or motion (*Wall* v. *Buffalo Water Works*, 18 N. Y. 119).

d. General statements in a complaint, which are evidently qualified and intended to be qualified by subsequent parts, must be taken accordingly with such qualification, and not as absolutely as if the qualification were not added (*Page* v. *Boyd*, 11 How. 416). A general allegation followed by a specific one is governed by the latter. And although the specific allegation is unnecessary, yet having been made and the general allegation being qualified by it, it cannot be rejected as surplusage; thus where the condition was that all suits in the supreme court were to be discontinued, meaning three ejectment suits in the name of P. M. H., one against Norman P., one against Nelson P., and one against S. D., and the allegation of performance was that all suits in the supreme court were discontinued, as in the condition of said bond stipulated meaning these ejectment suits in the name of P. M. H. against Nelson P. and

one against S. D., nothing being said as to the suit against Norman P. and it not appearing to have been in any way discontinued, it was held on demurrer alleging for cause that the complaint did not show performance of the stipulations as to the suit of Norman P., that the demurrer was well taken and that the complaint was defective (*Hatch* v. *Peet*, 23 Barb. 575).

a. Where there is an averment of a legal conclusion at variance with an admitted fact, the fact will be regarded and the legal conclusion disregarded (*Jones* v. *The Phœnix Bank*, 4 Selden, 235; *Robinson* v. *Stewart*, 10 N. Y. 189); and the averment of a mere conclusion without any fact to warrant it, is always disregarded (*Schenk* v. *Naylor*, 2 Duer, 678; and see *Mann* v. *Morewood*, 5 Sand. 566; *Garr* v. *Selden*, 4 Coms. 91; *Sibles* v. *Waffle*, 16 N. Y. 180; *Burrall* v. *Bowen*, 21 How. 378); and this has been held of an allegation that the defendant *is indebted* or *remains indebted* (*Chamberlain* v. *Kaylor*, 2 E. D. Smith, 139); that a defendant was liable under a special contract (*Lewis* v. *Acker*, 11 How. 163); that an instrument was a mortgage (*Fairbanks* v. *Bloomfield*, 2 Duer, 354); and so of the allegation "unlawfully converted" (*id.* 354), or that an obstruction was a flagrant nuisance (*Hentz* v. *L. I. R. R. Co.*, 13 Barb. 647, and see in note to § 160, *post*, *Decker* v. *Matthews* (2 Kernan, 321), *St. John* v. *Griffith* (1 Abb. 40).

b. A positive denial of fraud in an answer, will not prevail against admissions in the same answer of facts, which show that the transaction was fraudulent (*Robinson* v. *Stewart*, 10 N. Y. 189; and see *Wight* v. *Prescott* (2 Barb. 196); *Dykers* v. *Woodward* (7 How. 318).

c. A complaint which alleges that "the sheriff suffered and permitted such person to escape and go at large," states a voluntary and not a negligent escape (*Loosey* v. *Orser*, 4 Bosw. 391).

d. In an action for damages caused by defendant negligently leaving a ditch in a highway open, the complaint stated that "plaintiff fell into it without any fault or want of care on his part." The answer denied "that the plaintiff without any fault or want of care did fall therein." This was construed to put in issue the falling into the ditch as well as the exercise of proper care by the plaintiff (*Wall* v. *Buffalo Water Works Co.*, 18 N. Y. 119).

e. Where a party is shown to be the owner of property, on a certain day it need not be alleged that he continued such owner, the fact of his continuing to be owner will be presumed and need not be alleged (*Van Rensselaer* v. *Bonesteel*, 24 Barb. 366).

f. There is in substance no difference between an averment that by means of certain specified frauds of defendants (which are charged to have been practiced with intent to defraud the public generally), the plaintiff was induced to make and did make a particular purchase, and an averment that defendants, by means of the same frauds, induced plaintiff to make such purchase (*Cross* v. *Sackett*, 2 Bosw. 618).

g. An averment in pleading that an agent acted by due authority, is sustained by proof of subsequent ratification (*Hoyt* v. *Thompson's Executors*, 19 N. Y. 208).

h. To state in a pleading, the nature and source of the information upon which the party relies in making an averment on information and belief, does not vitiate the allegation, nor does prefixing the word therefore to an allegation render the allegation the less an allegation of fact (*Borrowe* v. *Milbank*, 5 Abb. 28; see *ante*, p. 196 *dd*).

i. A complaint, stating a promissory note, whereby the maker promised to pay the defendants named, "trading and doing business under the partnership name or firm of C. J. & Co., and that said note was duly indorsed by said defendants by their said partnership name, sufficiently avers the partnership; an answer, denying "the indorsement in the complaint alleged," does not put the partnership in issue (*Anable* v. *Conklin*, 25 N. Y. 470).

j. An allegation that the statement was published "with an intent to defraud those who might become purchasers," held not to mean a statement to defraud the public generally (*Morse* v. *Swits*, 19 How. 276).

a. The allegation that defendant subscribed to so many shares of stock implies that defendants were owners of those shares (*Oswego Plank R'd. Co.* v. *Rust*, 5 How. 390).

b. An allegation "that Abner Sanford was appointed to collect the money * * * and that no personal demand was made by the said Abner Sanford," does not imply that *no* personal demand *was* made by any person authorized to receive the sum demanded, and other than the said Abner Sanford" (*Manice* v. *Mayor of N. Y.*, 4 Selden, 132).

c. An allegation that plaintiff's intestate was in the employ of defendants *as an engineer upon* their locomotive while it was in their service, was held sufficient to show the relation of master and servant between the parties (*M'Millan* v. *Saratoga R'lroad Co.*, 20 Barb. 452).

d. From an allegation that plaintiff was the owner and entitled to certain real estate it cannot be inferred that he ever was in possession of such real estate (*Carpenter* v. *Stillwell*, 3 Abb. 460).

e. In an action on a policy of insurance against fire, proof that there was no force-pump in the building destroyed, is admissible under an allegation in the answer that the plaintiff on his application for insurance warranted that the building contained such force-pump, and that he removed the same before the fire (*McComber* v. *The Granite Ins. Co.*, 15 N. Y. 495).

f. An allegation that certain drafts were accepted by a corporation, by their treasurer, includes an averment of authority to the treasurer to accept the drafts (*Partridge* v. *Badger*, 25 Barb. 146).

g. Where it was alleged that there was an instrument in writing purporting to be the last will and testament of J. M., deceased, and to be duly executed by him and attested as such, that the instrument was admitted to probate as a will, of real and personal estate; that letters testamentary were issued, and that the persons named as executors qualified, it was held that the allegation was in substance and effect "not only that there was an instrument in writing which purported to be a will and to be duly executed and attested as such, but that by the decree of the proper court having jurisdiction in such matters, it had been adjudged and declared that there is a will (*Mason* v. *Jones*, 13 Barb. 467).

h. Where the covenant was that the legislature had a *right* to convey, and the breach was that the legislature had no authority to convey, held sufficient; (*Fletcher* v. *Peck*, 6 Cranch, 87; 2 Code R. 316; 2 Curtis, 330).

i. Where a deed is set up in an answer, it is not sufficient to say it was "executed in due form of law:" delivery and acceptance also must be averred (*Whitlocke* v. *Fiske*, 3 Edw. Ch. 131; and see 19 N. Y. 232; 30 Barb. 492).

j. Knowledge of the party means of the party making the contract (*Hickman* v. *Fernie*, 1 Horn & Hurl. 153; 3 M. & W. 517). Where the plaintiff avers facts amounting to an excuse for not giving notice of non-payment, and proves such facts on the trial, he may recover although he has also averred notice and gives no proof thereof. The latter averment may be regarded as surplusage (*Purchase* v. *Mattison*, 6 Duer, 587).

k. The words "as such attorney" amount to nothing, as it is a question of construction upon the facts whether or not the employment was in that character (*Ex parte Webb*, 1 New Pr. Cas. 213).

l. Allegation of *making* a written instrument implies a delivery (*Prindle* v. *Caruthers*, 15 N. Y. 426); allegation that defendant *accepted* implies a due acceptance (*Graham* v. *Machado*, 6 Duer, 514; *B'k of Louville* v. *Edwards*, 216); *no award* means no valid award (*Dresser* v. *Stansfield*, 14 M. & W. 822); *no memorial* means no valid memorial (*Hicks* v. *Cracknell*, 3 M. & W. 77); *taking* means an unlawful taking (*Childs* v. *Hart*, 7 Barb. 372); *conversion* means wrongful conversion (*Young* v. *Cooper*, 20 Law Jour. R. Ex. 136; 6 Ex. 62); *indorsed* means lawfully indorsed (*Mechanics B'k Asso.* v. *Spring Valley Shot Co.*, 25 Barb. 521; and see *Price* v. *McClave*, 6 Duer, 544; *B'k of Geneva* v. *Gulick*, 8 How. 57); and includes delivery (*B'k of Louville* v. *Edwards*, 11 How. 216; see 8 M. & W. 494); *entry* on land means lawful entry (*Turner* v. *McCarthy*,

4 E. D. Smith, 248); *sold* implies "a sale and delivery" (*Clark* v. *Meigs*, 13 How. 467); *negligence* includes gross as well as ordinary negligence (*Nolton* v. *West. R. R. Corp.*, 15 N. Y. 450; *Edgerton* v. *N. Y. & Harlem R. R.* 35 Barb. 389); *overpayment* means an overpayment in money (*Mann* v. *Morewood*, 5 Sand. 557); *sole heir at law* implies heirship and only heir (*St. John* v. *Northrup*, 23 Barb. 26); *signed* means made, applied to a promisory note (*Price* v. *McClave*, 6 Duer, 544; *B'k of Geneva* v. *Gulick*, 8 How. 57); *lease in writing* means a parol lease (*Vernam* v. *Smith*, 15 N. Y. 332); *furnished proof of* interest does not imply an interest (*Williams* v. *Ins. Co. of N. A.*, 9 How. 374); stating the recovery of a judgment and that it is a lien, implies that it was docketed (*Cady* v. *Allen*, 22 Barb. 394).

a. **To what period of time allegations in pleadings refer.**—The allegations in a pleading, in the absence of any averment to the contrary, are construed as referring to the time when the pleading is verified or served, and not to the time when the action was commenced, or the accrual of the cause of action (*Fisher* v. *Ford*, 12 Adol. & El. 654; *Faithful* v. *Ashley*, 1 Q. B. 183; *Prindle* v. *Caruthers*, 15 N. Y. 426; *Wheeler* v. *Heermans*, 3 Sand. Ch. 597; *Rice* v. *O'Conner*, 10 Abb. 362). To an allegation of the complaint that the defendant *is* the owner, an allegation in the answer that he *is not* the owner, was held uncertain, and that it should go further and allege that he was not such owner at the time of the commencement of the action (*Martin* v. *Kanouse*, 2 Abb. 329; see *Dendy* v. *Powell*, 3 M. & W. 442; *Moltan* v. *Torrance*, 9 Wheat. 537; *Warwick* v. *Beswick*, 10 B. & C. 676; *Boyd* v. *Weeks*, 2 Den. 222; *ante* p. 292 *a*).

§ 160. [137.] (Am'd 1849.) *Irrelevant or redundant. Indefinite or uncertain.*

If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby. And when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

b. It has been doubted whether this section relates to defences which consist of mere denials (*Otis* v. *Ross*, 8 How. 195); or to demurrers (*Smith* v. *Brown*, 6 *id.* 383).

c. **Redundant.**—Redundant and irrelevant are not equivalent terms. Matter which is irrelevant, it is true, is also redundant: but the converse is by no means true. A needless repetition of material averments is redundancy; although the facts averred, so far from being irrelevant, may constitute the whole cause of action (*Bowman* v. *Sheldon*, 5 Sand. 660). Allegations of aggravating circumstances in an action for malicious prosecution held not to be redundant (*Brockleman* v. *Brandt*, 10 Abb. 141); held contra in action for breach of promise of marriage (*Smith* v. *Waite*, 7 How. 227; and see *ante*, p. 000). Where to a complaint alleging want of probable cause, the answer after denying the allegation of the complaint, set up as a defence that defendant had probable cause, held that the latter defence was redundant (*Root* v. *Harris*, 12 Abb. 446; see *Benedict* v. *Seymour*, 6 How. 303).

d. **Irrelevant.**—Matter is *irrelevant* in a pleading which has no bearing on the subject-matter of the controversy, and cannot affect the decision of the court (*Fabricotti* v. *Launitz*, 1 Code Rep. N. S. 121; *Stafford* v. *Mayor of Albany*, 6 Johns. 25; *Van Rensselaer* v. *Brice*, 4 Paige, 177; *Perrine* v. *Farr*, 2 Zab. 356; *Lee B'k* v. *Kitching*, 11 Abb. 435; *Cahill* v. *Palmer*, 17 Abb. 196). If material only as affecting the damages (*Root* v. *Foster*, 9 How. 37), or the costs, it is not irrelevant (*Van Rensselaer* v. *Brice*, 4 Paige, 177). Hence, the true test of the materiality of averments sought to be struck out is, to inquire

whether such averments tend to constitute a cause of action or defence, and if they do, they are not irrelevant (*Ingersoll* v. *Ingersoll*, 1 Code R. 102; *Averill* v. *Taylor*, 5 How. 476; 1 Code Rep. N. S. 404; *Minor* v. *Terry*, 6 How. 208).

a. Where a fact is stated in a pleading, which of itself constitutes a cause of action (or a defence to the action), the intent to rely upon it is a necessary inference. No allegation to that effect is requisite, and if made it is irrelevant and redundant (*Bridge* v. *Payson*, 5 Sand. 216).

c. If a defence is sufficient in itself, it will not be rendered irrelevant by being united with another in the same answer. Thus, in an action to recover possession of personal property, an answer which set up as a first defence a denial of any knowledge or information sufficient to form a belief as to the plaintiff's title, and as a second defence a claim of lien for advances made on the property,—it was held that the second defence did not render the first irrelevant (*Townsend* v. *Platt*, 3 Abb. 327).

d. A defence is not irrelevant or redundant because it contains matter which may be proved under a general denial (*Hollenbeck* v. *Clow*, 9 How. 292; see however *Benedict* v. *Seymour*, 6 How. 304).

e. If a party make distinct though immaterial allegations, and in a traversable form, he cannot move to strike out his adversaries' pleading taking issue thereon (*King* v. *Utica Ins. Co.* 6 How. 485; and see *Anon.* 2 Code Rep. 67 - *Doran* v. *Dinsmore*, 20 How. 503).

f. Where the plaintiff applies to strike out a denial as being a denial of an immaterial allegation,—in such a case it seems a good test to ask the plaintiff if he will consent to strike out the allegation in his complaint; if he consent, then to grant his application; if he will not consent, then to deny his application. Such a course is suggested by the cases of *Cutts* v. *Surridge* (9 Q. B. 1015; 4 Dowl. & L. 642; 11 Jur. 585); and *Tallis* v. *Tallis* (16 Jur. 744; 21 Law. Jour. Rep. N. S. Q. B. 269; 11 Eng. Law and Eq. Rep. 457). In a note to *Tallis* v. *Tallis* (18 Eng. Law & Eq. R. 154) it is said, it is not a general rule of practice, that where the plea traverses an allegation in the declaration, and the plaintiff demurs to the plea, the plaintiff will be put to his election, whether the demurrer shall be set aside as frivolous or the allegation traversed be struck out; though this will be done if the plaintiff's pleading appear to be so framed as to entrap or unfairly perplex the defendant.

g. After stating the facts on which the pleader relies to establish his cause of action or defence, it may sometimes be necessary, to ensure certainty, to add the conclusion which he draws from such facts; but the statement of such conclusion will never vitiate the pleading, and probably would not be struck out as redundant. Thus, where a complaint, after stating the facts, proceeded: "Whereupon the plaintiff became entitled to the possession of the said note," the court said, "It was probably not necessary to state this conclusion upon the facts stated; but it can do no harm" (*Decker* v. *Matthews*, 2 Kernan, 321; *Gould* v. *Williams*, 9 How. 51). And by Roosevelt, J. (*St. John* v. *Griffith*, 1 Abb. 40): "I see no objection to the plaintiff's stating, in addition to the fact, what he considers to be its legal effect; such a statement may or may not be an 'unnecessary repetition,' according to circumstances." (See *Meyer* v. *Collem*, 28 Barb. 230; *Dows* v. *Hotchkiss*, 10 N. Y. Leg. Obs. 287; *Lee Bank* v. *Kitching*, 7 Bosw. 664; 11 Abb. 439; where such an allegation was held to be irrelevant.)

h. An allegation that "the said H. has sometimes pretended that he furnished the said C. & C. the means to pay the said draft, or repaid them therefor; but such allegation is untrue, and all moneys received by them, said C. & C., from said H. to be applied in any way towards such draft, were the proceeds of a discount of a new draft, upon said C. & C." &c.—was struck out as irrelevant (*Clark* v. *Harwood*, 8 How. 470). In an action against an endorser of a note, an answer that the defendant did not receive the notice of presentment and dishonor, would be irrelevant (*Edgerton* v. *Smith*, 3 Duer, 614).

i. Where a plaintiff has an option either to sue on contract or tort, and he elects to sue on contract in the form for money received to plaintiff's use, all allegations as to fraud on the part of the defendant, in reference to the alleged

cause of action, are redundant and irrelevant (*Sellar* v. *Sage*, 12 How. 531; 13 *id.* 239; *Lee* v. *Elias*, 3 Sand. 736; and see *Lamoreaux* v. *Atlantic Mut. Ins. Co.*, 3 Duer, 681).

b. In an action to recover possession of chattels, an answer denying plaintiff's title and then averring that the chattels were deposited by plaintiff with defendant as collateral security for moneys advanced and still due, was held not objectionable as containing redundant or irrelevant matter (*Townsend* v. *Platt*, 3 Abb. 325).

c. **Uncertainty.**—Wherever the pleader desires to show a conclusion different from that which the law would, *prima facie*, draw, he must state the facts which remove such *prima facie* conclusion; but if, instead of stating the facts, the pleader merely states the conclusion, the fault is uncertainty, not insufficiency, and the remedy of the opposite party is, by motion, to have the pleading made certain, by amendment (*Martin* v. *Kanouse*, 11 How. 568; 2 Abb. 327; see *Eno* v. *Woodworth*, 4 Coms. 253).

d. **Time.**—If the *time* when a fact happened is material to constitute the cause of action, it should undoubtedly be stated. The fact without the time would be insufficient to constitute the cause of action; but if the time is immaterial, a demurrer will not lie for omitting to state it (*The People* v. *Ryder*, 2 Kernan, 439). The remedy is by motion to make the pleading definite and certain (*Id.*; and see, to the same effect, *Barnes* v. *Mattison*, 5 Barb. 378; *Nash* v. *Brown*, 18 Law Jour. Rep. N. S. [C. P.], 62; *Payne* v. *Banner*, 15 *id.* 227; *Marshall* v. *Powell*, 8 Law Times [Q. B.], 159; and 13 Jurist, 126). The day on which it is alleged, in pleading under a videlicet, that an act is done, is usually immaterial; and if a day stated under a videlicet is inconsistent with any allegation of the pleading, the allegation of the day may be regarded as surplusage (*Lester* v. *Jewett*, 1 Kernan, 460; *Lyon* v. *Clark*, 4 Selden, 148; *Ive* v. *Scott*, 9 Dowl. Pr. C. 993; *Dubois* v. *Beaver*, 25 N. Y. 123). Allegations of time are evidence, as admissions against the party making them (*Andrews* v. *Chadbourne*, 19 Barb. 147).

e. In an action for slander, the allegation of the time of uttering the slander is immaterial (*Potter* v. *Thompson*, 22 Barb. 87).

f. Where it is important to show that a particular fact alleged in a pleading occurred after the happening of some other event, it is in most cases sufficient to allege that such fact occurred *after* such other event (*Martin* v. *Kanouse*, 2 Abb. 331; *Kellogg* v. *Baker*, 15 Abb. 287; and see *Brown* v. *Harmon*, 21 Barb. 510; *Beesley* v. *Dolby*, 6 Bing. N. C. 37); but an allegation that plaintiff was not advised of fraud *until long after*, is too vague and uncertain to be the basis of any action in a court of justice (*Johnson* v. *Johnson*, 5 Ala. R. N. S. 101; and see *Bertine* v. *Varian*, 1 Edw. Ch. R. 343).

g. A declaration for goods sold, &c., which did not allege the *time* of sale, held sufficient on special demurrer (*Lane* v. *Thelwell*, 3 Cr. M. & R. 140; 1 Tyr. & G. 352; 4 Dowl. 705; but see *ante*, 221 *a*); so was a declaration which made profert of letters testamentary, but omitted the date when the letters were granted (*Hughes* v. *Williams*, 2 Cr. M. & R. 331; 4 Dowl. 169). The day on which it is alleged, in a declaration in trespass for mesne profits, that the plaintiff was ejected, and that on which possession was recovered by him, are not material (*Ive* v. *Scott*, 9 Dowl. P. C. 993). By not material, is meant it may be departed from in evidence; but allegations in respect to time, like all other allegations, are evidence against the party making them, as his admissions (*Andrews* v. *Chadbourne*, 19 Barb. 149). Thus, where in an action by the indorsee of a note, which became due on the 12th of January, it was alleged in the complaint that the indorsement was on the 22d of February, it was held, there being no evidence as to time, the defendant might properly repose on the allegation in the complaint, and claim the benefit against the plaintiff of a payment made to the plaintiff's indorser before the alleged time of indorsement. (*Id.*) An allegation in a complaint that the "plaintiff afterwards, to wit," on a day specified, paid certain moneys, does not preclude him from showing that the payment was made at an earlier day, for the purpose of

claiming interest (*Lyon* v. *Clark*, 4 Selden, 418; see *Dubois* v. *Beaver*, 25 N. Y. 123).

See *ante*, pp. 199, *a*; 201, *a*, *b*; 226, *a*.

a. **Place.**—Where a plaintiff seeks to enforce in the courts of this State a contract which by the laws of this State is void, he must state *where* the contract was made, and that by the law of the place where made it was valid (*Thatcher* v. *Morris*, 1 Kernan, 440). Accordingly, where in a suit to recover prize-money drawn by tickets owned by the plaintiff in a lottery, alleged to be authorized by the laws of the State of Maryland, the complaint did not state where the tickets were sold or purchased, held on demurrer that the complaint did not state a cause of action enforceable in the courts of this State (*id.*); and whenever the matters pleaded are local in their nature, the allegation of place is material and the subject of the issue (*Vermilyea* v. *Beatty*, 6 Barb. 429; *Beach* v. *Bay State Co.*, 10 Abb. 71).

b. An omission to allege the time and place at which an act stated in a pleading was done, does not render the pleading insufficient or demurrible (*Carpenter* v. *Brown*, 6 Barb. 147; see *Beach* v. *Bay State Co.*, 10 Abb. 71; *Ryalls* v. *Bramall*, 1 Ex. 784; 5 D. & L. 753); and although it has been said that "When one agrees to sell and deliver at a particular place, and the other agrees to receive and pay, an averment by the purchaser of a readiness and willingness to receive and pay *at that place*, in case he sues for a non-delivery, is indispensably necessary to a *good* complaint" (*Clarke* v. *Dales*, 20 Barb. 65),—yet if in such a case the complaint alleges a *general* readiness and willingness on the part of the plaintiff to perform his part of the contract, this would imply a readiness and willingness to perform at *the particular place*; and therefore of such a complaint it could not be said that it did not state facts sufficient to constitute a cause of action; but it might properly enough present a case where the defendant would be entitled to call on the plaintiff by motion to amend his complaint by stating specifically whether or not he intended to allege a readiness and willingness to perform at the place in question. (*Id.*) See *ante*, pp. 211, *e*; 233, *e*; 246, *g*.

c. **Quantity.**—Allegations with regard to quantity are rarely necessary unless the subject of the averment is a record, a written instrument, or an express contract (*Van Rensselaer* v. *Jones*, 2 Barb. 643).

d. **Value.**—Allegations and proof of value only go to the *quantum* of damages. Allegations of value are not traversable (*Cannos* v. *Meir*, 2 E. D. Smith, 314; *Hackett* v. *Richards*, 3 *id.* 13; *Woodruff* v. *Cook*, 25 Barb. 505; *Waggoner* v. *Betts*, 4 Monroe, 7; *Haley* v. *Caller*, 1 Ala. 63; see, however, *Arch* v. *Boudinet*, 1 Code Rep. N. S. 373; *Gregory* v. *Wright*, 11 Abb. 471; *Holmes* v. *Hodgson*, 8 Moore, 379; *Bertie* v. *Pickering*, 4 Burr. 245; *Scott* v. *Jones*, 4 Taunt. 865; *Phillips* v. *Jones*, 19 Law Jour. Q. B. 374).

e. **Names of persons.**—The omission of the first names of persons in pleadings (unless excused by averment) makes the pleadings indefinite and uncertain (*Applemans* v. *Blanche*, 14 M. & W. 154; *Esdale* v. *M'Lean*, 15 *id.* 277). [The averment of excuse is that the first name is unknown to the pleader. This averment, although in this respect necessary, is not traversable. It is necessary to show that the pleader has made the pleading as certain as it was in his power to make it.] See section 175, *post*, and *ante*, p. 186, *c*.

f. **Allegations held not sufficiently certain.**—That referees duly made their award (*Everard* v. *Paterson*, 6 Taunt. 645; 2 Marsh, 304). That plaintiff was *duly* appointed administrator (*Beach* v. *King*, 17 Wend. 17); duly appointed receiver (*Gillett* v. *Fairchild*, 4 Denio, 83; *White* v. *Joy*, 3 Kernan, 86). That an act was done in a "suspicious manner" (*Muir* v. *Kaye*, 4 Taunt. 34); or "according to statute" (*Walker* v. *Maxwell*, 1 Mass. 104); contrary to statute (*Smith* v. *Lockwood*, 13 Barb. 209); or that the defendant had made "repeated acknowledgments" (*Bloodgood* v. *Bruen*, 4 Selden, 366); or that "by virtue of a certain writ or other warrant" (1 Saund. 298, n. 1); or that it was done "in due course of law" (2 Johns. 437); or that he was "compelled to pay" (*Packard* v. *Hill*, 7 Cow. 442, 1 Wend. 209); or that plaintiff is indebted on account of previous transactions (*Wiggins* v. *Gans*, 3 Sand. 738;

Eno v. *Woodworth*, 4 Coms. 253). Other necessary charges (*Barker* v. *Thorold*, 1 Saund. 47).

a. That defendant was bound to repair (*Casey* v. *Munn*, 5 Abb. 91); that a ship was seized "as prize" (*Beak* v. *Tyrrell*, Carth. 31), that the instrument sued on had become void (*Lewis* v. *Preston*, 1 Show. 290; Skin. 303), that a party had been "guilty of contempt as well by acts as by words" (*Collett* v. *Shrewsbury*, 2 Leo. 34), or that he did "not detain" (*Rex* v. *Winton*, 5 Term R. 89); a large sum (16 N. Y. 122); covenanted (14 N. Y. 544). That S. *failed to fulfil his obligations by virtue of said instrument* (*Van Shaack* v. *Winne*, 16 Barb. 95), that each plaintiff is a creditor in the sum of $100 and upwards (*Gray* v. *Kendall*, 5 Bosw. 666; 10 Abb. 66, 343 *n.*); that *A.* is a creditor *on several promissory notes of said firm*, (*id.*) that services and materials were done and supplied, *at the times and about the matters and at the prices specified in an account already delivered* (*Farcy* v. *Lee*, 10 Abb. 143); that a judgment obtained in the name of another *belongs to plaintiff* (*Martin* v. *Kanouse*, 11 How. 568; 2 Abb. 327); that plaintiff at defendants' request, rendered to defendants *other services as agent, for which he is entitled to have as a fair reward* $50: *also for work, labor and services done and material furnished by plaintiff for defendants* (*Chesbrough* v. *N. Y. & Erie R. R. Co.*, 13 How. 557); that *it appeared on the face of the complaint that certain persons ought to be parties, and that a complete determination of the action could not be had without their presence* (*Gassett* v. *Crocker*, 10 Abb. 133); facts anticipating and avoiding the defence of the statute of limitations (*Butler* v. *Mason*, 5 Abb. 40).

b. Perhaps a pleading in the form such as was known in the former system as the common counts, would not be sufficiently definite and certain (*Blanchard* v. *Strait*, 8 How. 85; *Wood* v. *Anthony*, 9 *id.* 78; *Eno* v. *Woodworth*, 1 Code Rep. N. S. 263; *Allen* v. *Patterson*, 3 Selden, 479; *Dows* v. *Hotchkiss*, 10 New York Leg. Obs. 281).

c. When the facts are not really stated with sufficient certainty, the introduction of the words "certain" (13 East, 102, 116; 1 B. and P. 98, 102; 2 *id.* 120, 265; *Bennett* v. *Ex'ors of Pixley*, 7 Johns. 249; 1 Saund. 298, n. 1), "duly," "lawfully," "sufficient," will not avail to make the fact certain (*Van Ness* v. *Hamilton*, 19 Johns. 349).

d. Letters relied on as embodying a contract, should not be set out in a pleading (*Dibblee* v. *Corbett*, 9 Abb. 201).

e. The complaint of a sub-contractor seeking to enforce a mechanics' lien which does not show his own contract with the contractor to have conformed to the contract with the owner, is indefinite (*Broderick* v. *Boyle*, 1 Abb. 319).

f. In an action by indorsee against a first indorser of a note an answer which after denying plaintiff's ownership, set up that the note belonged to R. a second indorser and previous holder who at the time he held it was indebted to the maker of the note and that the maker had notified defendant of such indebtedness and forbidden him to pay it, held that all the answer after the denial was irrelevant (*Arrangoiz* v *Frazer*, 2 Hilton, 244).

g. In an action for breach of promise to marry, a statement of mitigating circumstances in the answer, as that between the promise and the breach the plaintiff was guilty of improper conduct is irrelevant or redundant (*Smith* v. *Waite*, 7 How. 227), held otherwise in an action for a malicious prosecution (*Brockleman* v. *Brant*, 10 Abb. 141); and see *ante*, p. 280, *f.*

h. **Less definiteness and certainty is required when the facts lie more in the knowledge of the opposite party than of the pleader.**—This was the rule formerly, (Stephen's Plead. 370). If the pleader alleges he is heir, he must show his pedigree, and how he became heir; but if he alleges his opponent is heir, that is sufficient without more (2 Saund. 7 c., note; see *St. John* v. *Northrup*, 23 Barb. 26; *Richards* v. *Edick*, 17 *id.* 270). In alleging the opposite party to be an assignee, it is not necessary to state how he became assignee (*Norton* v. *Vultee*, 1 Hall, 384). A person claiming as next of kin, should show how he was related to the deceased. An allegation that he is "*nearer of kin*" to the deceased than any other person residing in the United States, is not sufficient (*Public Adm.* v. *Watts*, 1 Paige, 348). A policy of insurance in

possession of the opposite party, was held to be described with sufficient certainty, where it stated the names of the insurer and the insured, that it was on the furniture in defendant's tavern in Norwich, and that it was for $1,000 (*Nellis* v. *De Forest*, 16 Barb. 67). Where a complaint stated the circumstances under which the defendant made an assignment for the benefit of creditors, and set forth the whole assignment, and then alleged that the assignment was fraudulent and void on its face, and was made to hinder, delay and defraud creditors, held sufficiently definite and certain, and that it was not necessary to state why it was fraudulent and void on its face (*Hastings* v. *Thurston*, 18 How. 530; 10 Abb. 418).

a. A complaint which stated that at a specified time defendants received as agents of plaintiff, from a specified party, certain sums of money, amounting to a certain sum, and then stated a demand of payment and refusal, held neither indefinite nor uncertain. If defendants required information of the items they might seek it by a bill of particulars (*Sloman* v. *Schmidt*, 8 Abb. 5).

b. **Remedy for irrelevancy, uncertainty, &c.**—To make a pleading definite and certain, or to strike from it irrelevant or redundant matter, the remedy is by *motion*, not by demurrer (*Martin* v. *Kanouse*, 11 How. 567; *Graham* v. *Camman*, 5 Duer, 697; 13 How. 360; *Harlow* v. *Hamilton*, 6 id. 475; *Nichols* v. *Jones*, 6 id. 358; *Bement* v. *Wisner*, 1 Code Rep. N. S. 143; *Howell* v. *Fraser*, id. 270; *Seeley* v. *Engell*, 3 Kernan, 542; *B'k of Amer.* v. *Suydam*, 1 Code Rep. N. S. 325; *Fry* v. *Bennett*, id. 247; S. C. 5 Sand. 54; *Watson* v. *Husson*, 1 Duer, 242; *Spies* v. *Acces. Transit Co.* 5 id. 663; *Smith* v. *Greening*, 2 Sand. 702; *Hammond* v. *Hudson R. Iron Co.*, 20 Barb. 386; *Chesbrough* v. *N. Y. & Erie R. R. Co.*, 26 Barb. 9; *Meyer* v. *Van Collem*, 28 Barb. 230; *Hewit* v. *Mason*, 24 How. 366; see *Linden* v. *Graham*, 1 Duer, 672; *Lee Bank* v. *Kitching*, 11 Abb. 439; 7 Bosw. 664: *ante*, p. 227, *e*). An entire pleading cannot be stricken out as irrelevant or redundant (*Benedict* v. *Dake*, 6 How. 352; *Nichols* v. *Jones*, ib. 355; *Hull* v. *Smith*, 8 ib. 150; *Howell* v. *Knickerbocker Life Ins. Co.*, 24 How. 475; *Blake* v. *Eldred*, 18 How. 240). A party cannot on the trial object to a pleading as indefinite or uncertain (*Farmer's Bank of L. I.* v. *Sherman*, 6 Bosw. 181; see *Martin* v. *Kanouse*, 2 Abb. 331).

c. The indefiniteness and uncertainty to be relieved on motion is only such as appears on the face of the pleading (*Brown* v. *So. Mich. R. R. Co.* 6 Abb. 237).

d. Motions to strike out parts of a pleading as irrelevant or redundant are substitutes for special demurrers (*Kellogg* v. *Baker*, 15 Abb. 287; *Lee Bank* v. *Kitching*, 11 Abb. 439; 7 Bosw. 664). They are not to be encouraged unless it is manifest that it would be to the prejudice of a party who has to answer to suffer the objectionable matter to remain (*Molony* v. *Dows*, 15 How. 261). And matter, though clearly redundant, if not prolix, and not tending seriously to prejudice the opposite party or encumber the record, will not be stricken out. The opposite party is not aggrieved (*Clark* v. *Harwood*, 8 How. 470; *White* v. *Kyd*, 4 id. 68; *Hynds* v. *Griswold*, 4 id. 69; *Harlow* v. *Hamilton*, 6 id. 476; *Brockleman* v. *Brandt*, 10 Abb. 141). On the other hand, it has been said that a party is aggrieved by every unnecessary allegation (*Carpenter* v. *West*, 5 How. 53; *Isaac* v. *Velloman*, 3 Abb. 464); and again, "if the matter cannot be made the subject of a material issue it has no business in the pleading, and ought not to be left there to embarrass the opposite party and the court" (*Rens. Plank Road Co.* v. *Wetsel*, 6 How. 68; *Stewart* v. *Bouton*, 6 id. 71). "If the matter cannot be made the subject of a material issue, or affect the question of an injunction, or costs, or other relief to be granted, and embarrasses the opposite party and the court, it has no business in the pleading, and ought not to be left there" (*Martin* v. *Kanouse*, 2 Abb. 331); "the circuit is the best place for deciding what is material to the case, and what proof may be properly admissible. If an allegation in a pleading will in no event do any harm to the opposite party, the time of the court should not be occupied in motions to strike it out" (*id.*). See however *Farmer's Bank of L. I.* v. *Sherman* (6 Bosw. 181).

e. **Scandalous.**—The court may strike out scandalous matter (*Bowman* v. *Shelden*, 5 Sand. 660; *Carpenter* v. *West*, 5 How. 53; *Mussina* v. *Clark*, 17 Abb. 188).

a. **Motion, when and how made.**—The motion must be made before demurring to or answering the pleading objected to, and within twenty days from the service of such pleading (*N. Y. Ice Co.* v. *N. West. Ins. Co.*, 12 Abb. 74); and before noticing the issue for trial (*Kellogg* v. *Baker*, 15 Abb. 287). The motion papers should point out the precise parts objected to (*Benedict* v. *Dake*, 6 How. 352; *Blake* v. *Eldred*, 18 How. 240). But it seems they need not show affirmatively that the motion is made in time. If not made in time, it is for the opposite party to object (*Barber* v. *Bennett*, 4 Sand. 705; contra, *Rogers* v. *Rathbone*, 6 How. 66). A stipulation extending the time for the defendant to answer, and to make such application as he should be advised, operates to extend the time to move under this section (*Lackey* v. *Vanderbilt*, 10 How. 155). But obtaining an order for time to answer or reply, without any reservation or noticing the cause for trial, is a waiver of the right to move under this section (*Miln* v. *Voss*, 4 Sand. 660; *Esmond* v. *Van Benschoten*, 5 How. 44). If after notice of motion to strike out parts of the complaint, and before the motion is heard, the defendant serves his answer, he thereby waives his motion (*Goch* v. *Marsh*, 8 How. 439).

§ 161. [138.] *Judgments, how to be pleaded.*

In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial, the facts conferring jurisdiction.

b. "This section does not apply to foreign judgments; and a general averment of jurisdiction of a foreign tribunal would not be sufficient" (*Hollister* v. *Hollister*, 10 How. 539; and see *Barnes* v. *Harris*, 3 Barb. 603; *Ayres* v. *Covill*, 18 id. 260; *Bement* v. *Wisner*, 1 Code Rep. N. S. 143). Therefore a complaint on a judgment of a foreign court of inferior jurisdiction must state facts showing that the court had jurisdiction, both of the person and of the subject matter (*McLaughlin* v. *Nichols*, 13 Abb. 244). A complaint on a judgment of a circuit court of another State, *e. g.* the Warren County Circuit Court of New Jersey, must aver the existence either of a general jurisdiction in that court, or of a limited jurisdiction which extended to the cause of action for which the judgment was recovered, whatever it was, and also that the court had obtained jurisdiction of the person of the defendants (*id.*; held otherwise by James, J., *Halstead* v. *Black*, 17 Abb. 227). Need the *place* where the court was held be alleged? (*Duyckinck* v. *Clinton Mut. Ins. Co.*, 3 Zab. 279.)

c. In pleading any determination of a court or officer of limited jurisdiction within this State, it is no longer necessary to state the facts conferring jurisdiction, but such a judgment or determination may simply be alleged to have been duly given or made. If that be denied, jurisdiction and all jurisdictional facts must be proved (*Wheeler* v. *Dakin*, 12 How. 542). Thus in pleading an insolvent discharge it is not necessary to state the facts conferring jurisdiction, it is sufficient to say that the judgment or determination of the officer granting the discharge was duly given or made (*Livingston* v. *Oakesmith*, 13 Abb. 183). The officer should be designated (*Carter* v. *Koezley*, 14 Abb. 147). By the common law rule in pleading a by-law, a declaration was held sufficient after judgment, which alleged that the by-law was "duly made and passed" (*Wilson* v. *Port Hope*, 10 U. C., Queens B., Rep. 406). If the pleader desires to avail himself of this provision, he should allege substantially, if not literally, that the judgment was *duly* given or made. In pleading a justice's judgment, an allegation that the justice had authority and jurisdiction over both the person

of the defendant and the subject-matter of the action, to try the same, and that such proceedings were thereupon had, that on, &c., judgment was entered in said action by said justice in favor of the plaintiff, for, &c., which judgment remains unsatisfied, held insufficient, and not equivalent to an allegation that the judgment was "duly given or made" (*Hunt* v. *Dutcher*, 13 How. 538). Query this, see *Rowland* v. *Phalen*, 1 Bosw. 44, and in note to section 162 *post*; see, also, *Carter* v. *Keeley*, 14 Abb. 150).

§ 162. [139.] (Am'd 1851.) *Conditions precedent, how to be pleaded. Instrument for payment of money only.*

In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. In an action or defence founded upon an instrument for the payment of money only, it shall be sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum, which he claims.

a. This section applies only to instruments valid on their face (*Spear* v. *Downing*, 34 Barb. 523; 12 Abb. 437; 22 How. 30). It is not compulsory on the pleader to avail himself of this section, he may avail himself of it or not at his option (*Mayor of N. Y.* v. *Doody*, 4 Abb. 129). The pleader adopting the form of pleading here prescribed should "*adopt the substitute*" (*Graham* v. *Machado*, 6 Duer, 517; *Keteltas* v. *Myers*, 3 E. D. Smith, 83; 1 Abb. 403; and see *Hunt* v. *Dutcher*, 13 How. 538, in note to sect. 161 supra); yet in *Rowland* v. *Phalen* (1 Bosw. 44), it was held that a complaint which alleged that the plaintiff had "*fully and faithfully*," performed was equivalent to alleging that he had *duly* performed; and in *Wood* v. *Lilley* (not reported) Hoffman, J., held that alleging the plaintiff "performed," without the word duly or any equivalent term, was sufficient (*Adams* v. *Sherrill*, 14 How. 299). An allegation that the plaintiff "fully permitted" was held sufficient (*Cal. Steam Nav. Co.* v. *Wright*, 6 Cal. 258).

b. **Conditions precedent.**—Where the note in suit was payable at a particular place, and the complaint did not allege presentment at that place, but but only that it was *duly* presented, held sufficient (*Gay* v. *Paine*, 5 How. 108; *Ferner* v. *Williams*, 14 Abb. 215).

c. Where to entitle a plaintiff to recover, he must show performance of a condition precedent, or a valid excuse for its non-performance, and there has been no performance, but the plaintiff intends to rely on the excuse, in that case the complaint must state the facts on which the plaintiff relies as an excuse, and not state that he duly performed the condition; for under an allegation of performance, evidence in excuse of non-performance is not admissable (*Oakley* v. *Morton*, 1 Kernan, 33; *Garvey* v. *Fowler*, 4 Sand. 665; *Clark* v. *Crandall*, 27 Barb. 73; *Holmes* v. *Holmes*, 5 Selden, 525).

d. **Action on instrument for payment of money only.**—This section creates an exception to the rules of pleading prescribed by section 142. And in all cases of an action on a written instrument for the payment of money only, whether the action is by the original party or by an assignee or indorsee, it is sufficient to give a copy of the instrument, and to state that there is due thereon, to the plaintiff from the adverse party a specified sum, which he claims (*Prindle* v.

Carruthers, 15 N. Y. 425; rev'g 10 How. 33; *Butchers' B'k* v. *Jacobson*, 15 Abb. 220; 24 How. 204). And to the like effect are *Roberts* v. *Morrison*, 11 N. Y. Leg. Obs. 60; *Gay* v. *Paine*, 5 How. 107; 8 id. 53; 1 Duer, 602; *Woodbury* v. *Sackrider*, 2 Abb. 404; *Ranney* v. *Smith*, 6 How. 423; *Adams* v. *Sherrill*, 14 How. 297; *Chappell* v. *Bissell*, 10 How. 275; *Griswold* v. *Laverty*, 3 Duer, 690; *Andrews* v. *Astor B'k*, 2 Duer, 629; *Keteltas* v. *Meyers*, 19 N. Y. 231; rev'g 3 E. D. Smith, 83; which are supposed to overrule *Price* v. *McClave*, 3 Abb. 253; 6 Duer, 544; 5 *id.* 670; *Alden* v. *Bloomingdale*, 1 Duer, 601; *Lord* v. *Cheesbrough*, 1 Code Rep. N. S. 322; 4 Sand. 696; *Marshall* v. *Rockwood*, 12 How. 452; *B'k of Geneva* v. *Gulick*, 8 How. 51; *Cottrell* v. *Conklin*, 4 Duer, 52.

a. Thus where the complaint set out a copy of the instrument whereby the defendant promised to pay a sum of money to H. C., and then alleged "that the contract is the property of the plaintiff by purchase;" that the defendant is justly indebted to plaintiff on said contract $200, which plaintiff claims. It was on demurrer held sufficient (*Prindle* v. *Carruthers*, 15 N. Y. 425); and so a complaint by indorsees, which in its body stated only "there is due to plaintiff from defendants $2,400 with interest from, &c., on a written instrument, of which the following is a copy to wit: (here followed copy of a promissory note payable to defendant's order, with copies of their signatures and of the indorsements). That plaintiffs have duly performed all the conditions in said contract on their part, and claim the said sum and interest." Wherefore, &c., was held sufficient (*Butchers' B'k* v. *Jacobson*, 15 Abb. 220; 24 How. 204).

b. Is a promissory note payable on condition of the sale by the defendant of certain property then in his hands, an instrument for the payment of money only? (*Quin* v. *Tilton*, 2 Duer, 649).

§ 163. [140.] *Private statutes, how to be pleaded.*

In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute, by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

c. When a statute is pleaded, whether as conferring a right or sanctioning a defence, it is the safest, if not the necessary course to adopt and follow in the pleading the very words of the law (*Ford* v. *Babcock*, 2 Sand. 523; *Cole* v. *Jessup*, 10 How. 524).

d. In pleading a statute which requires to be passed by a three-fifth vote, it is not necessary to allege that such vote was had. An averment that the statute was passed is sufficient (*Wolfe* v. *Super. of Richmond*, 11 Abb. 270).

e. Where the plaintiff relies to maintain his action on the statute laws of another State, he must aver those laws in his pleadings in the same manner as other facts are required to be averred; and a general averment, that by the laws of that other State such and such a conclusion results, as, for example, that by the laws of that other State certain before-mentioned trusts are valid, is not permissible: it is only an averment of the conclusion of the pleader (*Throop* v. *Hatch*, 3 Abb. 25; see *Phinney* v. *Phinney*, 17 How. 197).

f. It is sufficient in a pleading to aver generally that a contract sought to be enforced, is in violation of some municipal ordinance or enactment, when such ordinance or enactment is founded upon a statute. It is not necessary to plead the statute specially (*Beman* v. *Tugnot*, 5 Sand. 153).

§ 164. [141.] *Libel and slander, how stated in complaint.*

In an action for libel or slander, it shall not be necessary to

state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish, on trial, that it was so published or spoken.

See *ante*, p. 225.

§ 165. [142.] (Am'd 1849.) *Answer in such cases.*

In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

a. **Justification on the ground of truth.**—Where the defamatory charge is in general terms it is not sufficient to set up in the answer merely that such charge is true (*Van Wyck* v. *Guthrie*, 4 Duer, 268, affirmed in court of appeals). As if the charge be that the plaintiff is a thief (*Anon.*, 3 How. 406); it is not sufficient to allege that the charge is true, but the answer must state the facts which show the charge to be true (*Annibal* v. *Hunter*, 6 How. 255; *Sayles* v. *Wooden*, id. 84; *Lewis* v. *Kendall*, id. 59; *Buddington* v. *Davis*, id. 401; *Porter* v. *McCreedy*, 1 Code Rep. N. S. 88; *Fry* v. *Bennett*, 5 Sand. 54; *Ormsby* v. *Douglass*, 5 Duer, 665; 2 Abb. 407; *Van Wyck* v. *Guthrie*, 4 Duer, 268). But if the charge is specific, as that an inspector of drugs improperly passed an adulterated article, the answer need only allege that the charge is true (*Van Wyck* v. *Guthrie*, supra; and see *Weaver* v. *Lloyd*, 2 B. & C. 678; *Holmes* v. *Catesby*, 1 Taunt. 543). Even in the cases where a specific answer is required, a general answer is sufficient to raise an issue, and is not open to demurrer, but the plaintiff's remedy is by motion to have it made definite (*Van Wyck* v. *Guthrie*, 4 Duer, 268).

b. The justification must be as broad as the charge; thus to a charge that the plaintiff was a swindler, an answer that defendant agreed with the plaintiff that the latter should sell goods for him on commission, that the plaintiff received goods and refused to account for them, was held insufficient as a justification (*Herr* v. *Bamberg*, 10 How. 130). And where the allegation was, "This scoundrel was indicted at San Francisco, February last, for fraud, arrested by C. A. Hosmer;" and the answer set up by way of justification, "that the plaintiff had been indicted and arrested for a conspiracy to cheat and defraud;" held, that such a justification did not reach the charge of being a scoundrel (*Loveland* v. *Hosmer*, 8 How. 215).

c. Where an alleged libel is privileged only on the ground that certain events happened, the happening of those events must be *sufficiently* alleged by the answer to be true to enable the defendant to maintain the defence of privilege (*Fry* v. *Bennett*, 1 Code Rep. N. S. 239; 5 Sand. 54; *Buddington* v. *Davis*, 6 How. 401).

d. In an action for libel the defamatory words were "specific charges of having committed thefts from the defendant," of articles specified, and of practising prostitution, specifying instances. Held that an answer which alleged, that the defendant had been robbed of the articles mentioned, and as defendant believed the plaintiff was guilty of the charges alleged against her,

and "that what defendant said of plaintiff was in full belief of its truth, in self-vindication and as a warning to others, and not from malice towards the plaintiff," was sufficiently definite and certain, and contained nothing irrelevant or redundant (*Steinman* v. *Clark*, 10 Abb. 132).

a. **Mitigating circumstances.**—After some conflict of decision, it was decided in *Bush* v. *Prosser*, (1 Kernan, 347), that a defendant may, with an answer denying the allegations of the complaint, set up mitigating circumstances. That to entitle a defendant to set up in his answer and prove on the trial mitigating circumstances, it is not necessary to interpose a justification. It is still, however, an open question, whether or not a defendant can, without making any defence—*i. e.* without either controverting the allegations of the complaint or setting up a justification—set up by answer mitigating circumstances alone. In *Van Benschoten* v. *Yaple* (13 How. 97), Harris, J., considered the case of *Bush* v. *Prosser* (supra), as having decided that a defendant may allege in his answer, "without any defence at all, mitigating circumstances." [We do not think that either *Bush* v. *Prosser*, or *Bisbey* v. *Shaw*, (2 Kernan, 67), warrant such a proposition; how can mitigating circumstances *alone* raise an issue?] In *Newman* v. *Otto*, (4 Sand. 669), it is said mitigating circumstances are not a defence in the proper sense of the term, and if pleaded alone would be struck out as frivolous.

b. To a complaint in slander, for charging plaintiff with stealing the defendant's hay, the defendant answered, first, a denial; secondly, that on, &c., in the neighborhood where the plaintiff had resided and still resides, the plaintiff had and still has the character and reputation of being addicted to stealing, and of having been on divers times guilty of the crimes mentioned in the complaint, &c. On motion, the second defence was struck out, as irrelevant, redundant and improper in mitigation (*Van Benschoten* v. *Yaple*, 13 How. 97).

c. Mitigating circumstances are such circumstances as the well-established rules of law allow to be given in evidence in mitigation of damages (*Graham* v. *Jones*, 1 Code Rep. N. S. 181; 6 How. 15).

d. The question whether the facts set up in mitigation are, or are not, such as should be admitted to be given in evidence in mitigation, must be determined by the presiding judge upon the trial of the issue of fact (*Newman* v. *Harrison*, 1 Code Rep. N. S. 184 *n.*; *Fry* v. *Bennett*, 1 Code Rep. N. S. 238; 5 Sand. 54; *Newman* v. *Otto*, 4 Sand. 669).

e. **What may be set up in mitigation.**—Anything tending to disprove actual malice, although it may tend to establish the truth (*Bush* v. *Prosser*, 1 Kernan, 347; *Bisbey* v. *Shaw*, 2 *id.* 67; *Heaton* v. *Wright*, 10 How. 83); that defendant requested the printer of the libel to do it privately (*Taylor* v. *Church*, 4 Selden, 452); that defendant was provoked to the publication by publications of the plaintiff (*Watts* v. *Fraser*, 7 Ad. & El. 223; 8 *id.* 170); that it was copied from a newspaper (*Thornton* v. *Stevens*, 2 M. & R. 45); plaintiff's general bad character (*Hamer* v. *M'Farlin*, 4 Denio, 509; *Gilman* v. *Lowell*, 8 Wend. 573; *Paddock* v. *Salisbury*, 1 Cow. 811); but it must be pled (*Stiles* v. *Comstock*, 9 How. 48); the defendant *cannot* set up in mitigation former controversies between him and the plaintiff, having nothing to do with the alleged slander (*Lister* v. *Wright*, 2 Hill, 320), or that the father of the plaintiff shortly before the uttering of the slander, used irritating language towards the defendant (*Underhill* v. *Talyor*, 2 Barb. 348); or in an action against the editor of a newspaper, that the libel was published on the communication of a correspondent (*Talbut* v. *Clark*, 2 M. & Rob. 312). Where the libel, as averred in the complaint, charged the plaintiffs, who were contractors with the corporation of New York, with fraudulent attempts to influence the supreme court in determining a suit therein pending against them, and with having bribed the common council,—*held*, that allegations in the answer of a generally wasteful and improper course of conduct on the part of the common council, and that certain contracts obtained therefrom by the plaintiffs, would result in vast profits to them, and in detriment to the city, and that they falsely pretended to possess patent rights for paving, and made other

pretenses, and that they poorly performed previous contracts, and had obtained preferences over lower bidders, were properly stricken out with additional similar matter, as too remote in application to the alleged libel, to constitute mitigating circumstances (*Rues* v. *Brooks*, 4 E. D. Smith, 645).

a. When circumstances which can only be given in evidence in mitigation of damages, are set forth in the answer, it must be distinctly stated that it is with that view and for that purpose only that they are introduced; since otherwise the plaintiff will have a right to infer that they are relied on as a bar to the action, and upon that ground may properly demur to them (*Fry* v. *Bennett*, 1 Code Rep. N. S. 238; 5 Sand. 54; *Matthews* v. *Beach*, 5 Sand. 264; *Ayres* v. *Covill*, 18 Barb. 260).

b. An answer which alleges new matter in justification, may allege the same matter in mitigation (*Howard* v. *Raymond*, 11 Abb. 155); and the mitigating circumstances may be alleged by a mere statement that the defendant will, on the trial, set up as mitigating circumstances the matter plead in justification. (*Id.*)

c. Matter pleaded only in mitigation, is not a subject of demurrer (*Newman* v. *Otto*, 4 Sand. 669; and see *Van Benschoten* v. *Yaple*, 13 How. 101); and cannot, on the trial, be offered in justification (*Baker* v. *Wilkins*, 3 Barb. 220).

d. Allegations in an answer, in an action for libel, which would not be allowed to be proved even in mitigation of damages, should be stricken out as irrelevant (*Brown* v. *Orvis*, 6 How. 376).

e. To a complaint for slander in charging that plaintiff had stolen defendant's hay, the answer denied each allegation of the complaint, and then, as a separate defence, stated that the words charged as slanderous were spoken in reference to a quantity of hay the defendant had cut and stacked, and to which hay the plaintiff claimed title, and which hay, under such claim of title, and in the day time, the plaintiff took from the land of the defendant to the adjoining land of him, the plaintiff; which taking, and not the crime of larceny, was what he, the defendant, meant by the words charged, and he was so understood by all who heard him. A motion to strike out this last defence as irrevelant and redundant, and because it was inconsistent with the general denial, was denied. Harris, J., held that *perhaps* the matter set up might have been admissible, under the general denial, but that was no reason for striking out matter which apprised the plaintiff of the exact ground of defence (*Hollenbeck* v. *Clow*, 9 How. 292).

f. To a count alleging the defamatory words to be "Susan Mary (the plaintiff) has robbed me—she is a thief—she has stolen my gold pen and pencil," the defendant answered that the plaintiff stole from the defendant five boxes of tooth paste, a cloak, a shawl, a gold pen and case, and one gold pencil-case. A motion to strike out as irrelevant all the parts of the answer not relating to gold pen and pencil, was denied on the ground that the allegation of robbery of other articles was applicable to the charge "has robbed me" (*Jaycocks* v. *Ayres*, 7 How. 216).

g. Of the rules of evidence and measure of damages in actions for slander (*Fulkerson* v. *George*, 3 Abb. 75; and see *Palmer* v. *Haight*, 2 Barb. 212; *Smith* v. *Kerr*, 1 Barb. 155; *Snyder* v. *Andrews*, 6 Barb. 43; *Weed* v. *Bibbins*, 32 Barb. 315).

§ 166. *In actions to recover property distrained for damage, answer need not set forth title.*

In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

§ 167. [143.] (Am'd 1849, 1852, 1863.) *What causes of action may be joined in the same complaint.*

The plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of,

1. The same transaction, or transactions connected with the same subject of action;

2. Contract, express or implied; or

3. Injuries, with or without force, to person and property, or either; or

4. Injuries to character; or

5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same; or

6. Claims to recover personal property, with or without damages for the withholding thereof; or

7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action, so united, must all belong to one of these classes, and except in actions for the foreclosure of mortgages must affect all the parties to the action, and not require different places of trial, and must be separately stated.

In actions to foreclose mortgages, the court shall have power to adjudge and direct the payment, by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

a. **What causes of action may be joined.**—One complaint may include causes of action for:

b. Malicious prosecution and slander (*Watson* v. *Hazard*, 3 Code Rep. 218).

c. Assault and slander (*Brewer* v. *Temple*, 15 How. 286).

d. Injuries to the person and to property arising from defendant's negligence (*Howe* v. *Peckham*, 10 Barb. 656).

e. Wrongfully cutting and converting wood, and for wrongfully drawing off

the wood, in action by reversioner against tenant for life, and another for injuries to the inheritance (*Rodgers* v. *Rodgers*, 11 Barb. 595).

a. Violation of agreement to print a work, and for injuring stereotype plates of same work, on the ground that the causes of action arose out of the same transaction (*Badger* v. *Benedict*, 4 Abb. 176; 1 Hilton, 414).

b. For surplus moneys and surrender of notes, in action by an assignor of a mortgage to secure payment of said notes against the assignees (*Calhoon* v. *Bank of Utica*, 3 Selden, 486).

c. Legal and equitable relief, *when consistent* (*Getty* v. *Hudson River R. R. Co.*, 6 How. 269; *Young* v. *Edwards*, 11 How. 201; *Wandle* v. *Turney*, 5 Duer, 661; *Gridley* v. *Gridley*, 24 N. Y. 136; *Phillips* v. *Gorham*, 17 N. Y. 284; *N. Y. Ice Co.* v. *N. West. Ins. Co.*, 21 How. 296; 12 Abb. 414; rev'g 20 How. 424); as to have a contract reformed and enforced as reformed (*Gooding* v. *McAllister*, 9 How. 123; *N. Y. Ice Co.* v. *N. West Ins. Co.*, 21 How. 296; and see *Lamoreaux* v. *Atlan. Mut. Ins. Co.*, 3 Duer, 680; and 16 N. Y. 267; *Bidwell* v. *Astor Mut. Ins. Co.*, 16 N. Y. 263); but the relief must be consistent. See, *What causes of action may not be joined, infra.*

d. Claims arising on several judgments (*Bank of N. Am.* v. *Suydam*, 1 Code R. N. S. 325).

e. Libel, slander, and malicious prosecution (*Martin* v. *Mattison*, 8 Abb. 3).

f. Possession of land, and a claim for damages for withholding, and for mesne profits (*Hotchkiss* v. *Auburn R. R. Co.*, 36 Barb. 600).

g. Recovery or assignment of dower, with damages for withholding same (*Van Name* v. *Van Name*, 24 How. 247).

h. The causes of action to be joined must be in favor of *all* the plaintiffs, and against all the defendants and must belong to the same class (*Enos* v. *Thomas*, 4 How. 48); but the defendants need not be all equally affected (*Vermeule* v. *Beck*, 15 How. 333).

i. **What causes of action may not be joined.**—One complaint may not include causes of action for:

j. A demand against defendant as administrator, trustee, or executor, and against him individually (*Latting* v. *Latting*, 4 Sand. Ch. R. 31; *Landau* v. *Levy*, 1 Abb. 376; *Benjamin* v. *Taylor*, 12 Barb. 328; *McMahon* v. *Allen*, 3 Abb. 89; 12 How. 40). But where executors continued to occupy premises occupied by their testator in his lifetime,—held that in an action against them in their representative capacity, there might, properly, be joined a demand for the rent which accrued in the lifetime of the testator, with a demand for the rent subsequently accrued (*Pugsley* v. *Aiken*, 1 Kernan, 494; overruling *S. C.* 14 Barb. 114).

k. Against one defendant as trustee, and against another defendant individually (*Alger* v. *Scoville*, 1 Code Rep. N. S. 303; 6 How. 131).

l. Divorce on the ground of adultery, and for cruel and inhuman treatment (*McIntosh* v. *McIntosh*, 12 How. 289; *Johnson* v. *Johnson*, 5 Johns. Ch. R. 163).

m. For cattle killed by railroad cars of defendants, and for the wrongful killing, carrying away and converting said cattle, with a cause of action on an agreement to carry cattle on the defendants' railroad, and for damages occasioned by the breach of such agreement to carry safely, and for the loss by death of cattle by reason of weak and insufficient cars, and for converting the cattle so killed (*Colwell* v. *N. Y. & Erie R. R. Co.*, 9 How. 311).

n. For a wrongful conversion of goods and a claim for money received to plaintiff's use (*Cobb* v. *Dows*, 9 Barb. 230; and see *Moore* v. *Smith*, 10 How. 361; *Hunter* v. *Powell*, 15 *id.* 221; *Dorman* v. *Kellam*, 4 Abb. 202; 14 How. 184; see, however, *Adams* v. *Bissell*, 28 Barb. 382).

o. To restrain some of the part owners of a vessel from disposing of her, in derogation of the rights of other part owners (the plaintiffs), and a cause of action for the hire of the vessel (*Coster* v. *N. Y. & Erie R. R. Co.*, 5 Duer, 677; 3 Abb. 332; 352).

a. Equitable relief against a corporation with a claim for damages against an individual defendant (*House* v. *Cooper*, 16 How. 298; 30 Barb. 157).

b. A claim as an individual and in a representative character (*Hall* v. *Fisher*, 20 Barb. 442; *Lucas* v. *N. Y. Cent. R. R. Co.*, 21 Barb. 245). But a plaintiff may unite a cause of action as *executrix* with one as *devisee* where both accrued under a contract made by the testator with the defendant, growing out of the same matter. Thus, the plaintiff was allowed to unite a cause of action as *devisee* against the defendant for the rent of a farm leased to the defendant by the testator, which rent accrued subsequent to the testator's death, with a cause of action as *executrix* for breaches of covenant in the lease of the same farm (*Armstrong* v. *Hall*, 17 How. 76).

c. A claim as an individual and one in the public generally (*Warwick* v. *Mayor of N. Y.*, 26 How. 358; 28 Barb. 212).

d. Against all the defendants jointly, and one or some of the defendants severally (*Barnes* v. *Smith*, 16 Abb. 420; *Wells* v. *Jewett*, 11 How. 242; *Le Roy* v. *Shaw*, 2 Duer, 626; *Rodgers* v. *Rodgers*, 11 Barb. 595; *Enos* v. *Thomas*, 4 How. 48; *Viall* v. *Mott*, 37 Barb. 208). Therefore, a plaintiff cannot unite a claim against two defendants to recover possession of real estate and damages for unlawfully withholding same, and a claim against one of the defendants for money received for rents and profits of the premises, for which that defendant is indebted to the plaintiffs (*Tompkins* v. *White*, 8 How. 520).

e. Breach of contract of warranty on the sale of a horse, and a claim for damages for fraudulent representations (deceit) in regard to the same horse (*Sweet* v. *Ingerson*, 12 How. 331; *Springsteed* v. *Lawson*, 14 Abb. 328).

f. Possession of land, and damages for not using the same land as required by the lease thereof (*Smith* v. *Hallock*, 8 How. 73; see, however, *Hotchkiss* v. *Auburn R. R. Co.*, 36 Barb. 600); nor can a plaintiff unite a cause of action for possession of land (ejectment) with a cause of action to compel a conveyance of the same land (*Lattin* v. *McCarthy*, 17 How. 239).

g. Partition of real estate, and for the usual relief on a creditor's bill (*Dewey* v. *Ward*, 12 How. 419).

h. Statute penalties for violating a city ordinance, and to enjoin a continuance of the violation (*Lamport* v. *Abbott*, 12 How. 340).

i. To recover real property for forfeiture or breach of covenant in a lease, and to restrain a continuance of the alleged breach (*Linden* v. *Hepburn*, 3 Sand. 668; 3 Code R. 164).

j. For building an embankment on defendant's own land, for building an embankment on the highway, near plaintiff's store; and for erecting an embankment on plaintiff's land, whereby damage had accrued to plaintiff (*Durkee* v. *Saratoga and Wash. R. R. Co.*, 4 How. 226; 2 Code Rep. 145).

k. Trespass, ejectment, and equitable relief (*Bigelow* v. *Gove*, 7 Cal. 133; *Lattin* v. *McCarthy*, 17 How. 239).

l. A legacy, and for rent not arising out of the same transaction (*Gridley* v. *Gridley*, 33 Barb. 250).

m. For damages for converting personal property, and for a redelivery (*Maxwell* v. *Furnan*, 7 How. 236; *Spalding* v. *Spalding*, 3 How. 297; *Hulce* v. *Thompson*, 9 How. 113; *Budd* v. *Bingham*, 18 Barb. 494).

n. For breach of contract for sale of real property, and for an assault on plaintiff and taking said contract from him (*Ehle* v. *Haller*, 6 Bosw. 661).

o. To recover money only against husband, and a claim to charge the separate estate of the wife with the same debt (*Palen* v. *Lent*, 5 Bosw. 713).

p. Against an agent employed to sell real estate for wrongfully selling, and against the purchaser of said estate for a reconveyance (*Gardner* v. *Ogden*, 22 N. Y. 327, 340).

q. Wrongful act of wife, and for wrongful act of husband (*Malone* v. *Stilwell*, 15 Abb. 421).

r. **Several counts.**—Several causes of action do not always form the subject of several separate counts, but are sometimes thrown, for the sake of brev-

ity and convenience, into one. Thus, in an action to recover penalties of five dollars a day for one thousand and ninety-five successive days' omission to put up a tariff of ferriage in a ferry-house, the plaintiff included all the penalties in one statement of a cause of action; and on motion to set aside the complaint for that reason, held that the complaint was properly framed (*Longworthy* v. *Knapp*, 4 Abb. 115). The several penalties are regarded as items of one claim, and any number of items may be included in one statement of a cause of action (*Adams* v. *Holley*, 12 How. 329). But where a party has a cause of action in respect of several items, part of them having always, and originally, belonged to him, and part of them having come to him by assignment, he should state those that accrued by assignment as a separate cause of action. And where the plaintiff has several causes of action, which, if they had all accrued to him originally, might probably have been complained upon by a statement as a single cause of action, yet if they accrued to him by assignment from several persons, the subject of each assignment should constitute a separate statement of a cause of action; and where a plaintiff has a cause of action which originally arose partly to himself and partly to another, and he has acquired the right of that other by assignment, so much of the cause of action which accrued to himself originally should constitute one statement of a cause of action, and so much as accrued to him by assignment should constitute another and separate statement of a cause of action. (*Id.*)

a. Stating several grounds of complaint are not necessarily several causes of action (*Durant* v. *Gardner*, 10 Abb. 445).

b. Where a complaint contains several causes of action not separately stated and plainly numbered, the remedy is not by motion to set aside the complaint, but by motion to make more definite and certain (*Wood* v. *Anthony*, 9 How. 78; but see *Blanchard* v. *Strait*, 8 How. 83).

c. **Consolidating actions.**—If two or more actions be brought by the same plaintiff, at the same time against the same defendant, for causes of action which may be joined, the defendant may move to consolidate the actions (2 R. S. 383, § 38). And if one or more of such actions be pending in the supreme court, and others be pending in another court of this State, the supreme court may order the actions in the other court to be consolidated with that in the supreme court; and when several suits are commenced against joint and several debtors in the same court, the plaintiff may, in any stage of the proceedings, consolidate such action (*Ib.* 384, §§ 39, 40; 3 Wend. 442; 9 *ib.* 451; 19 *ib.* 23; 4 Hill, 46; 9 Price, 393). An injunction is not a proper method for restraining a multiplicity of suits (*Minor* v. *Webb*, 10 Abb. 284).

d. A motion to consolidate may be made any where in the district containing the county in which the venue of either of the actions to be consolidated is laid (*Percy* v. *Seward*, 6 Abb. 326).

e. The granting or refusing a motion to consolidate, rests entirely in the discretion of the court (2 R. S. 383). Therefore, from an order granting or refusing a motion to consolidate, no appeal can be taken. If the grounds of the motion are not denied, and it does not appear that the plaintiff will be materially prejudiced by the consolidation, it has been customary with the courts to grant the motion (19 Wend. 23) not only where both or all the suits are brought at the same time, but where they are brought at different times, and although at the commencement of the first action the cause of action in the other had not accrued.

f. The test for allowing the motion is, Are the questions to be tried identical? If they are, the motion to consolidate should be granted (4 Hill, 46), unless it will prejudice the plaintiff (3 Hill, 450).

g. The defendant, to entitle him to an order to consolidate, need not swear to merits (3 Wend. 443); for the motion will be granted where no defence is intended, merely to avoid the expense of several judgments (4 Hill, 47; 3 Wend. 442).

h. Where several actions are brought on one policy of insurance, the court, on the application of the defendant, and with the consent of the plaintiff, will grant an order to stay the proceedings in all the actions but one, the defend-

ant undertaking to be bound by the verdict in such action, and to pay the amount of their several subscriptions and costs, in case the plaintiff should recover. This mode of consolidation, however, has been held to apply only to several actions on one policy, and not extend to several policies on one risk (1 Caines R. 114).

a. Where the same defendants in several actions for work and labor, entered into a stipulation that all proceedings should be stayed except in the action by J. D., and that the other actions should abide the final judgment in the case of J. D., held that J. D. having obtained final judgment against defendants, the plaintiffs in the other actions, on a reference for the purpose had to prove the *amount* of their claims only, and the defendants could controvert that one point only (*Honlahan* v. *Sacketts Harbor R. R.*, 24 How. 155).

b. Where in several actions, the plaintiff has regularly obtained judgment at the circuit or special term, the court have no power, on motion of the defendant, to grant an order to stay proceedings in all the actions but one, until the decision of the general term in that one, or to abide the event thereof. After a regular *appeal* to the general term, the court, on a proper application, where it is made to appear that a decision in one cause will dispose of all the questions in the others, may grant an order to hear an argument in one, and that the others abide the result of that one; or the court may refuse to hear but one argument (*Toll* v. *Thomas*, 15 How. 315).

c. A party moving to consolidate actions which are to be defended, must show by his affidavit that the questions to be tried in them will be substantially the same in all the suits (*Dunn* v. *Mason*, 7 Hill, 154). Where the affidavit was "that the defence in each and all of the actions will be substantially the same," but the nature of the defence was not stated, it was held insufficient. (*Ib.*) And where the affidavit was made by the defendant's attorney, and he swore he had been informed by the president of the company, defendant, that there was a good defence and that the questions were the same in each action, and gave no excuse why the president himself did not make the affidavit, Ingraham, J., denied the motion (*Hone* v. *Farmer's B'k. of Ohio*, not reported).

d. The plaintiff brought at one time, and against the same defendants, a separate action in each of the counties of the State, for one and the same libel, which was first published in the county in which all of the parties resided. *Held*, that the defendant's motion to consolidate the actions must be granted; and that the motion to consolidate was properly made in the county in which all the parties resided. The time to plead in the consolidated action in such a case, should be the time which remained in the action in the county to which the other actions were drawn by the consolidation (*Percy* v. *Seward*, 6 Abb. 326).

e. A motion to consolidate may be made by a plaintiff; and if the motion is granted it will be on the terms that the plaintiff pay the costs in all the actions but one up to the time of consolidating (*Briggs* v. *Gaunt*, 2 Abb. 77; 4 Duer, 664).

f. Actions of foreclosure will not, it seems, be consolidated under any circumstances. A motion to consolidate two foreclosure suits was denied by Davies, J., with costs in both suits (*Grant* v. *Spencer*, not reported).

g. Where a plaintiff commenced sixty-four actions against the same defendant, all of which were at issue, and were for the recovery of separate penalties for an alleged violation of the law concerning foreign bank notes, the defendant moved to consolidate; ordered that the plaintiff should bring to trial one of the suits, which might be selected by him, and that all proceedings in the remaining suits should be stayed until the trial of such selected suit, with liberty to the defendant after such trial to renew the motion for a consolidation (*Clark* v. *Metropolitan Bank*, 5 Sand. 665).

h. Where separate actions were brought against the three obligors of a joint and several bond, the court stayed the proceedings in two of the actions until one was tried (*Anderson* v *Towgood*, 1 Ad. & El. N. S. 245).

a. Where two actions were between the same parties, but involved in part only the same cause of action, the court refused to stay the proceedings in one until the other was determined (*Sorley* v. *Brewer*, 18 How. 509).

b. Where on consolidation some of the actions are discontinued, and only the consolidated action remains, there is no principle by which the costs in the discontinued actions can be included in the consolidated action, even though it embraces the causes of action in the actions discontinued. Provision for such costs must be made in the discontinued actions before they finally cease to exist, otherwise the party loses such costs as against his adversay (*Blake* v. *Michigan S. & N. Indiana R. R. Co.*, 17 How. 228).

§ 168. [144.] (Am'd 1849, 1852.) *Allegation not denied, when to be deemed true.*

Every material allegation of the complaint, not controverted by the answer, as prescribed in section 149; and every material allegation of new matter in the answer, constituting a counter-claim, not controverted by the reply, as prescribed in section 153, shall, for the purposes of the action, be taken as true. But the allegation of new matter in the answer, not relating to a counter-claim, or of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require.

c. **Material allegation.**—Only those allegations in a complaint are to be deemed material, which the plaintiff *must prove upon the trial in order to maintain his action* (*Fry* v. *Bennett*, 1 Code Rep. N. S. 245; 5 Sand. 54; *Newman* v. *Otto*, 4 Sand. 668; *Harlow* v. *Hamilton*, 6 How. 475; *Connoss* v. *Meir*, 2 E. D. Smith, 316; *Oechs* v. *Cook*, 3 Duer, 161; *Sands* v. *St. John*, 36 Barb. 628). Every allegation is material unless it may be struck out as surplusage (*Mayor of Albany* v. *Cunliff*, 2 Coms. 171).

d. "An allegation which at most merely *implies* a fact, or justifies an *inference* that such is or will be claimed to be the fact, should not be construed as a material allegation, especially in a case in which proof of the fact is not essential to the plaintiff's right to recover under the positive allegations contained in the complaint, although such fact may be disproved. Thus, in an action against two defendants to recover for goods sold and delivered, the *material question is*, Did the plaintiffs sell to the defendants? It is *immaterial* whether or not the defendants are partners, except as an item of proof of their joint liability. Therefore in a complaint against several defendants for goods sold, which, after alleging the sale of the goods to the defendants, adds, "under their firm name of Cook & Son," this last allegation is descriptive only, and not necessary to be proved. The defendant by not denying it, does not admit it (*Oechs* v. *Cook*, 3 Duer, 161). But if the complaint had alleged that the defendants composed the firm of Cook & Son, and then a sale to the firm—in that case the allegation that the defendants composed the firm of Cook & Son, would have been material. Hence "*an allegation may be material in one form of constructing a complaint and immaterial in another, in declaring on the same cause of action*" (Bosworth, J., *Oechs* v. *Cook*, supra); and a fact not material may be rendered material by the form of the pleading (*Livingston* v. *Miller*, 4 Selden, 289; *Hatch* v. *Peet*, 23 Barb. 575).

See in note to sections 159, 160.

e. "This section is confined to allegations of fact, and does not refer to an averment of the legal effect of written instruments; nor can it be applied to the intention of parties when they execute a written contract. An answer

which contains an allegation of the meaning of a written contract or agreement, but does not deny its execution, should be deemed by the court an 'immaterial allegation,' and disregarded at the trial. Nor can such answer be deemed equivalent to an allegation of mistake or surprise in the execution of the agreement, so as to entitle the defendant to have it avoided on either of those grounds" (*Barton* v. *Sackett*, 1 Code Rep. 96; 3 How. 358; and see *Dimon* v. *Dunn*, 15 N. Y. 498).

a. **What defendant admits by not answering.**—By not answering the defendant admits the truth of all the allegations in the complaint, but not that those facts constitute a cause of action (*Johnson* v. *Pierce*, 7 Eng. (Ark.) R. 599, and see note to subd. 6 of § 144). A defendant who does *not* answer is not to be taken as admitting anything contained in an answer of a co-defendant in which he has not participated (*Woodworth* v. *Bellows*, 4 How. 24).

b. **Effect of admissions.**—"Whatever has been *admitted* on both sides in the pleadings cannot be contradicted either in the subsequent pleadings or even in the verdict. For neither party can retract what he has before conceded on the record and the jury have no authority to find any other facts than such as are put in issue" (Gould, Pl. 152, citing Bac. Abb. Pleas, &c. Introd. ib. Verdict, W. 2 Mod. 6 Willis, 366; Laws Pl. 48; *Crosbie* v. *Leary*, 6 Bosw. 313; *Thomas* v. *Austen*, 4 Barb. 265; *Johnson* v. *McIntosh*, 31 Barb. 272). Evidence is only intended to establish contested facts (*Parkhurst* v. *M'Graw*, 24 Miss. R. 134; *Hackett* v. *Richards*, 11 N. Y. Leg. Obs. 315); and a judgment contrary to an admission in the pleading showing there ought to be no such judgment, would be erroneous (*Bridge* v. *Payson*, 5 Sand. 217; see *Barto* v. *Himrod*, 4 Selden, 483; and see 6 Johns. 543, 559, 565; 10 Wheat. 189; 1 Barb. Ch. Pr. 339; Gould Pl. 152; Laws Pl. 48; *M'Ferran* v. *Taylor*, 3 Cranch, 270).

c. Where a party relies on the confession of his adversary, the whole matter confessed must be taken together (*Dorlon* v. *Lewis*, 6 Barb. 451; *Stuart* v. *Kissam*, 2 *id.* 493). An admission made in the course of a pleading is not an admission made for all the purposes of the cause, but, as Lord Denman stated in *Robins* v. *Maidstone*, (4 Q. B., 811), correcting what he had said in *Bingham* v. *Stanley* (2 Q. B. 127); it is "an admission for all purposes regarding the issue arising from that pleading." (See, however, *Hutt* v. *Morrell*, 13 Jurist, 215; *Ayres* v. *Covill*, 18 Barb. 264; *Knight* v. *McDowell*, 12 Ad. & El. 442; *Gould* v. *Oliver*, 2 M. & G. 234; *Bonzi* v. *Stewart*, 4 M. & G. 295; *Gale* v. *Lewis*, 11 Jurist, 730; *Fearn* v. *Filiou*, 7 M. & G. 518; *Carter* v. *James*, 13 M. & W. 137). An admission, in an answer, of new matter upon which issue is taken, cannot be used on the trial as a general admission of a material fact alleged in the complaint, when there is in the same answer a general denial of all the material allegations of the complaint (*Troy and Rutland R. R. Co.* v. *Kerr*, 17 Barb. 581; *Swift* v. *Kingsley*, 24 *id.* 541). For the new matter pleaded in one defence does not dispense with the necessity of trying the issues formed directly upon the complaint by another defence (*Vassear* v. *Livingston*, 3 Kernan, 256; *Ayres* v. *Covill*, 18 Barb. 264).

d. The court will not allow an infant to be bound by an admission in his pleading adverse to him (*Moore* v. *Moore*, 4 Sand. Ch. R. 44).

e. No admission in a statement of a cause of action or in a defence which is expressly abandoned by the pleader, can be used in evidence against him (*Brown* v. *Feeter*, 7 Wend. 301). And where a pleading has been amended, *semble*, that the original pleading cannot be read in evidence to show what the party conceived to be his right at the time such pleading was put in (*Hales* v. *Pomfret*, 1 Dan. 141). The *prima facie* effect of the amendment of a pleading, is an acknowledgement of the pleader that he has been mistaken, and not that he made a wilful false statement in the pleading so amended (*Elizabethport Manufacturing Co.* v. *Campbell*, 13 Abb. 87; see *Fielden* v. *Carelli*, 26 How. 173; 16 Abb. 289); and *semble*, that facts stated in an answer held bad on demurrer cannot be used as an admission of those facts (*Firmin* v. *Crucifix*, 5 C. & P. 98).

f. **Reading pleadings to the jury.**—It rests wholly in the discretion of the

court whether or not it will permit the pleadings to be read to the jury (*Willis* v. *Forrest*, 2 Duer, 310). Where a plaintiff in an action against a firm, in order to prove a certain fact, read a portion of the answer of one member of the firm, admitting such fact, but also alleging other facts which, if true, would constitute a defence, such defendant is entitled to have the whole answer read as evidence in his own behalf (*Gildersleeve* v. *Mahony*, 5 Duer, 383). And as to reading pleadings in evidence, see *Gregory* v. *Brunswick* (6 M. & G. 955); *Jennings* v. *Asten* (5 Duer, 695; 3 Abb. 373; *Fry* v. *Bennett*, 3 Bosw. 200).

a. The verification of a pleading is only to secure good faith in the pleader not to make the pleadings evidence on the trial (*Ames* v. *Hurlbut*, 17 How. 185).

b. **Admission by not replying.**—An answer of infancy (*Hodges* v. *Hunt*, 22 Barb. 150), or the statute of limitations, is deemed controverted by this section without any reply (*Esselyn* v. *Weeks*, 2 E. D. Smith, 116; S. C., 2 Kernan, 635); so of a defence of usury (*Cutler* v. *Wright*, 22 N. Y. 472). Where the defence is infancy, the plaintiff may, without replying or amending his complaint, prove the making of a new promise by the defendant, after he attained majority (*Hodges* v. *Hunt*, 22 Barb. 150).

c. Where a conversion of personal property is set up as a counter-claim and no reply is interposed, the *amount* of damage alleged in the counter-claim are not thereby admitted (*McKenzie* v. *Farrell*, 4 Bosw. 193).

d. **Admission by demurrer.**—See *ante*, p. 257 *d* in note to § 144.

Chapter VI.

*Mistakes in pleading, and amendments.**

Section 169. Material variances, how provided for.
170. Immaterial variances, how provided for.
171. What not to be deemed a variance.
172. Amendments of course and after demurrer.
173. Amendments by the court.
174. Court may give relief in case of mistake.
175. Suing a party by a fictitious name.
176. No error or defect to be regarded unless it affect substantial rights.
177. Supplemental complaint, answer, and reply.

§ 169. [145.] (Am'd 1849.) *Existing suits—Material variance.*

No variance between the allegation in a pleading and the proof shall be deemed material, unless it have actually misled

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d. * This chapter does not apply to affidavits, at least so far as to authorize an amendment of the name of the court (*Clickman* v. *Clickman*, 1 Coms. 611; 3 How. 365). And where affidavits to be used in the court of appeals were entitled in the supreme court, they were held defective, and the motion was denied on that ground. (*Ib.*) But where in an action in which the delivery of personal property was claimed, an affidavit in support of the claim was found to be defective (but not in the name of the court), the court permitted the plaintiff to amend the affidavit, and without a motion for the purpose (*Spalding* v. *Spalding*, 3 How. 297; *Dows* v. *Green*, id. 377).

a. The provisions of the revised statutes (2 R. S. 424, omitted from the 4th

the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled; and thereupon the court may order the pleading to be amended, upon such terms as shall be just.

a. These sections (169 and 170) obviously contemplate a case where the alleged variance is developed on the trial, at which time the relief in a case to which it is appropriate may at once be given, and the trial thereafter proceed upon the amended pleadings (*Egert* v. *Wicker*, 10 How. 197; *Therasson* v. *Peterson*, 22 How. 98). They have introduced "a principle unknown to the former practice, namely, that of determining questions of variance, not by the incoherence of the two statements upon their face, and hence inferring their effect upon the state of the preparation of the party, but by proof *aliunde* as to whether the party was actually misled to his prejudice by the incorrect statement." "It is not left to the judgment of the court, whether in a given instance the variance was calculated to mislead, and from thence to hold that it did mislead; but whenever it is alleged that a party has been misled, that fact must be *proved* to the satisfaction of the court; and the proof must show in what respect he has been misled" (*Catlin* v. *Gunter*, 10 How. 321; 1 Kernan, 368; *Deuel* v. *Spencer*, 1 Abb. 237: *Cotheal* v. *Talmadge*, 1 E. D. Smith, 575; *Cobb* v. *West*, 4 Duer, 38). And these principles extend to all actions and "all cases indiscriminately, whether the party invoking their service is seeking to visit his adversary with a forfeiture or not," and they apply to a defence of usury (*Catlin* v. *Gunter*, 1 Kernan, 368). When no proof is furnished that the party has been actually misled to his prejudice, the variance must be disregarded, and the pleadings may be amended to conform to the facts proved (*Chapman* v. *Carolin*, 3 Bosw. 456); or the trial may proceed without any amendment, whether before a judge or a referee, and the party may after the trial move at chambers for leave to amend (*Lettman* v. *Ritz*, 3 Sand. 374; *De Peyster* v. *Wheeler*, 1 Sand. 719; 1 Code Rep. 93; *Harmony* v. *Bingham*, 1 Duer, 210; *Hart* v. *Hudson*, 6 Duer, 294; *Parsons* v. *Suydam*, 3 E. D. Smith, 276; *Craig* v. *Ward*, 36 Barb. 377; *Relyea* v. *Beaver*, 34 Barb. 547); or as it was held in *Coleman* v. *Playstead*, 36 Barb. 29, the disregarding the variance is equivalent to an amendment, or the amendment may be made *nunc pro tunc*, on an appeal. Where the note produced on the trial was payable eight months after date, and the complaint described it as payable immediately, proof by the defendants that they knew the plaintiff held the note produced on the trial; that they had given no other note of that date and amount; and no note of that amount payable immediately, does not tend to

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ed.) are not repealed, but this chapter and the provisions of the revised statutes are to be construed together (*Brown* v. *Babcock*, 1 Code Rep. 66).

b. It is a settled principle with the court, that its suitors shall not be prejudiced by the delay of the court (*Wilson* v. *Henderson*, 15 How. 90); nor by the mistakes or misprisions of its officers; and amendments in such cases are generally matters of course (*Neele* v. *Berryhill*, 4 How. 16; *Daly* v. *Matthews*, 20 How. 267; and see note to § 384, and 2 How. 16, 17).

c. An amendment by adding new parties is a waiver of a default previously taken (*Scudder* v. *Voorhis*, 1 Barb. 55; *Aikin* v. *Albany North. R. R. Co.* 14 How. 337).

d. An amended pleading takes the place of and supercedes the original (4 How. 174; *Fry* v. *Bennett*, 3 Bosw. 200; *Dann* v. *Baker*, 12 How. 521; *Burrall* v. *Moore*, 5 Duer, 656; *Hales* v. *Pomfret*, 1 Dan. 141). The amendment of a complaint relates back to the commencement of the action (*Ward* v. *Kalbfleish*, 21 How. 283).

show that they have been misled by the variance, no defence upon the merits being pretended. (*Id.*)

a. A variance between the proofs and the plaintiff's bill of particulars will not be deemed material, unless the defendant is misled thereby (*Seaman* v. *Low*, 4 Bosw. 338).

b. Where in an action against carriers for the loss of goods, it is averred that the goods were by the "plaintiff" "delivered to the defendants," and "the defendants promised safely" to carry, and the proof was that an agent of the plaintiff delivered the goods, and the promise was made to him,—held no variance (*Richards* v. *Westcott*, 2 Bosw. 590).

c. A complaint without averring that the parties had stated an account, set forth a state of facts showing him entitled to an accounting, and demanded judgment for a sum certain as an ascertained balance, held that the complaint should not be dismissed, but proceed as if the complaint prayed for an accounting and judgment for the amount found due (*Emery* v. *Pease*, 20 N. Y. 62).

d. An answer setting up the non-joinder of a joint contractor, and defective in not averring that such joint contractor is still living, may be made to conform to the proof (*Wooster* v. *Chamberlin*, 28 Barb. 602).

e. Where on the trial evidence is admitted of a cause of action or defence not within the pleadings, the objection to reception of such evidence must be distinctly taken at the time, or the court on appeal will deem the variance immaterial, or that the pleading was treated as amended to admit such evidence (*Manice* v. *Brady*, 15 Abb. 173; *Belknap* v. *Sealey*, 14 N. Y. 143; *Parsons* v. *Suydam*, 3 E. D. Smith, 280).

f. **Immaterial variances.**—The following have been held to be immaterial variances:

g. Allegation that work was performed by "Jones Wolcott;" proof that it was performed by "Edwin Jones Wolcott" (*Wolcott* v. *Meech*, 22 Barb. 321).

h. Allegation that it was defendant's duty to repair a fence between plaintiff's close and between the "*closes* of other persons;" proof that there was but *one* close between the plaintiff's and defendant's closes (*Underhill* v. *Harlem R. R. Co.* 21 Barb. 497).

i. Where two parties sued, one as executor of Keese, the other as the surviving partner of Keese, and it appeared on the trial that only the surviving partner should have sued (*Keese, Exec'tors of*, v. *Fullerton*, 1 Code Rep. 52).

j. In an action by four persons as lessors, on the trial it appeared that the lease was made by those four and another named Laight, since then deceased, but that the interest of Laight survived to the plaintiffs; but no reason for the omission of Laight as plaintiff was assigned in the declaration; held that the variance might be disregarded (*De Peyster* v. *Wheeler*, 1 Code Rep. 93; 1 Sand. 719).

k. Allegation that defendant represented the note to be "a good note, and that it would pass in South street;" proof that he said "the note was good, and there were people in South street who would take it" (*Hawkins* v. *Appleby*, 2 Sand. 421).

l. Allegation that goods were sold and delivered to the defendant; proof that the goods were purchased by defendant, but delivered to a third party for his own use by order of the defendant (*Rogers* v. *Verona*, 1 Bosw. 417).

m. Allegation of a sole liability; proof of a joint undertaking by defendant and another (*Carter* v. *Hope*, 10 Barb. 180).

n. Allegation of an absolute promise; proof of a conditional promise, it being also shown that before the commencement of the action the condition was fulfilled (*Hart* v. *Hudson*, 6 Duer, 294).

o. Allegation of notice of non-payment of a note; proof of facts to excuse notice (*Purchase* v. *Mattison*, 6 Duer, 587).

p. Allegation that a note was payable "*three* months after date;" proof that it was payable "four months after date" (*Trowbridge* v. *Didier*, 4 Duer, 448 and see *Chapman* v. *Carolin*, 3 Bosw. 456).

a. Allegation of bill payable to order of A: proof of a bill payable to order of B (*Farmer* v. *Crain*, 7 Cal. 135).

b. Allegation that the plaintiff warranted there was a force-pump in the building, and that he removed the same; proof that there never was a force-pump in the building (*McComber* v. *Granite Ins. Co.* 15 N. Y. 495).

c. Allegation of delivery of goods to a carrier at 59 Broadway; proof of a delivery in Canal street (*Newstadt* v. *Adams*, 5 Duer, 43).

d. Allegation that property belonged to plaintiff, proof that he held it as a factor (*Gorum* v. *Carey*, 1 Abb. 285).

e. Allegation that defendant was in possession of the premises in suit in right of his wife; proof that he was in possession in his own right (*Rose* v. *Bell*, 38 Barb. 25.

f. Allegation of defendant's sole liability; proof of a joint liability (*Carter* v. *Hope*, 10 Barb. 180).

g. Allegation of the time of committing a trespass (*Dubois* v. *Beaver*, 25 N. Y. 123).

h. Allegation that defendant is assignee of certain demised premises; proof that he is assignee of a part only (*Van Rensselaer* v. *Jones*, 2 Barb. 643).

i. Allegation that a note was payable eight months after date; proof that it was payable immediately (*Chapman* v. *Carolin*, 3 Bosw. 456).

j. Difference between the description of the premises in the complaint, in ejectment, and the proof on the trial (*Russell* v. *Conn*, 20 N. Y. 81).

k. In an action for trespass on lands, the plaintiff after proof of the trespass alleged in the complaint, may prove other trespasses prior to the earliest date mentioned in the complaint (*Relyea* v. *Beaver*, 34 Barb. 547).

l. Upon an answer setting up the non-joinder of other persons as co-defendants, articles of co-partnership are admissible to prove a partnership between the defendants and the persons omitted. But where the answer alleged that two persons not joined were partners of defendants, and the articles produced showed that there was only one partner not joined, it was held that the articles were not admissible (*Kayser* v. *Sichel*, 34 Barb. 84).

m. Under a complaint which alleges fraudulent representations of defendant, which induced plaintiff to pay him money, and which money is sought to be recovered back, plaintiff may prove facts entitling him to recover as for money received to his use, without proving the alleged fraud (*Byxbie* v. *Wood*, 24 N. Y. 607).

n. In an action for taking personal property, under an answer justifying the taking upon a *certain* execution against the former owner of the property subsequent to plaintiff's claim of title, the defendant cannot give evidence of a levy under another execution, before the plaintiff claimed title (*Graham v. Harrower*, 18 How. 144).

o. A defence of non-joinder of a co-contractor, defective in not alleging that the joint contractor was still living, may be cured by proof on the trial (*Wooster* v. *Chamberlin*, 28 Barb. 602).

p. An averment in a complaint on a promissory note, that the note "*was duly presented to the maker, and payment demanded*," is sustained by proof that the note was presented at the maker's last place of business, from which he had then recently removed, and after diligent inquiry he could not be found so that it could be presented to him personally (*Paton* v. *Lent*, 4 Duer, 231; see *Spies* v. *Gilmore*, 1 Coms. 326).

§ 170. [146.] *Existing suits. Immaterial variance.*

Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment withou costs.

a. Allowing or refusing to allow an amendment of the pleadings on the trial so as to admit proof of a new cause of action or defence, is a matter within the discretion of the court, and such exercise of discretion is not the subject of an exception, and is not reviewable on a motion for a new trial (*Hendricks* v. *Decker*, 35 Barb. 298; *Roth* v. *Sloss*, 6 Barb. 308; *Brown* v. *McCune*, 5 Sand. 229); nor on an appeal (*Gould* v. *Rumsey*, 21 How. 97; and see *McCarty* v. *Edwards*, 24 How. 237), unless perhaps where the denial proceeds on a supposed want of power to allow it (*Russell* v. *Coun*, 20 N. Y. 81).

See note to section 171.

§ 171. [147.] *Existing suits. Failure of proof.*

Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two sections, but a failure of proof.

b. When the party sets up some particular matter as cause of action or ground of defence and fails to prove it in some particular, it is a *variance only*. But where there is a total want of proof of any allegation in the pleading of the subject-matter, cause of action, or ground of defence, it is a failure of proof (*Kelsey* v. *Western*, 2 Coms. 500; *Richards* v. *Allen*, 3 E. D. Smith, 408; *Fay* v. *Grimstead*, 10 How. 321; *Catlin* v. *Gunter*, 10 How. 321; 1 Kernan, 368; *Duel* v. *Spence*, 1 Abb. 237). Where the alleged cause of action or counter-claim is a tort, and the proof is a cause of action or counter-claim on contract, it is a failure of proof (*Walter* v. *Bennett*, 16 N. Y. 250; *Ransom* v. *Wetmore*, 39 Barb. 104; *Mayor of N. Y.* v. *Parker Vein Steamship Co.*, 21 How. 289). Thus, where the alleged cause of action was the wrongful conversion of a draft, and the proof showed a cause of action for money received, being the amount of such draft, it was held to be a failure of proof (*Walter* v. *Bennett*, 16 N. Y. 250).

c. Under a defence that a note was given without consideration, proof of payment, is a failure of proof (*Texier* v. *Gouin*, 5 Duer, 389).

d. After a debt has been released, an action to recover it, on the ground that it has been subsequently revived by a new promise, must allege such new promise as the cause of action, and if the cause of action alleged in the complaint is the original debt, proof of the new promise only will be a failure of proof (*Stearns* v. *Tuppin*, 2 Duer, 294). See *ante*, p. 181, *c.*

e. Where the cause of action alleged is a fictitious sale and purchase of stock, and the proof is a conversion of the stock, it is a failure of proof (*Salters* v. *Genin*, 3 Bosw. 250; 7 Abb. 193). Where a complaint alleged an insurance to B. & L., on a joint interest and a joint loss, and their allegations were put in issue by the answer, the proof was of a joint loss and an insurance to B. *alone*, without any general words, such as, "For the benefit of whom it may concern;" or, "as the property may appear;" and there was no allegation or proof of an assignment by B. to L.,—held a failure of proof (*Burger* v. *Columbian Ins. Co.*, 17 Barb. 274).

f. If the proofs do not agree with the pleading it is a failure of proof, although the facts proved may themselves constitute a cause of action or defence (*Gasper* v. *Adams*, 28 Barb. 441).

g. Where the complaint alleged that the plaintiff left with defendant on 27th Sept., 1854, 20 shares of stock for sale at not less than 46 per cent., and that defendant sold the stock at that rate and refused to pay over the proceeds; and the proof was that by plaintiff's direction said proceeds were invested in other 20 shares of stock, which by the like direction were sold and the proceeds invested in other 20 shares of stock, which by plaintiff's author-

ity were sold and proceeds received 20 March, 1855,—held not a failure of proof (*Hall* v. *Morison*, 3 Bosw. 520).

a. In an action on a promissory note, the answer set up the defence of usury, in exacting more than seven per cent. on giving a further day of payment. The proof was that defendants, being indebted to plaintiffs on a promissory note, requested an extension of time to pay, which plaintiffs' agent consented to on their giving a new note, with other indorsers, and paying his expenses in going to all the makers of the note and waiting for the new note,—the note in suit was for the amount of the old note and such agent's expenses,—held that the defendants not having proved the facts as alleged in their answer, and not having asked to amend, they had "failed to substantiate their defence," and that the plaintiffs were entitled to recover (*Gasper* v. *Adams*, 28 Barb. 441).

b. In *Codd* v. *Rathbone* (19 N. Y. 39), it was held that, the answer being usury proof of a violation of the statute prohibiting banks from paying out paper discounted at less than par, was a failure of proof.

c. Where the cause of action alleged in the complaint is a conversion of personal property, and the proof is a breach of duty in respect of such property, *e. g.*, a sale of it by an agent at a less price than instructed, it is a failure of proof (*Moore* v. *McKibbin*, 33 Barb. 246).

d. Where the complaint in an action by an assignee of personal property, alleged a conversion subsequent to the assignment, and on the trial the plaintiff gave evidence to sustain the allegations in the complaint, held that he could not afterwards prove and recover on a conversion anterior to the assignment; it was not a variance, but an offer to prove an entirely distinct cause of action from that alleged in the complaint (*Whittaker* v. *Merrill*, 30 Barb. 389).

e. An allegation that a certain valuation should be made by A. & B., and that if they were unable to agree that they should select a third as umpire, that they did disagree, and selected a third as umpire, is not sustained by proof of an agreement that the third person was to be selected as a third arbitrator, and held that there was a failureof proof (*Lyon* v. *Blossom*, 4 Duer, 318).

See as to amending pleadings in actions against partners (Laws 1862, ch. 476).

f. An objection that the case made by the proof, varies from that stated in the complaint, should be distinctly made at the trial (*Manice* v. *Brady*, 15 Abb. 173). Such an objection is not embraced in a motion to nonsuit on the ground that *no cause* of action has been shown. There is a distinction between objecting that *no cause* of action has been proved, and that *the cause of action alleged in the complaint* has not been proved. And on a trial by the court, the objection that there is a failure of proof is not embraced in a general exception to the decision on the facts and the law (*Belknap* v. *Sealey*, 14 N. Y. 143; *Parsons* v. *Suydam*, 3 E. D. Smith, 280).

g. If the court or a referee erroneously hold a variance to be a failure of proof, the only mode of rectifying the error is by an exception and an appeal from the judgment (*Gasper* v. *Adams*, 24 Barb. 288).

See note to section 169.

§ 172. [148.] (Am'd 1849, 1851, 1859.) *Existing suits. Amendments of course and after allowance of demurrer.*

(1.) Any pleading may be once amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time within twenty days after it is served, or at any time before the period for answering it expires, or it can be so amended at any time within twenty days after the service of the answer or demurrer to such pleading, unless it be made

to appear to the court that it was done for the purposes of delay, and the plaintiff or defendant will thereby lose the benefit of a circuit or term for which the cause is or may be noticed; and if it appear to the court that such amendment was made for such purpose, the same may be stricken out, and such terms imposed as to the court may seem just. In such case a copy of the amended pleading must be served on the adverse party.

(2.) After the decision of a demurrer, either at a general or special term, the court may, in its discretion, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just.

(3.) If the demurrer be allowed for the cause mentioned in the fifth subdivision of section 144, the court, may in its discretion and upon such terms as may be just, order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.

a. **New assignment.**—The amendment of the complaint under this section takes the place of a "new assignment" (*Stewart* v. *Wallis*, 30 Barb. 344).

b. **Stay of proceedings.**—The right to amend of course is not *per se* a stay of proceedings *Casson* v. *Whalon*, 1 Code Rep. N. S. 27; see *Plumb* v. *Whipple*, 17 How. 411).

c. **Amendment after decision on demurrer.**—The third paragraph of this section applies to actions in the different classes specified in § 167 (*Robinson* v. *Judd*, 9 How. 383).

d. Where a demurrer is interposed which the pleader could not have supposed would dispose of the case on the merits, it cannot be deemed to have been put in in good faith (*Osgood* v. *Wittelsey* 10 Abb. 134). If after such a demurrer is overruled with leave to answer within a certain time, the defendant omits to answer, he should not afterwards be admitted to answer unless he shows he has a meritorious defence. (*Id.*)

e. Where only part of an answer is demurred to, the defendant under a leave to amend can only amend the portion of the answer to which the demurrer referred and cannot set up any new defence, but he may add to the part demurred to, anything which would perfect or strengthen the defence as originally made (*Fielden* v. *Carelli*, 26 How. 173; 16 Abb. 289).

f. On the decision of a demurrer leave to amend the pleading demurred to may be reserved, but the court cannot order the pleading to be amended (*Lord* v. *Vreeland*, 13 Abb. 195).

g. **To what cases this section applies.**—No one will construe this section as allowing amendments which the court is prohibited from allowing, upon special application (*Spaulding* v. *Spaulding*, 3 How. 300; 1 Code Rep. 64). It applies only to cases where the first pleading put in is regular; for if the opposite party on receiving an irregular pleading prepare to move to set it aside for irregularity, the party pleading it cannot amend without payment of the costs of the opposite party (*Williams* v. *Wilkinson*, 1 Code Rep. N. S. 20; 5 How. 357). It does not authorize the amendment of the summons of course (*Dibles* v. *Mason*, 1 Code Rep. 37; *M'Crane* v. *Moulton*, 1 Code Rep. N. S. 157; 3 Sand. 736; *Follower* v. *Laughlin*, 12 Abb. 105).

h. **What is an amended pleading?**—Where a pleading was served *without* a verification, and afterwards *re-served* without alteration but *with* a verification, it was held that the pleading last served was not an amended pleading, and might be disregarded (*George* v. *M'Avoy*, 1 Code Rep. N. S. 318; 6 How.

200). And in *Snyder* v. *White* (6 How. 321), where an answer was put in, and afterwards the defendant served another answer which he called an *amended* answer, and which in form and phraseology differed from the one first served, but its *legal effect* amounted to the same thing, Welles, J., held that the answer secondly put in was not an *amended answer*, and that the defendant had no right to put it in, because it was identical in *legal effect* with the answer first served; and he ordered the answer secondly served to be struck out. Properly speaking the name of a party is not a part of the pleadings, therefore, striking out the name of a party only changes the parties to the action and leaves the pleadings the same, a change of parties does not amend the pleadings (*Billings* v. *Baker*, 6 Abb. 216). See *ante*, p. 302, *e*. The fact that portions of a complaint are on motion struck out as irrelevant, is not an amendment of the complaint within this section (*Ross* v. *Dinsmore*, 20 How. 328; 12 Abb. 4). And where portions of a complaint are on motion struck out as irrelevant it is not necessary to serve a copy of the complaint without the parts struck out. (*Id.*) The party upon whom an amended pleading is served is not at liberty to disregard it because he deems it inconsistent with the original (*Spencer* v. *Tooker*, 12 Abb. 353).

a. **Amendment of course. In what cases:**—"*The right to amend [of course] is absolute, subject only to the power of the court to strike out for cause shown.* If the amendment is made in good faith, and not for the purpose of delay, it cannot be stricken out, although the effect may be to deprive the opposite party of the benefit of a circuit or term. The court must pass upon the question of intent as well as of the effect, and be satisfied that it was made for the purpose of delay, and that such will be the effect of it before it can be stricken out. The statute does not authorize the party [on whom the amended pleading is served] to decide in the first instance and disregard it at his peril, leaving the right of the parties to be subsequently settled upon motion, but provides for a decision upon the good faith and propriety of the amended pleading before any other proceedings are had in the action, which may affect the rights of the parties" (*Griffin* v. *Cohen*, 8 How. 452; and see *Farrand* v. *Herbeson*, 3 Duer, 658; *Cooper* v. *Jones*, 4 Sand. 699; *Thompson* v. *Minford*, 11 How. 273; *Burrall* v. *Moore*, 5 Duer, 654; *Rogers* v. *Rathbun*, 8 How. 466; *Spencer* v. *Tooker*, 12 Abb. 353). *But where an amended answer is served for delay, and at so late a period as to throw the cause over the circuit, it may be treated as a nullity* (*Allen* v. *Compton*, 8 How. 251). The cause was at issue on the 20th February, and on the same day plaintiff served notice of trial and inquest for the 14th of March, and on the 9th of March defendant served an amended answer. Plaintiff's attorney disregarded the amended answer, and took an inquest, and then moved to strike out the amended answer. The motion was opposed on an affidavit of the defendant's attorney, in which he swore that his client informed him of two grounds of defence at the time of his retainer, namely, set-off and want of consideration for the making of the note sued on; but he concluded that the set-off would be sufficient, and therefore did not include the other defence in the original answer; but that when the plaintiff denied the set-off in his reply, he considered it better to amend the answer by inserting the other defence. Shankland, J., granted the motion with costs.

b. In *Vanderbilt* v. *Bleeker*, (4 Abb. 289) the amended answer [the amendment being of a mere clerical error] was served five days before the circuit. Plaintiff returned it, and proceeded; and Emot, J., held that he was right in so doing, the design to delay being manifest; and that in such cases the question of good faith might be raised at the circuit.

c. Where an action was commenced by service of a summons without a complaint, and the defendant suffered judgment by default, without demanding a copy of the complaint, the judgment was afterwards set aside, with leave to defendant to answer within twenty days after service of a copy of of the complaint; held, that the plaintiff might serve an *amended* complaint without first serving the original (*Plumb* v. *Whipple*, 7 How. 411).

d. A party having amended his pleading once, although by leave of the court, his right to amend of course is gone, and he cannot again amend with

out leave (*Jeroliman* v. *Cohen*, 1 Duer, 631; *White* v. *Mayor of N. Y.* 5 Abb. 322; 14 How. 495). But after an order obtained by the defendant requiring the plaintiff to make certain parts of the complaint definite and certain, the plaintiff may of course, and without any leave of the court, make amendments other than those required by the order, and not inconsistent therewith. (*Id.*) Thus, where an order made before answer, granting a motion to strike out parts of a complaint as irrelevant contained a clause reserving leave to plaintiff to amend his summons and complaint, plaintiff amended his summons pursuant to the leave reserved and gave notice that he declined to amend his complaint, the defendants subsequently answered and then the plaintiff served an amended complaint, the court denied a motion to set it aside, holding that the order striking out parts of the complaint as irrelevant was not such an amendment as took away the plaintiff's right to amend once of course (*Ross* v. *Dinsmore*, 12 Abb. 4; 20 How. 326).

a. Where the complaint was served on May 12, and an order made June 26, on defendant's motion requiring the plaintiff to make certain parts of his complaint definite and certain, and striking out certain other parts, but specifying no time within which the amendments were to be made, the plaintiff, on Nov. 1, served an amended complaint, containing most of the matter directed by the order to be stricken out, together with other allegations not contained in the original complaint. The defendant moved to set aside the amended complaint for irregularity, on the ground that, (1) It was not served in time; (2) That it contained matter ordered to be stricken out of the original complaint; and (3) That under the form of an amended complaint, a new complaint, on a different cause of action, had been introduced. The motion was denied without prejudice to the defendant's right to move to strike out as irrelevant or redundant, any of the matter stricken from the original complaint, and reinserted in the amended one (*Jeroliman* v. *Cohen*, 1 Duer, 631). It was held that an answer containing denials only, cannot be amended of *course*, but answers containing new matter may (*Farrand* v. *Herbeson*, 3 Duer, 655; *Plumb* v. *Whipple*, 7 How. 411; *Townsend* v. *Platt*, 3 Abb. 325; *Lampson* v. *M'Queen*, 15 How. 345). *Semble*, it is otherwise since the amendment of 1859.

b. **Within what time.**—A complaint may be amended of course at any time within twenty days after service thereof (*Clor* v. *Mallory*, 1 Code Rep. 126); or within twenty days after an answer or amended answer has been served (*Seneca County B'k* v. *Garlinghouse*, 4 How. 174); and although more than twenty days have elapsed from the service of the original answer and replication thereto, the amended answer may cause a necessity for an amended complaint. (*Id.*)

c. Where a defendant properly serves his answer by mail, he has *forty* days thereafter, within which to serve an amended answer (*Washburn* v. *Herrick*, 4 How. 15).

d. When after an answer the plaintiff noticed the cause for trial, and, no affidavits of merits having been filed or served, took an inquest on the second day of the circuit, and entered judgment, the defendant within the time allowed for an amendment of course, but after the judgment was entered, served an amended answer, and then moved to set aside the judgment, it was held that the judgment was regular, otherwise the amendment would have prejudiced the proceedings already had (*Plumb* v. *Whipple*, 7 How. 411; see *Cuson* v. *Whalon*, 1 Code Rep. N. S. 27).

e. A notice of motion for judgment on account of the frivolousness of the answer does not deprive the defendant of the right to amend of course. He may notwithstanding such notice amend within twenty days after the answer is served, and such amendment will be sufficient to defeat the motion for judgment (*Burrall* v. *Moore*, 5 Duer, 654).

f. After service of a summons and complaint, and before defendant's time to answer expired, plaintiff served an amended complaint. At the expiration of twenty days from the time of service of the original complaint, plaintiff entered judgment; held, that the defendant had twenty days from the service of

the amended complaint in which to answer or demur thereto (*Dickerson* v. *Beardsley*, 1 Code Rep. 37); but *semble* after issue, notice of trial, and the examination of a witness under § 391, it is too late for a defendant to amend of course, although twenty days have not elapsed since the answer was served (*Snyder* v. *White*, 6 How. 321).

f. After a demurrer to an answer, the defendant may serve an amended answer of course within twenty days, if he has *not* previously amended of course (*White* v. *Mayor of N. Y.*, 5 Abb. 322; 14 How. 495); although before demurring to the answer the plaintiff had obtained on motion an order to strike out parts of it with leave to the defendant to amend on terms, which he had not done (*Cooper* v. *Jones*, 4 Sand. 699). The only limit to the right to amend of course after a demurrer is, that it shall not be done for the purpose of delay. (*Ib.*) So held where, on December 20, an order was made striking out portions of the answer, with leave to the defendant to amend his answer on payment of costs. On January 15, the defendant not having amended, the plaintiff demurred to the answer, and noticed the demurrer for argument. On January 20, the defendant served an amended answer, and it was held he might do so without paying any costs. (*Ib.*)

g. **Extent of amendment of course.**—The plaintiff cannot by an amendment of course, stike out the names of any of the parties who have been served with the summons (*Russell* v. *Spear*, 3 Code Rep. 189; *Chase* v. *Dunham*, 1 Paige, 572; see *ante*, p. 174, *b*), nor without amending his summons, introduce the names of additional defendants (*Follower* v. *Laughlin*, 12 Abb. 105), nor introduce circumstances happening after the commencement of the action (*Hornfager* v. *Hornfager*, 1 Code Rep. N. S. 180); he may probably change the place of trial named in the complaint (see pp. 146, *c*, 148, *c*, *ante*); and he may insert "other allegations material to the case" (*Jeroliman* v. *Cohen*, 1 Duer, 632); or insert any new or additional cause of action or defence that can properly be united (*Mason* v. *Whitely*, 1 Abb. 86; 4 Duer, 611; *Townsend* v. *Platt*, 3 Abb. 323; *Thompson* v. *Minford*, 11 How. 273; *Griffin* v. *Cohen*, 12 How. 451; *Spencer* v. *Tooker*, 12 Abb. 354; 21 How. 233; *Macqueen* v. *Babcock*, 13 Abb. 268; *Byman* v. *Remond*, 18 How. 272; *Fielden* v. *Caselli*, 26 How. 173; 16 Abb. 289). Thus, where the original answer contained a counter-claim, and the defendants afterwards amended by striking out the counter-claim and setting up the defence of the statute of limitations, held he might do so (*Wyman* v. *Remond*, 18 How. 272; contra, *Field* v. *Morse*, 8 How. 48; *Hollister* v. *Livingston*, 9 *id.* 140). A complaint cannot be amended of course, so as to change the cause of action from one for a money demand on contract to one for relief (*Gray* v. *Brown*, 15 How. 555). Thus, where the complaint was in the usual form on a promissory note, it was held that the plaintiff could not amend of course by making it an action to charge the separate estate of a married woman. (*Id.*) By an amendment of course, a party may strike out a cause of action or defence (*Watson* v. *Bushmore*, 15 Abb. 51).

c. It is irregular for a plaintiff to amend his complaint as regards one defendant without notice to the other (*Fassett* v. *Tallmadge*, 15 Abb. 206).

h. Where a complaint is amended of course, by substituting a different cause of action, the defendant cannot treat it as a new action and answer separately to the original and amended complaints (*M'Grath* v. *Van Wyck*, 2 Sand. 651).

a. After answer, forming an issue, the place of trial being Albany County, the defendant served notice of motion to change the place of trial, for convenience of witnesses, to Schoharie County; the plaintiff then served an amended complaint, the only amendment being a change of the place of trial to Schenectady County,—held that the defendant's right to make his motion was not taken away by such amendment (*Toll* v. *Cromwell*, 12 How. 79).

b. **Amendment after allowance of demurrer.**—A demurrer interposed in the honest belief that it may prevail, but not in the expectation of disposing of the cause on its merits, is not "in good faith," and leave will not be given to withdraw it and put in an answer (*Osgood* v. *Whittlesey*, 20 How. 74).

§ 173. [149.] (Am'd 1849, 1851, 1852.) *Existing suits. Amendment by order.*

The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party; or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved.

a. **Partition.**—This section applies to *proceedings* for partition (2 Laws 1857, p. 504; see *Croghan* v. *Livingston*, 6 Abb. 350; see note to § 448, *post*).

b. **Amendment can only be ordered by the court in which the action is commenced.**—The power of amendment is confined to the court in which the action originated, and therefore the supreme court has no power to amend the record brought into it on an appeal from an inferior court (*Gould* v. *Glass*, 19 Barb. 186). The application to amend should be made in the court below; and where only a copy is sent to the appellate court, after an amendment of the original, it is of course to allow the copy to be amended (*Luyster* v. *Sniffin*, 8 How. 250). It is doubtful whether an appellate court can amend exceptions, in matter either of form or substance (*Onondaga Mut. Ins. Co.* v. *Minard*, 2 Coms. 98). [The court of appeals has, in some cases, directed a re-settlement of the case by the court below.] But *after* argument and judgment, it will not set aside the judgment and stay proceedings to enable the appellant to make an application to the court below, to alter the statement of the exceptions taken at the trial (*Fitch* v. *Livingston*, 7 How. 410). The court of appeals on appeal conformed the pleadings to the proof to sustain a judgment for plaintiff (*Pratt* v. *Hudson R. R. Co.*, 21 N. Y. 305).

c. **Amendment generally before trial.**—It is very much a matter of course to allow any party, at any time before trial, to amend his pleadings, so as to present his own views of the questions to be litigated upon such terms as may be deemed equitable. There is now no restriction upon the power of the court to allow such amendments, even though the effect be to change entirely the whole cause of action or the grounds of defence. It is only when a party seeks to amend his pleadings after trial, that the court is prohibited from allowing an amendment which would substantially change the cause of action or the defence (*Troy and Boston R. R. Co.* v. *Tibbets*, 11 How. 170; *Daguerre* v. *Orser*, 3 Abb. 86). The court will grant an amendment on terms just to the opposite party, whenever it can see that justice will be furthered by it, on some reasonable excuse being shown for the defect sought to be rectified (*Harrington* v. *Slade*, 22 Barb. 164). Thus amendments have been allowed: by changing the action from one on a promissory note to one on contract (1 Code R. 27, but see 27 How. 179); changing an allegation from "severally indorsed" to "jointly indorsed" (*Bacon* v. *Comstock*, 11 How. 197); by substituting a cause of action in *special* contract for a common count (*Jackson* v. *Saunders*, 1 Code Rep. 27); by adding a material averment (*Keese* v. *Fullerton*, *id.* 52); by substituting the name of a receiver for the defendant in the action (*Fuller* v. *Webster Fire Ins. Co.*, 12 How. 293); by changing the plaintiff's name or description (*Barnes* v. *Perine*, 9 Barb. 202; *Travis* v. *Tobias*, 8 How. 334; *Davis* v. *Schermerhorn*, 5 How. 440; *Pomroy* v. *Sperry*, 16 *id.* 211; and see as to parties changing their name pending an action, Laws 1847, ch. 464; 1860, ch. 80); by striking out the name of a defendant (*Bemis* v. *Bronson*, 1 Code Rep. 27); by adding a verification (*Bragg* v. *Bickford*, 4 How. 21); by altering the prayer of the complaint so as to claim the property itself, and damages for its detention, instead of praying judgment for the value of the property (*Dows* v. *Green*, 3

How. 378; see, however, *Morris* v. *Rexford*, 18 N. Y. 557); by increasing the amount claimed in an action on contract for the recovery of money only, even after a reply, repeating the original claim, and both pleadings verified *Merchant* v. *N. Y. Life Ins. Co.*, 2 Sand. 659; 2 Code Rep. 66, 87); the occasion of the mistake being satisfactorily shown (*id.*); and where the plaintiff declared for goods sold, the answer set up that they were sold upon a credit which had not expired, plaintiff moved to amend his complaint by averring that the goods were procured through fraudulent representations on the part of the defendant. In the original complaint the plaintiff demanded judgment for $162 87, that being the contract price of the goods. In the complaint as proposed to be amended, he demanded judgment for the *same amount*, averring that to be the value of the goods. The amendment was allowed (*Chapman* v. *Webb*, 1 Code Rep. N. S. 388). But where a plaintiff purposely commenced his action upon contract, with a view to obtain an advantage he could not obtain if he had sued in tort, having secured that advantage, he will not be allowed to amend it by making his action in tort (*Lane* v. *Beam* 19 Barb. 51; 1 Abb. 65; and see *Andrews* v. *Bond*, 16 Barb. 633; *Walter* v. *Bennett*, 16 N. Y. 250; *Mayor of N. Y* v. *Parker Vein Steamship Co.*, 21 How. 289; *Ransom* v. *Wetmore*, 39 Barb. 104).

a. When the facts alleged in a complaint do not constitute a cause of action, the plaintiff cannot either by amendment or supplemental complaint, incorporate into the case facts essential to a cause of action and occurring after the action was commenced (*McCullough* v. *Colby*, 4 Bosw. 603).

b. The fact that an answer sets up the defence of usury is no reason for denying the defendant leave to amend the answer as to other defences contained therein (*Brown* v. *Mitchell*, 2 Abb. 481; 12 How. 408). For it is said that the same rule as to amendments applies to a defence of usury as to any other defence (*Catlin* v. *Gunter*, 1 Kernan, 368; *Brown* v. *Mitchell*, 12 How. 408; 2 Abb. 481). The cases, however, only go the length of holding that the defence of usury being in, it is to be governed by the same rules as other defences, and the question remains whether the defence not being in at all, the defendant will be permitted, under cover of an amendment of his answer, to introduce such a defence. In *Morris* v. *Slatterly* (6 Abb. 74), Hoffman, J., refused such permission, as did Harris, J., in *Bates* v. *Voorhees* (7 How. 284). The refusal, however, was against his own convictions as to its propriety, and because the practice to disallow such amendments had become "*inveterate*." In *Grant* v. *M'Caughin*, (4 *id.* 216), Parker, J., on opening a default taken for want of an answer, refused to impose the terms that the defendant should not set up the defence of usury. Ordinarily the court will not give leave to amend an answer for the purpose of interposing the defence of the statute of limitations (*Sagory* v. *N. Y. & New Haven R. R. Co.*, 21 How. 455); or usury or any defence of the class denominated unconscionable (*Macqueen* v. *Babcock*, 13 Abb. 268; 22 How. 229; *Osgood* v. *Whittlesea*, 20 How. 72).

c. **Summons.**—Leave may be given to amend the summons (*McDonald* v. *Walsh*, 5 Abb. 69; *Dean* v. *O'Brien*, 13 Abb. 11); or a copy filed (*Van Wynch* v. *Hardy*, 20 How. 222). An application for leave to amend a summons must be upon notice (*Hewitt* v. *Howell*, 8 How. 346). Leave was granted a plaintiff to amend his summons by increasing the amount demanded, although as to the increased amount the effect was to deprive the defendant of the benefit of the statute of limitations (*Deane* v. *O'Brien*, 13 Abb. 11). And where the summons was signed with the firm name of two attorneys in partnership, and the complaint served with the summons was signed with the name of one of such attorneys only, and all subsequent proceedings are had in the name of the attorney who signed the complaint, the court after judgment amended the summons by substituting the name of the attorney for the firm name (*Sluyter* v. *Smith*, 2 Bosw. 673).

d. **Affidavits.**—The affidavits on which an attachment issued may be amended (*Farman* v. *Walter*, 13 How. 350; see p. 357, *d*, *e*, and § 406, *post*.)

e. **Attachment.**—A warrant of attachment may be amended (*Kissam* v *Marshall*, 10 Abb. 424).

a. **Undertaking.**—An undertaking on arrest (*Bellinger* v. *Gardner*, 2 Abb. 443; 12 How. 381); an undertaking on appeal (*Wilson* v. *Allen*, 3 How. 369; *Burns* v. *Robbins*, 1 Code Rep. 62; *Schermerhorn* v. *Anderson*, 1 Coms. 430); an undertaking on an attachment (*Kissam* v. *Marshall*, 10 Abb. 424), may be amended.

b. The consent in writing of the surety should be annexed to and filed with the amended undertaking (*Wilson* v. *Allen*, 3 How. 369).

c. **Amendment on motion to set aside.**—It has been the practice to allow a party opposing a motion to set aside proceedings for some alleged defect therein, to amend the defects complained of without a new motion on his part, when the amendment proposed is proper in itself (*Spalding* v. *Spalding*, 1 Code Rep. 64; 3 How. 297; see *Weare* v. *Slocum*, 1 Code Rep. 105; 3 How. 397; *Kissam* v. *Marshall*, 10 Abb. 424; *Sherman* v. *Fream*, 8 Abb. 33).

d. **Unauthorized amendment.**—Where a party makes an unauthorized amendment, the remedy of the opposite party is to refuse to accept, or to return promptly the amended pleading, or to give notice that he disregards such amended pleading and stating his reasons for doing so (*Follower* v. *Laughlin*, 12 Abb. 105; *Hollister* v. *Livingston*, 9 How. 140). Receiving such an amended pleading, and retaining it sixteen days without such notice was held a waiver of objections to it (*Hollister* v. *Livingston*, 9 How. 140); so was obtaining an order to answer such amended pleading held a waiver of the objection (*id.*), if the party persists in serving such amended pleading or does not withdraw it, the party on whom it is served may move to have it struck out or set aside as irregular (*Follower* v. *Laughlin*, 12 Abb. 105).

e. **Amendment on the trial.**—The court or referee cannot, *upon* the trial, order an amendment which amounts to a new cause of action or defence (*Union Bank* v. *Mott*, 18 How. 506; 10 Abb. 372; 11 Abb. 42; and see *N. Y. Marbled Iron Works* v. *Smith*, 4 Duer, 362; *Waldheim* v. *Sichel*, 1 Hilton, 45; *Robbins* v. *Richardson*, 2 Bosw. 248). Leave to amend an answer, or raising a new issue pending a reference was denied (*Cocks* v. *Radford*, 13 Abb. 207; *Davis* v. *Garr*, 7 How. 311); and so of a complaint (*Saltus* v. *Genin*, 19 How. 233). Subject to the foregoing limitation there is no restriction upon the power of amendment of pleadings on the trial, where the amendment is in furtherance of justice (*Van Ness* v. *Bush*, 14 Abb. 36; *Beardsley* v. *Stover*, 7 How. 294; *Daguerre* v. *Orser*, 3 Abb. 86). And *semble*, that pending a trial before a referee, the court *may*, on terms, make an order to amend in any respect, thus, pending the trial of an action before a referee, the court allowed an amendment by striking out the name of one of the plaintiffs, and alleging an assignment by him to his co-plaintiff (*Holmes* v. *Schermerhorn*, 5 How. 440, see *Cocks* v. *Radford*, 13 Abb. 207; *Union Bank* v. *Mott*, supra; and see *Proceedings on trial before referees*, *post*.)

f. On the trial of an action of ejectment, brought in the names of several plaintiffs, the defendant's counsel, upon the opening of the case, moved for judgment on the ground that the complaint did not state facts sufficient to constitute a cause of action in favor of either of the plaintiffs separately, or in favor of all of them jointly; whereupon the plaintiffs' counsel offered to rely upon the title of F. S., one of the plaintiffs, and moved for leave to amend the complaint so as to set up the title in him alone. The judge permittted the trial to proceed, upon the offer of the plaintiffs' counsel to rely exclusively upon the title of F. S., leaving the plaintiffs to apply for leave to amend (*St. John* v. *Northrup*, 23 Barb. 26).

g. Where the defence of a former action pending is interposed, it is not proper to make an order on the trial, allowing the plaintiff to enter a rule discontinuing the former action, and thereupon to overrule such defence (*Bedell* v. *Powell*, 13 Barb. 183).

h. In an action for for an assault the complaint charged, that the defendant assaulted and beat the plaintiff; on the trial plaintiff was permitted to amend his complaint, without terms, by inserting that defendant at the same time and place "wounded plaintiff, and bit off both his ears" (*Hagins* v. *De Hart*, 13 How. 323).

a. A complaint was amended on the trial, by inserting a claim for special damages (*Miller* v. *Garling*, 12 How. 203).

b. Where the parties go to trial on imperfect pleadings, but with a full understanding of their rights and neither party is taken by surprise, the court will allow such amendments as may be necessary to conform the complaint to the facts proved (*Hunter* v. *Hudson River Iron Co.*, 20 Barb. 493).

c. A pleading may be made to conform to the proof; immaterial allegations may be disregarded, immaterial evidence rejected, and such judgment may be directed as the facts and the law of the case require (*Corning* v. *Corning*, 1 Code Rep. N. S. 351; 2 Selden, 97; *Fox* v. *Hunt*, 8 How. 12; *Martin* v. *Kanouse*, 2 Abb. 331; *Getty* v. *Hudson R. R. R. Co.*, 6 How. 270; *Gasper* v. *Adams*, 24 Barb. 287; *Wood* v. *Wood*, 26 *id.* 359; *Decker* v. *Matthews*, 5 Sand. 445; *Dauchy* v. *Tyler*, 15 How. 399; *Hall* v. *Gould*, 3 Kernan, 127; *B'k. of Havana* v. *Magee*, 20 N. Y. 360; *Van Duzer* v. *Howe*, 21 N. Y. 531).

d. **Amendment after the trial.**—After a trial has been had and the defendant's case fully developed, if the plaintiff amends his complaint, he should elect upon what averments he will rest his case, and should not be permitted to speculate on the chances of proof by complaining in the alternative upon inconsistent statements (*Saltus* v. *Genin*, 3 Bosw. 639; 8 Abb. 254; 17 How. 390). And where a trial has been had in which the whole case was developed and the plaintiff continued to insist on his right to recover on the facts alleged in the complaint until two years and three months after the trial, and eight months after the court on appeal had decided that on those facts he could not recover,—held that if the plaintiff could be permitted to amend by substantially changing his cause of action, it should only be on payment of all the costs accrued since the original complaint was filed. (*Id.*) In that case the application to amend was denied (see *Johnson* v. *McIntosh*, 31 Barb. 267); and (Semble,) that after trial the court should not allow a complaint to be amended by inserting claims known to plaintiff at the commencement of the action (*Bulen* v. *Burdell*, 11 Abb. 381; and see *Cocks* v. *Radford*, 13 Abb. 207). Where the complaint might have been amended on the trial, but is not in fact, and proof is given sufficient to constitute a cause of action, the court after the trial will amend the complaint *nunc pro tunc* (*Coleman* v. *Playsted*, 36 Barb. 27; and see *Lounsbury* v. *Purdy*, 18 N. Y. 515; *Pratt* v. *Hudson R. R. Co.*, 21 N. Y. 305).

e. **Amendment of verdict.**—The verdict of a jury may be amended so as to conform to the facts, where there is no doubt as to such facts (either from certificate of the judge or otherwise) and of the real intentions of the jury (*Burhans* v. *Tibbitts*, 7 How. 21).

f. **Amendment after verdict or report of Referee.**—After a decision of a referee in favor of a defendant and upon evidence of facts not embraced within the answer, it is erroneous to allow an amendment of the answer to make it conform to the proof on the trial (*Johnson* v. *McIntosh*, 31 Barb. 272).

g. A defendant, after virtually trying one defence and failing in it, will not be allowed to withdraw the same and set up one entirely different (*Willet* v. *Fayerweather*, 1 Barb. 72).

h. In an action for a tort, namely, for unlawfully converting a promissory note, the plaintiff, after verdict for the defendant, asked leave to amend, by changing the action into a claim of the avails of the said note as money had and received, the court refused to allow the amendment, as it would change the entire character of the action from tort to contract (*Andrews* v. *Bond*, 16 Barb. 633; *Walter* v. *Bennett*, 16 N. Y. 250; and see *Mayor of N. Y.* v. *Parker Vein Steamship Co.*, 21 How. 289).

i. Leave was given after trial before a referee, to amend the summons and the complaint by adding a new and distinct cause of action not connected with the original cause of action (*Allaben* v. *Wakeman*, 10 Abb. 162). Terms on which such an amendment allowed. (*Id.*)

j. Leave to increase amount claimed to amount of verdict (*Corning* v. *Corning*, 2 Selden, 97).

a. The proper place for deciding upon the propriety of an amendment is at the circuit, where the parties and their witnesses are before the court, and where the good faith of the amendment can be investigated (*Travis* v. *Barger*, 24 Barb. 627).

b. The general rule is, that a party who has not applied for an amendment until after he has been nonsuited, is too late to ask for a new trial in addition to an amendment; but where a plaintiff has been nonsuited on the ground that his declaration contained no count adapted to the nature of the case, it appearing that the defendant had not been misled, that the cause had been once tried without any objection having been made, that the statute of limitations had attached, and that such relief would be manifestly in furtherance of justice, the court allowed the plaintiff to amend his declaration *nunc pro tunc*, and set aside the nonsuit, on the payment of costs (*Balcom* v. *Woodruff*, 7 Barb. 13).

c. **Amendment of judgment.**—A judgment should not be varied in substance by amendment (*Clark* v. *Hall*, 7 Paige, 382); nor amended at all unless on some allegation of mistake or omission (*N. Y. Ice Co.* v. *N. West. Ins. Co.* 32 Barb. 534; 11 Abb. 419; see *Pitt* v. *Davison*, 12 Abb. 385; *Barnard* v. *Bruce*, 21 How. 360).

d. A judgment may be amended by the court at any time before the time to appeal has expired, and probably afterwards (*N. Y. Ice Co.* v. *Northwestern Ins. Co.*, 21 How. 296; 12 Abb. 414; overruling S. C. 20 How. 255; 32 Barb. 534; 11 Abb. 419; and see *Pitt* v. *Davison*, 12 Abb. 385, where a judgment was amended).

e. The court below, while an appeal is pending in the court of appeals, have control of the judgment for the purpose of making amendments (*Judson* v. *Gray*, 17 How. 289).

f. The mistakes which may be corrected under this section do not include judicial errors in rendering judgment (*Hotaling* v. *Marsh*, 14 Abb. 161); and does not, therefore, empower an amendment of the judgment by inserting an allowance in addition to that given by section 308 of the Code. (*Id.*)

g. **Amendment of judgment roll.**—Where the complaint contained thirteen causes of action, to one of which, the sixth, the defendant demurred, and to the others put in an answer. After trial of the issues of fact and verdict for the plaintiff thereon, the issue on the demurrer remaining undisposed of, the plaintiff entered judgment on the verdict, and inserted in his judgment roll the sixth cause of action. Under the special circumstances in the case, and on the plaintiff's motion, the court allowed the judgment roll to be amended by inserting, *nunc pro tunc*, an order that the plaintiff take nothing by the sixth cause of action (*Fry* v. *Bennett*, 9 Abb. 45; and see *Williams* v. *Wheeler*, 1 Barb. 48).

h. **Judgment record, how amended.**—When it becomes necessary to amend a judgment record, it is not proper to make an actual obliteration of the record, or an erasure of such parts as are directed to be amended. It should be done by duly entering the order for the amendment with the clerk, and appending a certified copy of the order to the judgment record. It is also proper to mark the passages amended by brackets or lines of distinction, and to refer by an entry in the margin of the judgment to the order for amendment by its date; or, the judgment as amended may be entered at length, if the party so desire (*Sluyter* v. *Smith*, 2 Bosw. 673).

i. **Amendment after judgment.**—The court, in its discretion, has an extraordinary power, even after judgment, to allow a pleading to be amended by inserting new allegations material to the case; but this power should be sparingly exercised (*Field* v. *Hawkshurst*, 9 How. 75; *Egert* v. *Wicker*, 10 *id.* 193). *And after judgment amendments will be allowed only for the purpose of sustaining the judgment.* Thus, after judgment for the defendants affirmed on appeal to the general term, a motion by the plaintiff at *special term* for leave to amend the complaint was denied (*Engless* v. *Furniss*, 3 Abb. 82; *Gasper* v. *Adams*, 24 Barb. 288; *Williams* v. *Birch*, 6 Bosw. 674). Such a motion was granted at *general term*, and a new trial ordered, in *Balcom* v. *Woodruff* (7

Barb. 18). In *Prindle* v. *Aldrich* (13 How. 466) the complaint was for goods sold, the agistment of cattle, and for use and occupation. On the trial before a referee, the referee found as a fact that the defendant had agreed to pay the plaintiff $100 in settlement of the account, and basing his decision on that fact, found for the plaintiff $100. On appeal from the judgment on the referee's report, it was held that there was a variance between these pleadings and the proof, and that the judgment should be reversed. The plaintiff then moved at special term for leave to amend his complaint. The motion was granted on the terms of the plaintiff paying all the costs of the defendant and $10 costs of opposing the motion to amend. See note to section 261, *post*.

a. After judgment for plaintiff and judgment reversed for a defect in the complaint, and new trial ordered, leave was given to plaintiff to amend his complaint on terms (*McGrane* v. *Mayor of N. Y.*, 19 How. 144; and see *Nash* v. *Wetmore*, 33 Barb. 155).

b. **Amendment on appeal.**—The application to amend should be made at special term (*Brown* v. *Colie*, 1 E. D. Smith, 270); it is not the time nor place to ask leave to amend for the *first time*, when the appeal from the *judgment* below is brought on for argument (*Ketcham* v. *Zerega*, *id.* 562).

c. Upon appeal to the general term the court may treat the pleadings as having been amended so as to conform to the facts proved, in any respect in which the court ought clearly to allow an amendment upon application at special term (*Bowdoin* v. *Coleman*, 3 Abb. 431; *Harrower* v. *Heath*, 19 Barb. 331; *Cady* v. *Allen*, 22 Barb. 388); and so on an appeal to the court of appeals (*Bate* v. *Graham*, 1 Kernan, 237). But when the record furnishes the only ground for and against the amendment, then the amendment may be made on the hearing of an appeal at general term, and without a notice of motion for leave to amend (*Clark* v. *Dales*, 20 Barb. 42). Thus, where the action was for the non-delivery of flour, the complaint alleged a readiness and willingness on the part of the plaintiff to receive and pay for the flour. On the trial the proof showed that the flour was to be delivered at a particular place, and as the complaint did not allege a readiness and willingness to receive and pay for the flour at the particular place named, a nonsuit was asked for on the trial, and refused, and the plaintiff had judgment. On appeal, the court at general term, and without any motion for leave to amend, allowed the plaintiff to insert in the complaint, after the allegation of readiness and willingness, the name of the place where the flour was to be delivered (*Clark* v. *Dales*, 20 Barb. 67).

d. After a trial, verdict for plaintiffs, judgment thereon, and affirmance of the judgment on appeal to the general term, with leave to defendants to move at special term for an order to amend their answer, held on the motion at the special term, that the defendants were too late, and that the court had not the power to grant the amendment after argument of the appeal and final judgment thereon. The judgment should be first set aside; and it is doubtful whether a motion to set aside a regular judgment rendered at general term can be granted at special term for the purpose of allowing a party to amend his pleading. If, however, such a motion can be entertained, it must not only appear that the party has been misled or surprised after the exercise of ordinary care and skill, but that the amendment asked for is clearly required in order to promote the ends of justice (*Malcomb* v. *Baker*, 8 How. 301).

e. The court of appeals conformed the pleadings to the proof to sustain a judgment (*Pratt* v. *Hudson River R. R. Co.*, 21 N. Y. 305).

f. **Terms on amendment.**—Amendments should be made at the expense of the amending party (*Union B'k* v. *Mott*, 11 Abb. 42); and the opposite party should be indemnified for all additional expense involved in the amendment. (*Id.*; *Hare* v. *White*, 3 How. 296); and the costs of the motion for leave to amend. (*Id.*) As to the terms on which amendments are allowed, see note, 11 Abb. 48; *Union B'k* v. *Mott*, 10 Abb. 372; *Chapman* v. *Webb*, 1 Code Rep. N. S. 388; 6 How. 390; *Harrington* v. *Slade*, 22 Barb. 164. But "an amendment without costs is an amenment *upon such terms as may be proper* (*Cayuga Bank* v. *Warden*, 2 Selden, 27). After an order allowing an amendment on

payment of costs, the court may make an order allowing the amendment without costs (*Selden* v. *Christopher*, 1 Abb 272).

a. Where after a hearing before a referee and after he has made his report, an order is made allowing plaintiff to amend the complaint by inserting a new cause of action, it should only be on the condition that the plaintiff stipulate to set aside the report, and vacate the order of reference with costs to abide the result, and the order should provide for service of an amended summons and complaint, and afford defendant an opportunity to answer (*Allaben* v. *Wakeman*, 10 Abb. 162).

b. After a hearing before a referee, and before the referee had made his report, the plaintiff was allowed, on the terms of $10 costs of motion, and the costs of proceedings before notice of trial, and the expense of amending the answer if necessary, to amend his complaint by striking out the name of one of the defendants (*Turner* v. *Hillerline*, 14 How. 231).

c. Where pending a reference the plaintiff is allowed to amend his complaint by inserting a new cause of action, it should be on payment of trial fee and disbursements (*Union B'k* v. *Mott*, 19 How. 267; 10 Abb. 372; 11 Abb. 42), and the defendant should be allowed to answer anew. In such a case the court cannot order that the testimony already taken shall apply to the new issues. (*Id.*)

d. After a verdict for the plaintiff for a sum exceeding the amount demanded by the complaint, an amendment of the complaint by increasing the amount demanded should not be allowed, except on the terms of the plaintiff submit- to a new trial (*Corning* v. *Corning*, 1 Code Rep. N. S. 351; 2 Selden, 97), paying the costs of the trial already had, and the costs of the motion to amend (*Bowman* v. *Earle*, 3 Duer, 691; see *Union B'k* v. *Mott*, 11 Abb. 42).

e. On ordering the amendment of an answer after an order for a reference, it would be proper, if either party desires it, to vacate the order of reference (*Beardsley* v. *Stover*, 7 How. 294; and see *Allaben* v. *Wakeman*, 10 Abb. 162).

f. **Appeal from order granting or denying leave to amend.**—Usually the allowance or disallowance of an amendment of the pleadings in the discretion of the court, and cannot be reviewed on appeal (*Gould* v. *Rumsey*, 21 How. 97; *Macqueen* v. *Babcock*, 13 Abb. 268; *Salters* v. *Genin*, 19 How. 233; 10 Abb. 478; *St. John* v. *West*, 3 Code Rep. 85; *Ford* v. *David*, 1 Bosw. 570; *Travis* v. *Barger*, 24 Barb. 614; *Phincle* v. *Vaughan*, 12 *id.* 215; *N. Y. Marble Iron Works* v. *Smith*, 4 Duer, 362; *Smalley* v. *Doughty*, 6 Bosw. 66; *Kissam* v. *Roberts*, id. 154); but an appeal is allowed to the general terms where the amendment invades "*some substantial right*" (*Union B'k* v. *Mott*, 11 Abb. 42; 19 How. 267; and see *Johnson* v. *McIntosh*, 31 Barb. 267); or where leave to amend was refused on the ground of want of power to allow it (*McElwain* v. *Corning*, 12 Abb. 16; *Russell* v. *Conn*, 20 N. Y. 81). No appeal lies to the court of appeals from an order reversing an order, giving leave to amend (*N. Y. Ice Co.* v. *N. West. Ins. Co.*, 23 N. Y. 357; 12 Abb. 414; 21 How. 296; *Hodges* v. *Tennessee Ins. Co.*, 4 Selden, 146; and see *Lounsbury* v. *Purdy*, 18 N. Y. 515).

g. Where after trial an order was made amending the complaint by adding an additional cause of action without allowing the defendant to answer anew, held that such order was appealable (*Allaben* v. *Wakeman*, 10 Abb. 162). The order violated a right, and in such cases an appeal lies (*Union B'k* v. *Mott*, 11 Abb. 42).

h. A decision of the court on the trial imposing terms as a condition of granting leave to amend an answer, will be deemed to be acquiesced in, unless an exception is taken at the time (*Griggs* v. *Howe*, 31 Barb. 100).

§ 174. [149.] (Am'd 1851.) *Existing suits. Relief in case of mistake.*

(1.) The court may likewise, in its discretion and upon such terms as may be just, allow an answer or reply to be made, or

other act to be done, after the time limited by this act, or by an order enlarge such time: and (2.) may also in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may (3.) supply an omission in any proceeding; and (4.) whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may, in like manner, and upon like terms, permit an amendment of such proceeding, so as to make it conformable thereto.

a. This section does not authorize an extension of the time to apply under section 121 (*Coon* v. *Knapp*, 13 How. 175); nor to appeal (see §§ 331, 332); but it authorizes the allowance of exceptions *nunc pro tunc*, after the ten days for filing them have expired (*Sheldon* v. *Wood*, 14 How. 18; *Bortle* v. *Mellen*, 14 Abb. 228); and it authorizes the opening of a judgment by default for want of an answer (see in note to § 246, *post*); the relieving of a party against a judgment in his own favor (*Montgomery* v. *Ellis*, 6 How. 326); or on account of any defect in the judgment roll (*Williams* v. *Wheeler*, 1 Barb. 48). A mere irregularity in entering judgment cannot be taken advantage of after one year (*Van Benthuysen* v. *Lyle*, 8 How. 312); but neither an unauthorized judgment for a deficiency in a foreclosure (*Simonson* v. *Blake*, 20 How. 484); nor a judgment entered without service of process is within this limitation (*Baldwin* v. *Kimmell*, 16 Abb. 355).

b. In *Pettigrew* v. *Mayor of N. Y.* (17 How. 492), the court, after judgment, on motion of the defendant, set aside the judgment on the ground that the contract on which the plaintiff sued, had been fraudulently altered by some person unknown, by which the plaintiff had recovered more than he was entitled to; and see *Macombe* v. *Mayor of N. Y.*, 17 Abb. 36.

c. After verdict for plaintiff, case on which to move for a new trial made by defendant, judgment entered and time for appeal had elapsed, defendant was allowed to come in and be heard, on his case (*Jellinghaus* v. *N. Ins. Co.*, 5 Bosw. 678).

d. The prosecution of an action by an individual, in a name importing a corporate character is a formal error which the court may amend or disregard (*Bank of Havana* v. *Magee*, 20 N. Y. 355).

§ 175. [150.] *Existing suits. Fictitious name.*

When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding, by any name; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

e. It is not allowable to a plaintiff to designate a defendant by a fictitious name at discretion; it can only be done when the plaintiff is ignorant of the true name (*Crandall* v. *Beach*, 7 How. 271), see *ante*, p. 186, *c.*

f. Where three persons used a name indicating that they were a corporation, but they were not incorporated, the plaintiff having sued them as a corporation by the name used by them was allowed on discovering the mistake to

amend without costs by substituting the names of the individuals as defendants (*Newton* v. *Milleville Manufacturing Co.*, 17 Abb. 318 *note*).

a. Where an infant not yet named is a party, how is it to be described (*Ely* v. *Broughton*, 2 Sim. & Stu. 183).

See *Pindar* v. *Black* (4 How. 95) in note to § 181; see *note* to § 176.

§ 176. [151.] *Existing suits. Errors or defects to be disregarded.*

The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

b. This section does not make valid a bad pleading when the defects are made the grounds of demurrer (*Vanderburg* v. *Van Valkenburg*, 8 Barb. 218).

c. Where the action was commenced by summons, which stated that the complaint would be filed in the office of the clerk of the city and county of New York, and on demand the complaint was served, which did *not specify the name of the place of trial*—held, on a motion to set aside the complaint for irregularity, that the complaint might be amended (*Davison* v. *Powell*, 13 How. 287).

d. Where an affidavit to obtain an order of arrest was entitled in the cause before the action was commenced, it was held a defect not affecting the substantial rights of the adverse party, and might be disregarded (*Pindar* v. *Black*, 2 Code Rep. 53; 4 How. 95).

e. An answer entitled in the "supreme" instead of the "superior" court. The error may be disregarded (*Williams* v. *Sholto*, 4 Sand. 641).

f. Where in a summons and complaint an infant defendant was described as "Letitia Varian," and in the petition for a guardian *ad litem* she was described as "T. Letitia Varian," and it not being asserted that neither was the true name—held such a variance as the court was bound to disregard (*Varian* v. *Stevens*, 2 Duer, 639).

See §§ 406, 173, and 289, *note*.

This section applies to the court of appeals (*Bank of Havana* v. *Magee*, 20 N. Y. 360; and see 21 N. Y. 240, 341).

* § 177. [152.] (Am'd 1849.) *Supplemental pleading.*

The plaintiff and defendant respectively, may be allowed, on motion, to make a supplemental complaint, answer, or reply, alleging facts material to the case, occurring after the former complaint, answer, or reply, or of which the party was ignorant when his former pleading was made.

a. **Supplemental Pleading.**—A supplemental pleading is not a *substitute* for or waiver of the original, but in addition to it (*Dann* v. *Baker*, 12 How. 521); it must be consistent with the original (*Slauson* v. *Engelheart*, 34 Barb. 198; *Wattson* v. *Thibou*, 17 Abb. 184); must be of circumstances happening after the commencement of the action, or after the original pleading was put in, or of which the party was ignorant at the time of putting in his original pleading (*Hornfager* v. *Hornfager*, 1 Code Rep. N. S. 180; *Hendricks* v. *Decker*, 35 Barb. 302; *Williams* v. *Hernon*, 16 Abb. 173; *Lampson* v. *McQueen*, 15 Abb.

* *Amended—See Appendix.*

345; *Drought* v. *Curtiss*, 8 How. 56; *Radley* v. *Houghtaling*, 4 How. 251; *McMahon* v. *Allen*, 1 Hilton, 103; 3 Abb. 89; 12 How. 39; *Sage* v. *Mosher*, 17 How. 367; *Houghton* v. *Skinner*, 5 How. 420); and set up matter which cannot be inserted by an amendment (*McMahon* v. *Allen*, *supra*), but introducing new facts or new parties by amendment in a case where it should be done by a supplemental pleading is irregular, but the pleading so amended is not a nullity (*Beck* v. *Stephani*, 9 How. 193; see *Hornfager* v. *Hornfager*, and *Lampson* v. *McQueen*, *supra*). A supplemental pleading may be demurred to (*Goddard* v. *Benson*, 15 Abb. 191).

a. Leave to file a supplemental pleading must be obtained by motion on notice or order to show cause (*Garner* v. *Hannah*, 6 Duer, 263). An order allowing a supplemental pleading is appealable (*Harrington* v. *Slade*, 22 Barb. 161; *Guild* v. *Parsons*, 16 How. 382).

b. **Supplemental complaint.**—A supplemental complaint may be resorted to, almost as a matter of course, where facts have occurred subsequent to the original complaint, which vary the relief to which the plaintiff was entitled at the commencement of the action (*Hasbrouck* v. *Shuster*, 4 Barb. 285. As to supplemental bill, see *Butler* v. *Cunningham*, 1 Barb. 86); and leave to file a supplemental complaint will be granted in such cases without costs, if the application is made promptly (*Sage* v. *Mosher*, 17 How. 367). The rule is said to be that the filing a supplemental complaint should be allowed only on equitable terms, and never at the expense of the defendant. (*Id.*) Where the performance or happening of some act is necessary to give the plaintiff a cause of action, and such act is not performed or does not happen until after the action is commenced, the plaintiff cannot by supplemental complaint incorporate such act into the case (*McCulloch* v. *Colby*, 4 Bosw. 603; *Watson* v. *Thibou*, 17 Abb. 184); for a new substantive cause of action cannot be set up by a supplemental complaint. (*Id.*)

c. Where pending an action against an assignee for the benefit of creditors, jointly with other defendants, such assignee dies and a successor is appointed, the proper mode of making such successor a party to the action is by supplemental complaint (*Johnson* v. *Snyder*, 7 How. 395). The leave to the representatives of a deceased plaintiff to file a supplemental complaint decides nothing as to their rights (*Robbins* v. *Wells*, 26 How. 15). *Semble*, that where leave is given to file a supplemental complaint merely to bring in parties, the original defendents need not be made parties to it, the supplemental complaint (see *McGown* v. *Yerks*, 6 Johns. Ch. R. 450).

d. Where a bill has been dismissed for want of prosecution as against one of several defendants, and he was afterwards, at the hearing, held to be a necessary party, the court would not allow a supplemental bill to be filed against him, but dismissed the suit with costs (*Lautour* v. *Holcombe*, 11 Simons, 71; 8 Sim. 76).

e. On a supplemental complaint being filed, the defendant cannot, of course, answer anew to the original complaint (*Dann* v. *Baker*, 12 How. 521).

f. A motion for leave to file a supplemental complaint was denied, with costs, where it appeared there was another suit pending between the same parties for the same object as that sought to be obtained by the supplemental complaint (*Sage* v. *Mosher*, 17 How. 367).

g. Where an order is made allowing a supplemental complaint to be served, and such complaint is served, and the defendants appeal from such order and demur to the complaint, and the demurrer is sustained and such order reversed, and the plaintiff has appealed from the order sustaining such demurrer, the latter appeal necessarily falls by the reversal of the order allowing the supplemental complaint (*Guild* v. *Parsons*, 16 How. 382).

h. **Supplemental answer.**—It is almost of course to allow a supplemental answer to be filed at any time before the trial (*Bate* v. *Fellowes*, 4 Bosw. 639; *Hoyt* v. *Sheldon*, 4 Abb. 59; 6 Duer, 661; *Radley* v. *Houghtaling*, 4 How. 251); but leave to file a supplemental answer after a trial was refused, in *Bowen* v. *Irish Presb. Congregation*, 6 Bosw. 246; *Houghton* v. *Skinner*, 5 How. 420; and *Semble*, the court will not even before trial allow a supplemental answer to set

up a technical defence, to defeat a just claim (*Hoyt* v. *Sheldon*, 4 Abb. 59; 6 Duer, 661); nor to set up any matter of defence known to the defendant at the time his former answer was put in (*Houghton* v. *Skinner*, 5 How. 420). The supplemental answer under the code is a substitute for the old plea of *puis darrien continuance;* but it differs from that plea in this respect, that the supplemental answer may be allowed on motion *whenever* the facts forming the ground of the answer have occurred since the answer was put in, or where the defendant was ignorant of them at the time of pleading the first answer; whereas the plea of *puis darrien continuance* could strictly be pleaded only before or at the next continuance *after* the facts transpired. When the facts asked to be incorporated and pleaded in a supplemental answer go to divest the plaintiff of the right to maintain the action, and transfer the cause of action to another, who has received satisfaction for the demand involved in it, it is the duty of the court to grant the motion, whether the motion be made at the earliest day or not (*Drought* v. *Curtiss*, 8 How. 56; see however *Morell* v. *Garelli*, 16 Abb. 269, where it is said that the application should be made promptly).

a. On motion for leave to file a supplemental answer the court will enquire into the truth and sufficiency of the proposed answer, and will not grant the leave unless the answer appear to be true in fact, and to state a good defence (*Morell* v. *Garelli*, 16 Abb. 269).

b. The putting in a supplemental answer does not necessarily waive the former answer, yet the court may make it a condition of leave to file such supplemental answer, that the defendant waive his original answer (*Bate* v. *Fellowes*, 4 Bosw. 639; and see *Dann* v. *Baker*, 12 How. 521). A supplemental pleading may be demurred to (*Goddard* v. *Benson*, 15 Abb. 191).

TITLE VII.

*Of the provisional remedies in civil actions.**

CHAPTER I. Arrest and bail.
II. Claim and delivery of personal property.
III. Injunction.
IV. Attachment.
V. Provisional remedies.

CHAPTER I.

Arrest and bail.

SECTION 178. No person to be arrested in a civil action, except as prescribed.
179. Arrest in civil actions, in what cases.
180. Order for arrest, by whom to be made.
181. Affidavit to obtain order for arrest. To what actions this chapter applies.
182. Security by plaintiff before obtaining order for arrest.
183. Order for arrest, when it may be made, and its form; time to answer after or to move to vacate.
184. Original affidavit and order to be delivered to sheriff, and copy to be delivered to defendant.
185. Arrest, how made.
186. Defendant to be discharged on giving bail or making a deposit.
187. Bail, how given.
188. Surrender of defendant.
189. The like.
190. Bail, how proceeded against.
191. Bail, how exonerated.
192. Delivery of undertaking of bail to plaintiff, and its acceptance or rejection by him.
193. Notice of justification. New bail.
194. Qualification of bail.
195. Justification of bail.
196. Allowance of bail.
197. Deposit in lieu of bail.
198. Payment of deposit into court.
199. Substituting bail for deposit.
200. Deposit, how disposed of after judgment in the action.
201. Sheriff, when liable as bail.
202. Proceedings on judgment against sheriff.
203. Bail liable to sheriff.
204. Vacating order of arrest or reducing bail.
205. Affidavits on motion to vacate order of arrest or reduce bail.

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a. * **Waiver of provisional remedy.**—A plaintiff who has resorted to a provisional remedy waives it by uniting in his complaint causes of action to some or one of which the provisional remedy does not extend (*Lambert* v. *Snow*, 9 Abb. 91). (see *post.* 374, *f*, *h*).

§ 178. [153.] *No person to be arrested, except as prescribed.* No person shall be arrested in a civil action, except as prescribed by this act; but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, or any act amending the same, nor shall it apply to proceedings for contempts.

a. **Persons privileged from arrest.**—The following-described persons are exempt from arrest on civil process: persons holding office under the Metropolitan Police act, whilst actually on duty (Laws 1860, p. 446, § 34); and a Metropolitan Police officer is not protected from arrest when not actually on duty by a rule of the Police Commissioners that he shall be deemed to be always actually on duty (*Hart* v. *Kennedy*, 15 Abb. 290; 14 Abb. 432; 23 How. 417; 24 How. 425; Squires' Case, 12 Abb. 38); Senators and Representatives in Congress, at certain times (Const. U. S. art. 1 § 6; 2 Johns. Cas. 222); and also members of the State legislature (1 R. S. 154, §§ 6, 7, 8, 9); and all officers of either house whilst in actual attendance upon the house (*Id.* § 10); electors, on day of an election (1 R. S. 126, § 4; Laws 1842, ch. 130, § 2); domestic servants of a public minister (1 Opin. Atty. Gen'l. 26); militia-men on parade days, from the rising to the setting of the sun (1 R. S. 303, § 27); non-commissioned officers, seamen, and mariners enlisted in the service of the U. S. during their term of office, for any debt or contract (Laws U. S. vol. 3, p. 97); parties to a suit, their attorneys and witnesses, in coming to, attending upon, and returning from court (2 Rol. Abr. 272; 1 Mod. R. 66; Barnes, 27, 378; Peake Ev. 193; 1 Camp. 229; 11 East, 439; 2 W. Blac. R. 1113; 4 Dallas, 387, 329; 6 Taunt. 358; 3 Eng. Law and Eq. R. 435; 29 *id.* 331; 1 H. Bl. 636; 3 B. & Ald. 252; 2 Marsh. 57; 8 Bing. 166; *Newton* v. *Constable*, 1 Gale & D. 408; 9 Dowl. 933), or any lawful tribunal, as an arbitration (*Spence* v. *Stuart*, 3 East, 89; *Sanford* v. *Chase*, 3 Cowen, 381), or commissioners of bankruptcy, or to give deposition before a magistrate, under an order of the court (*Arding* v. *Flower*, 8 T. R. 534; *Walters* v. *Rees*, 4 J. B. Moore, 34); and by the Revised Statutes (2 R. S. 402, §§ 51, 52, 53, 54, 55) "every person duly and in good faith, subpœnaed as a witness to attend any court, officer, commissioner or referee, or summoned to attend any judge, officer or commissioner, in any case where the attendance of such witness may be enforced by attachment or commitment, shall be exonerated from arrest in any civil suit, while going to the place where he shall be required by such subpœna, to attend, while remaining at such place, and while returning therefrom;" and provision is made for the discharge of persons arrested while so privileged, and declaring their arrest absolutely void, and for the means of exonerating the officer for not making the arrest, by an affidavit of the witness. The privilege extends to a non-resident (*Merrill* v. *George*, 23 How. 331; and see *Seaver* v. *Robinson*, 3 Duer, 622); does not extend to an arrest by bail, *semble* (*Ex parte Lyne*, 3 Stark. 470). It is a personal privilege, and may be waived by the witness by willingly submitting himself to the custody of the officer (*Brown* v. *Getchell*, 11 Mass. 11, 14; *Geyer* v. *Irwin*, 4 Dall. 107), or by putting in bail, or by a general appearance (*Steward* v. *Howard*, 15 Barb. 26). The privilege does not extend to a witness who attends voluntarily, without a subpœna (*Hardenbrook's case*, 8 Abb. 416; *Re McNeil*, 6 Mass. 264), except the witness be from a foreign state or country (*Norris* v. *Beach*, 2 Johns. 294; *Sanford* v. *Chase*, 3 Cow. 381; *Hopkins* v. *Coburn*, 1 Wend. 292). Where a witness attended on a subpœna before a referee, and was examined, his examination closed, and the hearing adjourned. On the adjournment day, the witness attended without any subpœna, but at the request of one of the counsel in the action, to be further examined; held, a voluntary attendance, and that he was not privileged from arrest (*Hardenbrook's case*, 8 Abb. 416). A person brought into this State as a fugitive from justice, is liable to arrest (*Williams* v. *Bacon*, 10 Wend. 536). A person under arrest on a justice's warrant, is privileged (*Love* v. *Humphreys*, 9 Wend. 204). A person acquitted

of a criminal charge, has a reasonable time to reach home before he can be arrested in a civil action (*Lucas* v. *Albee*, 1 Den. 666). As to the privileges of attorneys and counsel, while attending court, see 4 Wend. 204; 1 *id.* 32; 5 *id.* 90; 4 Hill, 59; 18 Johns. 52. As to the privilege of an insane person, see *post*, in note to section 179. A sheriff is not privileged from arrest (*Hill* v. *Lott*, 10 How. 46).

a. The arrest on an order of arrest of a person while temporarily exempt from arrest, is not a ground for vacating the order of arrest, but only for discharging the defendant out of custody (*Hart* v. *Kennedy*, 15 Abb. 290; 14 Abb. 432; 23 How. 417).

b. **Non-imprisonment act.**—A warrant may now be issued under the act abolishing imprisonment for debt, in *all* the cases prescribed by that act (*Gregory* v. *Weiner*, 1 Code Rep. N. S. 210; and see *Corwin* v. *Freeland*, 6 How. 241; 2 Selden, 560; *Latham* v. *Westervelt*, 26 Barb. 256; *Krauth* v. *Vial*, 10 Abb. 139). An assignee of a judgment recovered against a debtor for fraud and false misrepresentations, may institute proceedings under the act of 1831 for the arrest and imprisonment of such debtor (*King* v. *Kirby*, 28 Barb. 49).

c. **Ne exeat.**—The superior court of the City of New York hold that this writ is abolished by the Code (*Johnston* v. *Johnston*, 16 Abb. 43; 25 How. 181). The supreme court hold that it is not abolished (*Forrest* v. *Forrest*, 5 How. 125; 10 Barb. 48; *Bushnell* v. *Bushnell*, 7 How. 393; 15 Barb. 399; *Rogers* v. *Michigan, &c., R. R. Co.*, 28 Barb. 539; *Glenton* v. *Clover*, 10 Abb. 422; *Neville* v. *Neville*, 22 How. 500). It is as much a writ of right as any other process (*Gibert* v. *Colt*, Hopk. 496; *Mitchell* v. *Bunch*, 2 Paige, 606). It may be applied for at any stage of the action, *e. g.*, pending an appeal (*Dunham* v. *Jackson*, 1 Paige, 629); before decree (*Denton* v. *Denton*, 1 Johns. Ch. 441); before service of the summons (*Bushnell* v. *Bushnell*, 15 Barb. 399; 7 How. 389). Formerly it issued only to enforce equitable demand in the nature of debts actually due (*Forrest* v. *Forrest*, *supra*); and would not be granted where the demand was purely legal, nor where the defendant was an executor or administrator not shown to have assets in his hands (*Smedbury* v. *Mark*, 6 Johns. Ch. 138); nor where the amount in question is less than $100 (*Palmer* v. *Doren*, 2 Edw. Ch. 425); nor after the defendant has obtained a discharge from imprisonment (*Ashworth* v. *Wrigley*, 1 Paige, 301); nor where the defendant could be or had been held to bail at law (*Pratt* v. *Wells*, 1 Barb. 425); or was held to bail for the same cause in another court (*Mitchell* v. *Bunch*, 2 Paige, 606); nor where the defendant could not be arrested under the act for imprisonment for debt (*Gleason* v. *Bisby*, Clarke, 551), unless it was a cause of equitable cognizance (*Brown* v. *Haff*, 5 Paige, 235); or unless it was to prevent a failure of justice (*Porter* v. *Spencer*, 2 Johns. Ch. 169). It may issue on a creditor's bill to reach equitable assets (*Ellingwood* v. *Stevenson*, 4 Sandf. Ch. 366), or against a citizen of another State or country, on demands arising abroad (*Woodward* v. *Schatzell*, 3 Johns. Ch. 412; *Gibert* v. *Colt*, Hopk. 496; *Mitchell* v. *Bunch*, 2 Paige, 606); or against a foreign administrator or executor for an account (*McNamara* v. *Dwyer*, 7 Paige, 239); against a married woman (*Neville* v. *Neville*, 22 How. 500); but not against a non-resident coming into the State as a witness (*Dixon* v. *Ely*, 4 Edw. Ch. 557; *Merrill* v. *George*, 23 How. 331); nor on a demand against a vendor for specific performance (*Cowdin* v. *Cram*, 3 Edw. Ch. 231), nor on a demand not judicially ascertained on a penal bond by a surety against his principal (*Gibbs* v. *Mennard*, 6 Paige, 258; 2 Edw. Ch. 482).

d. To entitle a party to this writ, his demand must be satisfactorily ascertained, must be *positively* sworn to, except the amount, which may be on *belief*. It must be *positively* sworn that the defendant threatens or purposes to leave the State, and that the demand will thereby be lost or its recovery endangered. A statement of the fears of the applicant is not sufficient. Facts must be stated to enable the court to judge if the case be one in which it is proper to issue the writ (*Forrest* v. *Forrest*, 5 How. 125; 10 Barb. 48; *Bushnell* v. *Bushnell*, 7 How. 389; 15 Barb. 399; *Thorne* v. *Hulsey*, 7 Johns. Ch. 189; and see *Ordronaux* v. *Helie*, 2 Ch. Sentinel, 69; *Denton* v. *Denton*, 1 Johns. Ch. 441; *Mattocks* v. *Tremain*, 3 Johns. Ch. 75; *Woodward* v. *Schatzell*, *id.* 412).

a. Any justice of the supreme court, or any county judge, may out of court allow writs of *ne exeat* in suits and proceedings in the supreme court, according to the course and practice of such court in such cases, and under such regulations as shall be provided by law, or by the rules and regulations of such court not inconsistent with law (Laws 1847, ch. 470, § 13). It is not necessary, although it is usual, that a *ne exeat* should be by writ: it may be by order enforced by attachment for contempt. The granting of this writ is entirely in the discretion of the court, and is granted with much caution (*Pratt* v. *Wells*, 1 Barb. 425).

b. The court determines the amount of bail, and the sheriff must take a bond for that sum without any addition (*Gibert* v. *Colt*, Hopk. 496; and see *McNamara* v. *Dwyer*, 7 Paige, 239). If the sheriff refuses bail, the court will take security and exonerate the sheriff. Time may be given the sheriff to produce the defendant, or to collect on the bail bond from the sureties (*Brayton* v. *Smith*, 6 Paige, 489). Sureties may, by statute, surrender their principal (*Re Wolfe*, 3 N. Y. Legal Obs. 383); and may arrest him wherever they can. (*Id.*) *Semble*, leave should be obtained to put the bond in suit, but the objection that no leave to sue was obtained may be waived (*Harris* v. *Hardy*, 3 Hill, 393). As to bail on *ne exeat*, see laws 1854, p. 251; and 1 Barb. Ch. Pr. 647.

c. It is of course to discharge a *ne exeat* on defendant's giving security (*McNamara* v. *Dwyer*, 7 Paige, 239; *Mitchell* v. *Bunch*, 2 *id.* 606).

d. The defendant may move to discharge the writ without security at any time before giving security, and he may, by leave of the court, give security without prejudice to his right so to move (*Jesup* v. *Hill*, 7 Paige, 95). But he cannot move while he is in contempt for disobeying an injunction (*Evans* v. *Van Hall*, Clarke, 22). On motion to discharge, defendant may deny or explain the affidavits on which the writ issued (*Cowdin* v. *Cram*, 3 Edw. Ch 231), and may read his answer in the action (*Gibert* v. *Colt*, Hopk. 496; *Thorne* v. *Halsey*, 7 Johns. Ch. 189).

§ 179. [154.] (Am'd 1849, 1851, 1863.) *Arrest in what cases.* The defendant may be arrested, as hereinafter prescribed, in the following cases:—

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the State, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring or for wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled or fraudulently misapplied, by a public officer or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation, or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, where the property or any part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff, and with the intent that it

should not be so found, or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud, in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female shall be arrested in any action, except for a willful injury to person, character, or property.

Note to subd. 1.

a. An action for *crim. con.* is an "injury to the person," within this subdivision (*Delamater* v. *Russel*, 2 Code Rep. 147: 4 How. 234; *Straus* v. *Schwarzwaelden*, 4 Bosw. 627); and so is an action for seduction (*Taylor* v. *North*, 3 Code Rep. 9). An application for a divorce on the ground of adultery is not, but an application for a limited divorce on the ground of cruel and inhuman treatment is (*M'Intosh* v. *M'Intosh*, 12 How. 289).

b. A complaint by a moneyed corporation, which shows that the defendant was employed by plaintiffs as their officer or agent; that in that fiduciary capacity he had access to the papers of the plaintiffs; that by means thereof he abstracted from the possession of the plaintiffs *certificates of shares in the stock of plaintiffs' company, which shares were owned by plaintiffs*, and that he sold the same and embezzled the proceeds,—states a cause of action upon which defendant may be arrested. A complaint which shows that under like circumstances defendant abstracted from the possession of the plaintiffs *certificates of shares in the stock of plaintiffs' company, which certificates were deposited by the owners of them with the company for safe keeping*, and sold the same &c., also states a cause of action upon which defendant may be arrested (*North. Railway Co.* v. *Carpentier*, 4 Abb. 47).

c. In an action against an innkeeper to recover the value of goods of a guest lost in his house, the defendant is not liable to arrest (*People* v. *Willett*, 26 Barb. 78; 6 Abb. 37; 15 How. 210). Unless he be a non-resident or about to remove from the State. (*Id.*)

d. Semble, an action for a false warranty is an action "arising on contract" (*Fowler* v. *Abrams*, 3 E. D. Smith, 13).

e. A defendant may be arrested for the unlawful conversion of property in a foreign country; where the property is brought into this State (*Blason* v. *Bruno*, 21 How. 112; and see *N'ern R'way* v. *Carpentier*, 13 How. 222; 3 Abb. 259).

f. An order for arrest should not be granted in actions for assault, libel or slander unless the defendant is a non-resident or transient person, unless in extreme cases (Per Daly, F. J., *Davis* v. *Scott*, 15 Abb. 127). Before the code to hold a defendant to bail where an order was necessary, something more had to be stated than a cause of action (*Brooks* v. *McLellan*, 1 Barb. 627). *Semble*, it is otherwise now (*Baker* v. *Swackhamer*, 5 How. 251; *Straus* v. *Schwarzwaelden*, 4 Bosw. 627).

g. **Resident.**—In Burrell's Law Dictionary, *Resident* is defined, "One who has a seat or settlement in a place; one who dwells, abides or lies in a place. An inhabitant (20 Johns. 208; 8 Wend. 134, 140); one who resides or dwells

in a place for some time (*Webster*)." In *Roosevelt* v. *Kellogg* (20 Johns. 210), Woodworth, J., says, A person resident is defined to be "one dwelling or having his abode in any place," an inhabitant, "one that resides in a place." In the matter of *Fitzgerald* (2 Caines, 317), it was decided that a person that came into this State on a commercial adventure, without any intent of settling here, was not a resident within the meaning of the act for relief against absconding debtors. In the matter of *Thompson* (1 Wend. 43), the court held, in respect to an absent debtor, that residing abroad, engaged in business for a time, whether permanently or temporarily, was a "residing out of the State," within the meaning of the statute. In *The matter of Wrigley*, 4 Wend. 602; 8 *ib.* 134), it was held that a person remaining temporarily for a month in the cities of New York and Brooklyn, intending to commence business in Canada, was not an inhabitant or resident within the meaning of the insolvent act of 1813. Savage, Ch. J., in that case, says that in *The matter of Fitzgerald* (2 Caines, 318), it was held that a resident within the State was one who had a residence of a permanent and fixed character, not one who had a mere residence of a temporary nature. In *Frost* v. *Brisbin* (19 Wend. 11), the facts were these: A resident of this State left the State in May, 1836, and went to Wisconsin, and commenced business there as a merchant, with intent to make it his permanent residence, but left behind his wife and child at board at his former residence in this State. In March, 1837, he returned to his former residence on a visit, and remained until May, when he was arrested and held to bail. And it was held that he was not a resident of this State, within the meaning of the act abolishing imprisonment for debt. In that case, Nelson, Ch. J., says, "There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term." In *Thorndike* v. *City of Boston*, (1 Met. 245), Shaw, Ch. J., says, "The question of residence, inhabitancy, or domicil, although not in all respects precisely the same, they are nearly so, and depend much on the same evidence." In *Cadwallader* v. *Howell* (3 Harrison's Rep. 144), Dayton, J., says, "The word residence (fixed residence I mean) is generally used as a tantamount to domicil, though I am not prepared to say whether they are or are not, in all respects, convertible terms. But in *Crawford* v. *Wilson* (4 Barb. 505), it was held that the words legal residence and domicil, are convertible terms.

a. A person who had formerly been a resident of another State (Indiana), but had with his family removed so this State, and was then residing with a relative, while he was looking out for an opportunity to engage in business, and whether he should finally settle in this State, was undetermined: held that he was a non-resident of this State (*Burrows* v. *Miller*, 4 How. 349).

b. A person, an emigrant, having left his native land with no intention to return, and who is living in this State without any determination to reside elsewhere, is a resident of this State (*Heidenbach* v. *Schland*, 10 How. 477).

c. A person may be a *non-resident* while his *domicil* continues within the State. Actual non-residence, without regard to the domicil of the debtor, is what is contemplated by the statute. A debtor detained abroad in attendance to business, three years and upwards, though keeping up a house in New York, as he had done for many years before, is a non-resident (*Haggart* v. *Morgan*, 4 Sand. 198; 1 Selden, 422; see *Shedden* v. *Patrick*, 28 Eng. L. and Eq. R. 64).

d. Where the defendant, a merchant doing business at Hornellsville, in this State, where he owned real estate, and where he and his family resided in September, 1854, took from his store a large portion of the goods and went to Hudson, Wisconsin, with the intention and expectation of disposing of them more readily, for cash to pay his debts, and if the trade proved to be good to continue his trade there in charge of a clerk, and to return himself and continue his business in this State, retaining in the mean time his store and business at Hornellsville in charge of a clerk, where his family remained, intending, as he wrote to his creditors, to return in the spring of 1855, but did not actually return until July, 1855,—held that defendant was a resident of this

State on the 29th of June, 1855, when the plaintiffs, his creditors, issued an attachment against his property at Hornellsville. He was only temporarily absent for a single purpose, which from its nature would not *keep* him away from the process of our courts (*Hurlbut* v. *Seeley*, 11 How. 507; 2 Abb. 138).

a. A person who carries on within the city of New York, a regular business, and who in the course of his occupation, spends his time during the regular business hours of the business days of the week in the city, keeping his bank account there, and there in good faith conducting all his business transactions, is not a non-resident within the meaning of the attachment laws; although his family reside in another State, and he himself spends his Sundays or even all his nights with them (*Towner* v. *Church*, 2 Abb. 299). That case was decided at a general term of the supreme court in the first district. The superior court held otherwise, and that a defendant having all his business property, business capital, and his bank account in New York, where he was engaged in business, and where he spent on an average eight hours of every business day; but for reasons of convenience and economy merely, maintained his family in New Jersey, and spent with them there his nights and Sundays, was "not a resident of the State of New York" (*Barry* v. *Bockover*, 6 Abb. 374; and to the like effect, *Chaine* v. *Wilson*, 1 Bosw. 673; 8 Abb. 78; *Bache* v. *Lawrence*, 17 How. 554; *Lee* v. *Stanley*, 9 How. 272); and the supreme court have probably modified their views as expressed by the cases of *Hurlbut* v. *Seeley* and *Towner* v. *Church* (supra). See *Greaton* v. *Morgan* (8 Abb. 64). In that case it appeared that the defendant had a place of business in New York, but boarded in New Jersey and had a place of business there, and had stated that to be his place of residence, and was seldom at his place of business in New York: held, that he was a resident of New Jersey.

b. Residence is the place of a man's fixed habitation; where his political rights are to be exercised, and where he is liable to taxation (*Houghton* v. *Ault*, 16 How. 77). Residence depends on intention (*The People* v. *Peralta*, 4 Cal. 175; *Visher* v. *Visher*, 12 Barb. 640; and see *Sprague* v. *Houghton*, 2 Scammon, 413; *Powers* v. *Bryant*, 7 Porter Ala. R. 15; *Isham* v. *Gibbons*, 1 Brad. Sur. Rep. 70; *U. S.* v. *The Penelope*, 2 Peters, 450; *Hegeman* v. *Fox*, 31 Barb. 475; *Larrenville* v. *Anderson*, 17 Jurist, 511).

c. Enlistment in the volunteer army of the United States, and absence from the State on such service, do not render a debtor a non-resident (*Tibbitts* v. *Townsend*, 15 Abb. 221).

Note to subd. 2.

d. This subdivision is controlled by subdivision 5; and therefore in an action by a male against a female for breach of promise to marry, the defendant cannot be arrested (*Seifke* v. *Tuppy*, 3 Code Rep. 23). The construction of this subdivision is, that a defendant may be arrested in an action *for money received* where he is a factor, attorney, agent, &c., or other person in a fiduciary capacity, and that the same designated persons may be arrested for property embezzled or fraudulently misapplied by them. There are two cases for the arrest, and the enumerated persons may be arrested in either of them. In one class, the order of arrest may be made upon *facts* which may be entirely *independent of the cause of action*, which are to be stated in affidavits, and need not be stated in the complaint, and where the arrest may take place after the cause has actually been tried. In the other class, where a defendant is sought to be arrested as an agent for receiving money, the gronnd of action and the ground arrest are identical. If the cause of action is shown to be unfounded, the cause of *arrest* must fail. If the affidavits destroy the allegation of a fiduciary character, the arrest cannot be sustained; although that will not terminate the suit (*Republic of Mexico* v. *Arrangois*, 11 How. 1—576).

e. For damages sustained by a stockholder from fraudulent acts of directors and officers of a company, an action may be sustained by the stockholder against the officers and directors, and the defendants may be arrested (*Crook* v. *Jewett*, 12 How. 19). A defendant may be arrested in an action for money received, or property embezzled or fraudulently misapplied as an agent of the plaintiffs, or while he was acting for the plaintiffs in a fiduciary capacity, such

as a pedler of goods for the plaintiffs. It is immaterial whether the facts authorizing the arrest are or are not inserted in the complaint, or whether the action is brought on the contract for not accounting for and paying over the goods and money to the plaintiffs, or in tort for the *conversion* of the goods and money (*Ridder* v. *Whitlock*, 12 How. 209).

c. One who receives money from another to pay directly to a third party, and omits to do so, may be arrested, as well because he received the money as agent, as because of his fiduciary character (*Burhans* v. *Casey*, 4 Sand. 707). Where the defendant received as agent or attorney of plaintiff a specific sum for a specific purpose, and while the money was in defendant's hands, not applied to such purpose, the plaintiff demanded its return to him, defendant refused to return it, in the *bona fide* but erroneous belief that he could not, in justice to a third person do so,—held he was liable to arrest (*Schadle* v. *Chase*, 16 How. 414); and see *Hall* v. *McMahon*, 10 Abb. 319).

d. A factor who receives money to be invested in goods, with the condition that it shall not be employed for any other purpose, acts in a "fiduciary capacity" (*Noble* v. *Prescot*, 4 E. D. Smith, 139; *Dubois* v. *Thompson*, 25 How. 417). An agent employed to collect moneys for his principal, is liable to arrest where he appropriates such moneys to his own use. In such a case, the agent assumes a special trust, and acts in a "*fiduciary capacity*" (*Stoll* v. *King*, 8 How. 298; *Shadder* v. *Shields*, 17 How. 420; *Ostell* v. *Brough*, 24 How. 274). Where defendant contracted with plaintiffs in writing, to receive a lot of fruit trees from them, to be delivered to different purchasers thereof from the plaintiffs, and the defendant was to and did receive payment therefore on delivery, and afterwards alleged that he lost the money by theft or accident, held he was an *agent* in a fiduciary capacity, and was liable to arrest on the plaintiff's allegation that he embezzled the money, and that it was not proper on a motion to vacate the order of arrest to try whether he embezzled or lost the money (*Frost* v. *M'Carger*, 14 How. 131.)

e. An auctioneer who receives goods for sale under an agreement that he is to receive all over a certain amount of the proceeds for his compensation, is liable to be arrested for a failure to pay on demand the amount of the proceeds (*Holbrook* v. *Homer*, 1 Code Rep. N. S. 406; 6 How. 86; *Barret* v. *Gracie*, 34 Barb. 20).

f. In *Goodrich* v. *Dunbar* (17 Barb. 644), the defendant was consignee and agent at San Francisco of a ship owned by the plaintiffs. His duties were to take a general charge of the ship, pay all expenses relating to her, sell her, and pay the expenses of the sale, and then to account to the plaintiffs, as their debtor, for the balance he might owe them, after deducting all payments previously made by him, and the balance due him from the plaintiffs on a former account; the supreme court held the defendant was not liable to arrest as a factor, agent, or broker, or as having received the plaintiff's money in a fiduciary capacity.

a. A merchant who received goods upon consignment, upon condition that he would advance to the consignor a certain amount in cash, and then consign the goods, with the bills of lading and invoices, to responsible parties in Europe, for sale and returns, guaranteeing the faithful disposition of the property and returns of accounts of sales, together with whatever balance there might be over and above the advances made, the consignor holding himself responsible to the consignee for any deficiency,—held, that on a deficiency of the amount of goods returned on sales by the parties in Europe, for which the consignee was liable on his guarantee, and the consignor on his promise to the consignee, the consignee did not act in a *fiduciary capacity* where he had received the amount of the deficiency from the consignor, and had not paid over the same to the parties in Europe, for which they sought to hold him to bail (*Angus* v. *Dunscombe*, 8 How. 14).

b. An attorney sued for not paying over money collected for his client, is liable to imprisonment, such suit being an action for misconduct in a professional employment (*Stage* v. *Stevens*, 1 Denio, 267). Where an attorney residing and practicing in another State, receives money upon demands left with him for

collection in that State, which he omits or refuses to pay over, he is liable to arrest here, in an action brought to recover such money (*Yates* v. *Blodgett*, 8 How. 278). In such a case the money is received by the defendant as an attorney, in the course of his employment as such. The action was founded, not so much upon a breach of contract as the violation of professional duty. (*Ib.*)

a. Where plaintiff had employed defendant to sell goods as his agent, and the defendant was to render an account and pay over the proceeds weekly, on the defendant's failure to pay over such proceeds, he became liable to be arrested in an action to recover the amount of such proceeds (*Turner* v. *Thompson*, 2 Abb. 444; and see *Soloman* v. *Waas*, 2 Hilton, 183; *Barrett* v. *Gracie*, 34 Barb. 20).

b. The defendant, a banker, the plaintiffs in November 1855 employed him, to act as their banker, receive their deposits, collect their bills, and credit them the amount, allowing him to use the money, he agreeing to pay interest thereon, and also to pay the plaintiffs' drafts. While this arrangement continued in force, and on 13th August, 1857, plaintiffs remitted to defendant a draft for $4,000, payable 25th, to be collected and placed to plaintiffs' credit. Defendant received the draft on the 17th and collected it on the 25th. On the 24th, defendant knew he was insolvent, and on the 25th suspended. On motion to discharge an order for the defendant's arrest, it was held he did not receive the money in a "fiduciary capacity," nor did he "wrongfully" convert the money; nor was he guilty of any fraud; nor of any fraud in incurring the obligation to pay the $4,000 so collected (*Bassing* v. *Thompson*, 15 How. 97).

c. Where *an agent* is liable to his principal in a fiduciary capacity, for moneys of the principal received by him, and the principal settles with him by taking his note, payable *in futuro*, the principal's claim which was in its nature for a wrong, is not thereby changed into a debt (*Shipman* v. *Shafer*, 14 Abb. 449; *Pettengell* v. *Mather*, 12 Abb. 436; see, however, *contra*, *Alliance Ins. Co.* v. *Cleveland*, 14 How. 408; and *post*, p. 373, *a*).

d. As to who are public officers, see 1 R. S. 85. An attorney is not (9 Wend. 503; but see *Stage* v. *Stevens*, 1 Denio, 267).

Note to subd. 3.

e. Before the amendment of 1851, it was held (*Van Neste* v. *Conover*, 5 How. 148) that in an action to recover personal property, the defendant was liable to arrest if the property had been removed, however innocently, so that it could not be found by the sheriff. In *Roberts* v. *Randall* (*id.* 327; 3 Code Rep. 190), it was held otherwise, and that to warrant the arrest, the removal must be with an intent that the goods should not be found. The amendment has always been regarded as a legislative overruling of *Van Neste* v. *Conover*, and adoption of the ruling in *Roberts* v. *Randall* (*Pike* v. *Lent*, 4 Sand. 650).

f. To entitle a plaintiff to an order of arrest under this subdivision, it must be true as a present fact that the property claimed *is detained by the defendant* at the time the suit is commenced, or at all events when the action is moved by the plaintiffs, or other assertion of their claim to the property is made (*Reimer* v. *Nagel*, 1 E. D. Smith, 258; 1 Code Rep. N. S. 219; *Merrick* v. *Suydam*, id. 212; *Pike* v. *Lent*, supra). And, therefore, if it appear that the defendant had disposed of the property claimed, in the usual course of his business, *ante litem motam*, and without any intent to prevent the taking thereof by the sheriff, the plaintiff is not entitled to an order of arrest. (*Id.*)

g. To authorize an order of arrest under this subdivision, it must appear by the affidavits on which it is sought to be obtained, that the property has been removed after suit brought, with *intent* to prevent its being taken or found by the sheriff, or with *intent* to deprive the plaintiff of the benefit thereof; or if the disposition or removal took place before suit brought, it must appear to have been done with intent to render ineffectual the proceedings in a suit which the defendant knew or had reason to apprehend the plaintiff intended to bring to recover possession of the property. In the ordinary case for con-

verting property, or detaining it in hostility to the claim of the true owner the order to arrest must be under the 1st subdivision of this section, which is satisfied with bail that the defendant shall render himself amenable to the process and judgment of the court; whereas an arrest under subdivision 3 can be superseded only by an undertaking to pay any judgment that may be recovered (*Roberts* v. *Randall*, 3 Sand. 710).

a. The plaintiff has his election to proceed (§ 206) to recover possession of property, or to recover damages for the taking or detention; and having made his election, he must abide by it. He cannot have the defendant arrested and have a delivery of the property too, pending the litigation (*Chappell* v. *Skinner*, 6 How. 338). The plaintiff may pursue the proceedings pointed out in chapter 2, title 7; and if the property cannot be found, and the case is within this subdivision, have the defendant arrested: but in that case he cannot afterwards obtain the possession of the property pending the action. (*Id.*)

b. An order of arrest obtained under this subdivision cannot be sustained where the complaint alleges as a cause of action the wrongful conversion of a horse, and demands judgment for damages. Such an action is for damages, —not to recover specific property (*Seymour* v. *Van Curen*, 18 How. 94).

Note to subd. 4.

c. The "obligation" referred to in this subdivision means an obligation of such a character that an action might be brought on it, even if unaccompanied by fraud in incurring it (*McGovern* v. *Pyne*, 32 Barb. 83; disapproving of *Crandall* v. *Bryan*, 5 Abb. 162; 15 How. 48, which held that "obligation" meant "legal liability").

d. It is not necessary that the papers presented as the basis of an application for an order of arrest on the ground of fraud, should make out every fact entering into the fraud, by evidence which would be competent to establish it on a trial (*Crandall* v. *Bryan*, 5 Abb. 162; 15 How. 48; and see *Robbins* v. *Seithel*, 20 How. 366).

e. What is a disposal of property with intent to defraud creditors? (*McButt* v. *Hirsch*, 4 Abb. 441, and *post*, p. 373, *c*).

f. The law does not, in ordinary cases, impose upon a purchaser the duty of disclosing to the seller, at or before the sale, the state of his pecuniary circumstances, however desperate they may be, and be known by him to be. This general principle is applicable, notwithstanding there has been a long course of dealing between the parties, in the course of which credit has been given to the purchaser, and he has punctually performed his engagements, and his insolvency has occurred during those dealings; no relation of trust or confidence is thereby created which would entitle the seller to expect of the purchaser or require of the purchaser as a legal duty, to communicate to the seller, information of his inability to pay all his debts, while he continues his business and the management of his affairs. Therefore, although a purchaser at the time of making an additional purchase from persons with whom he has been in the habit of dealing, is insolvent, and he well knows his insolvency, and intentionally conceals it from the vendors by simply withholding his knowledge on the subject, without otherwise saying or doing anything to mislead, and he still retains the possession of property, and is pursuing his business as before, he is not thereby guilty of a fraud entitling the vendor to avoid the sale. But if the purchaser, at the time of making a new purchase, is not only insolvent, and knows himself to be so, but has performed an open and notorious act of insolvency, by breaking up his business, and assigning his property for the benefit of his creditors, it is his duty, arising out of his previous dealings with the vendors, to communicate that fact to them before the sale; and the violation of that duty amounts to a fraud (*Mitchel* v. *Worden*, 20 Barb. 253; *Hall* v. *Naylor*, 6 Duer, 74; 18 N. Y. 589; *Morrison* v. *Gardner*, 7 Abb. 425; *Seligman* v. *Kalkman*, 8 Cal. 215).

a. Where the defendant, knowing himself to be insolvent, applied to purchase goods from the plaintiff, and assured him that he, the defendant, "was good and able to pay all that he should contract to pay;" and the plaintiff, relying on his representation, made the sale desired,—held that the debt was fraudulently contracted, and the defendant liable to arrest (*Freeman* v. *Leland*, 2 Abb. 479).

b. Where the ground of arrest is misrepresentation as to the defendant's circumstances, it must be shown that the defendant knew that the representations were false; for if he believed them true at the time he made them, he was not guilty of any fraud, however false the representations may have been in fact (*Gafney* v. *Burton*, 12 How. 516; *Birchell* v. *Strauss*, 8 Abb. 53; 28 Barb. 293).

c. The defendant obtained credit upon these representations: "I am perfectly good and responsible for all the goods I may purchase. I own in Jersey City the house and lots in which I am living, which I value at between five and six thousand dollars; and I consider this good and sufficient for any goods I may buy. I also own real estate in Williamsburgh, and I have other property." The question was, whether this representation was false, and known by him to be so, when he made it. The defendant, without any change having taken place in his circumstances in the meantime, about a month after such representations, made an assignment of all his property for the benefit of creditors; which assignment disclosed about double the amount of indebtedness to the amount of property assigned,—held, that this exhibit of the defendant's affairs implied upon its face, that the representations made by him were clearly false, and must have been known by him to have been so (*Scudder* v. *Barnes*, 16 How. 534; and see *Wilmerding* v. *Mooney*, 11 Abb. 283).

d. A purchaser who obtains credit by a false representation, must be held to *intend* the legitimate consequences of his act. If he obtains credit by representations false in fact, and which he knew to be false when he made them, it will not do for him to say he did not mean to defraud the plaintiffs at the time (*Whitcomb* v. *Soloman*, 16 How. 533).

e. Where a person actually insolvent, purchases goods on credit, upon his representations of solvency, yet he is not liable to arrest in an action to recover the price of such goods, if at the time of making the representations he believed them to be true (*Berchell* v. *Strauss*, 8 Abb. 53; 28 Barb. 293). Where the question is whether the vendee procured the sale of them through fraud, evidence is admissable of purchases made by him at or about the same time, involving similar frauds (*Hall* v. *Naylor*, 18 N. Y. 588). And evidence is admissable of contemporaneous sales procured by affirmative representations of the purchaser's insolvency, though the issue is upon an alleged fraudulent concealment of facts material to his credit. (*Id.*) Otherwise, of representations which, though false, were not fraudulent as statements in respect to his circumstances, made to a creditor having no present right of action, for the purpose of quieting his alarm in respect to his security, though accompanied by an offer to return goods previously purchased, and the creditor declining such offer in consequence of such representations. (*Id.*)

f. The mere omission of a purchaser of goods, to disclose his insolvency to the vendor, is not a fraud for which the sale may be avoided (*Nichols* v. *Pinner*, 18 N. Y. 295). When no inquiries are made of the vendee on the subject of his pecuniary condition, and he makes no false statement, nor resorts to any artifice to mislead the vendor, it is not in general fraudulent in him to remain silent as to his pecuniary condition. (*Id.*) An honest, though abortive, purpose to continue business and pay for the goods, is consistent with the vendee's knowledge of his own insolvency; and the purchase is not fraudulent when made with such intent, though founded in delusive and unreasonable expectations. (*Id.*) Whether, however, the failure of the vendee to disclose a marked and sudden change in his affairs, for the worse, which he had reason to suppose unknown to the vendor, may not be a fraudulent concealment, rendering the sale voidable, query? (*Id.*)

g. I. loaned G. $1,000, taking, as security, his note and eleven receipts signed

by G.'s wife, for eleven consecutive payments of 15*l.* each, payable to her by K., out of her separate estate. Before the first of these installments became due, G. forbade K. to pay the amounts to I., and thereafter himself drew them out as they became due. In an action by I. to recover of G. said $1,000, it was held that G. could not be arrested: he had not removed or disposed of his property to defraud his creditors, nor was the debt fraudulently contracted (*Isaacs* v. *Gorham*, 1 Hilton, 480).

a. In an action for falsely and fraudulently representing, to plaintiff, the means and pecuniary ability of a third person, whereby the plaintiff was induced to sell and deliver to the latter goods on credit, and was damaged, the defendant cannot be held to bail unless it be shown by the affidavits on which the order of arrest is sought, that the defendant is a non-resident, or is about to depart from this State (*Smith* v. *Corbiere*, 3 Bosw. 634).

b. The liability of a party for falsely and fraudulently representing the means and pecuniary ability of a third person, is not a debt fraudulently contracted, nor an "obligation" fraudulently incurred, within subdivision 4 of § 179 of the code. (*Id.*)

c. Though the omission of a purchaser of goods on credit to disclose his insolvency is not necessarily fraudulent, yet if the purchase be made with a preconceived design not to pay, it is a fraud (*Hennequin* v. *Naylor*, 24 N. Y. 139; *Nichols* v. *Michaels*, 23 N. Y. 264; see *Sharp* v. *Mayor of N. Y.* 40 Barb. 256).

d. Where a defendant borrowed money on a promise to apply it to a specific use and instead of so applying it, applied it to another use, held that he was liable to arrest for fraud in contracting the debt (*Lovell* v. *Martin*, 11 Abb. 126).

e. A fraud committed in contracting a debt for the sale of goods to recover which debt the action is brought, subjects the offender to an arrest for the amount of the debt, whether the fraud would avoid the sale or not (*Wallace* v. *Murphy*, 22 How. 414). Thus where defendant purchased goods for cash and got possession of them before payment with an intent to put them out of the reach of the vendor, it was held a fraud for which he was liable to arrest (*id.* and see *Harding* v. *Shannon*, 20 How. 25).

f. In an action against partners to recover a debt of the co-partnership, in contracting which *some* of the partners were guilty of a fraud, *all* the partners are liable to arrest (*Townsend* v. *Bogart*, 11 Abb. 355; *Coman* v. *Allen*, 21 How. 114; and see *Sharp* v. *Mayor of N. Y.* 40 Barb. 257; Re Lawrence, 23 Law Jour. N. S. Ch. 79; contra, see *Hanover Co.* v. *Sheldon*, 9 Abb. 240; *Wetmore* v. *Earle. id.* 58 *note*).

g. Where a firm of which M. was a partner, received moneys of the plaintiff, from his, plaintiff's, agent, having been previously requested by plaintiff to remit the same to him when received. M.'s firm, after receipt of the money remitted a bill of exchange for the amount, drawn on a branch of the house, payable at sixty days after sight. The bill was accepted and delivered to plaintiff, but M.'s firm failed before the bill matured, and the bill was unpaid; held, in an action against the firm for converting the moneys so received, that M. was liable to arrest (*Bull* v. *Mellies*, 9 Abb. 58).

h. Although a principal is civilly liable for the fraud of his agent, he is not liable to arrest therefore unless he participate in such fraud, or knowingly ratify it (*Claflin* v. *Frank*, 8 Abb. 412).

i. In all cases in which fraud is charged, proof of an actual intent ought to be required to justify an order of arrest (*Berchell* v. *Strauss*, 28 Barb. 293; 3 Abb. 53; *Claflin* v. *Frank*, 8 Abb. 412).

j. Defendant may be arrested in an action to recover possession of real estate *and* damages for the unlawful withholding (*Merritt* v. *Carpenter*, 30 Barb. 61), but not in an action to recover possession of real estate only, *without* any claim for damages for withholding the possession (*Brush* v. *Mullen*, 12 Abb. 242; and *Fullerton* v. *Fitzgerald*, 10 How. 39).

k. Neither the 1st section of the act to abolish imprisonment for debt, nor the 4th subdivision of § 179 of the Code, apply to the case of a proceeding to

set aside an assignment of personal property (*Fassett* v. *Tallmadge*, 37 Barb. 436; 14 Abb. 188). The acceptance of the debtors' draft which is dishonored does not prevent the creditor proceeding on the original transaction and obtaining an order of arrest (*Harding* v. *Shannon*, 20 How. 25).

a. Although a debt was fraudulently contracted, or an obligation fraudulently incurred, by a defendant, yet, if subsequently thereto the plaintiff with full knowledge of the fraud, settles the original debt or obligation, and enters into a new contract with the defendant, upon different terms and upon additional consideration,—in an action upon the new contract, the defendant cannot be held to bail, merely because the original debt or obligation was fraudulently contracted or incurred. In such a case, if the debt, for the recovery of which the action is brought, was not fraudulently contracted, the defendant cannot be held to bail (*Merchants' B'k. of New Haven* v. *Dwight*, 13 How. 366; *Alliance Ins. Co.* v. *Cleaveland*, 14 *id.* 408).

b. Recovery of judgment in another State for goods sold is no bar to an action for deceit in procuring the credit given on such sale, or for fraudulent representations made to induce the vendor to sell the goods. The defendant may be held to bail in such a case. In an action upon such a judgment an order of arrest may be made, on the ground that the defendant was guilty of fraud in contracting the debt or incurring the obligation for which the action is brought (*Wanzer* v. *De Baum*, 1 Code Rep. N. S. 280; 1 E. D. Smith, 261; and see *Arthurton* v. *Dalley*, 20 How. 311; see *contra*, *Goodrich* v. *Dunbar*, 17 Barb. 644; *Mallory* v. *Leach*, 23 How. 507). The issuing of an extent, does not change the character of the debt (*Peel* v. *Elliott*, 16 How. 485; 7 Abb. 433; 28 Barb. 200). Recovery of a judgment in a court of this State, merges the original causes of action (*McButt* v. *Hirsch*, 4 Abb. 441).

See note to subd. 2.

Note to subdivision 5.

c. To warrant an order of arrest under this subdivision, the disposition must be with an *actual*, not a *constructive* intent to defraud (*Caldwell's case*, 13 Abb. 405; 35 Barb. 444; *Pacific Mut. Ins. Co.* v. *Machado*, 16 Abb. 451; *Spies* v. *Joel*, 1 Duer, 669; *Birchel* v. *Straus*, 8 Abb. 54; *Krauth* v. *Vial*, 10 Abb. 140; and the action must be one for the recovery of money (*Caldwell's case*, 13 Abb. 405; 35 Barb. 444). What is a fraudulent disposition of property (see *Phillips* v. *Benedict*, 12 Abb. 355; 33 Barb. 655; *McButt* v. *Hirsch*, 4 Abb. 441; *Hathorn* v. *Hall*, 4 Abb. 227; *Courter* v. *McNamara*, 9 How. 265; *Brodsky* v *Ihms*, 25 How. 471; 16 Abb. 251).

d. An order of arrest on the ground that defendant is about to dispose of his property with intent to defraud his creditors, should only be made on legal evidence tending to convict him of such a charge (*Courter* v. *McNamara*, 9 How. 255; see however *Crandall* v. *Bryan*, 5 Abb. 162; 15 How. 48).

e. A disposition of property in a foreign country, between foreigners, to defraud creditors, is not a ground of arrest in this State (*Blason* v *Bruno*, 21 How. 112; 12 Abb. 265; 33 Barb. 520).

f. In an action against husband and wife for a tort committed by the wife, the husband may be arrested (*Solomon* v. *Waas*, 2 Hilton, 179); and also the wife (*Schaus* v. *Putscher*, 25 How. 463; *Anon.* 8 How. 134; 1 Duer, 613, disapproved. See however *Balwin* v. *Kimmell*, 16 Abb. 353, and *note*).

g. In an action against a female she cannot be held to bail, on the ground that she fraudulently contracted the debt on which the action is brought (*Wheeler* v. *Hartwell*, 4 Bosw. 684).

h. The concealment, removal, and disposal of a piano, by a female, does not subject her to be held to bail. A female can be arrested only for wilfully or maliciously injuring property, but not for a detention or conversion of it (*Tracy* v. *Leland*, 2 Sand. 729; questioned, *Solomon* v. *Waas*, 2 Hilton, 183).

i. Where two of the defendants, with the aid and assistance of the female defendant, abstracted certain railway shares, with coupons attached, belonging to the plaintiffs, and converted the same into money, and then escaped from

France to this country with said money—held, that these shares and coupons were property, and converted with the intent to deprive the plaintiffs of the benefit of the same as property, and was an *injury*, and a *willful injury*, to the property—the stock and coupons having been destroyed as such, and converted into money (*Northern Railway* v. *Carpentier*, 13 How. 222; 3 Abb. 259).

a. One partner cannot have an order of arrest against his co-partner upon an allegation of the fraudulent removal of the partnership property (*Cary* v. *Williams*, 1 Duer, 667).

See *ante*, note to subd. 2.

General Note.

b. The causes of arrest enumerated in subdivisions 1, 2 and 4, must, of necessity, exist at the time of the commencement of the action. Those in subdivision 5 may exist at the commencement of the suit; but if they occur after the action is commenced, the plaintiff has ample remedy under the law of 1831 to abolish imprisonment for debt (*Corwin* v. *Freeland*, 6 How. 241).

c. In cases arising under the 4th and 5th subdivisions, if the plaintiff wish to obtain the benefit of the execution against the person, provided for in section 288, he must set up the fraud at the commencement of the suit, or, at least, before judgment, and cause the defendant to be arrested (*Lee* v. *Elias*, 1 Code Rep. N. S. 117, and see § 288).

d. At common law a defendant cannot be discharged from arrest in a civil suit on the ground that he was insane at the time of his arrest, or became so shortly afterward (*North* v. *Verney*, 4 D. & E. 121; *Kernott* v. *Norman*, 2 ib. 891; *Steel* v. *Allen*, 2 ib. 362). But, by a statute of this State, to organize State lunatic asylums, &c., it is enacted, that if a person, imprisoned on civil process, become insane, "the judge may discharge him from imprisonment, and order him into safe custody and to be sent to the asylum." He may be arrested again when of sound mind. The judge has no power to discharge the insane prisoner, except for the purpose of sending him to the asylum (*Bush* v. *Pettibone*, 1 Code Rep. N. S. 264; 5 Barb. 273).

e. The granting an order of arrest is a matter of discretion (*Davis* v. *Scott*, 15 Abb. 127; and see *Lapeous* v. *Hart*, 9 How. 541).

f. An order of arrest must relate to the whole causes of action, and not to part of them, and therefore where there are two causes of action as to one of which the defendant is not liable to arrest, no order of arrest should be granted (*Lambert* v. *Snow*, 2 Hilton, 501; *McGovern* v. *Payn*, 32 Barb. 83).

g. No order of arrest should be granted in an action on contract where the material allegations in the complaint are inconsistent with those in the affidavits on which the order is sought to be obtained (*Wickes* v. *Harmon*, 12 Abb. 476; 21 How. 462).

h. The plaintiff who has resorted to a provisional remedy—arrest—waives it by uniting in his complaint causes of action to some of which the provisional remedy does not extend. Thus, where at the commencement of the action the defendant was arrested on an affidavit charging the receipt of moneys in a fiduciary capacity, the complaint, subsequently served, united with a cause of action for moneys received in a fiduciary capacity, a cause of action on contract for which the defendant was not liable to arrest; held that the defendant was entitled to discharge from the arrest, even after bail given (*Lambert* v. *Snow*, 9 Abb. 92; 17 How. 517). If in such a case a plaintiff would resort to the provisional remedy, he must bring separate actions. (*Id.*)

i. A defendant cannot be twice arrested by process out of different courts in the same State for the same cause of action (*Hernandez* v. *Carnobeli*, 10 How. 433; 4 Duer, 642). Proof of arrest upon process out of one court, is sufficient ground to discharge the defendant upon a second arrest for the same cause of action upon process issued out of the other court. The only doubt as to discharging the defendant from the second arrest is whether the plaintiff is not entitled to elect upon which order of arrest he will hold the defendant. And perhaps the better practice is to reduce the bail in one case to a nominal

amount, similar to the discharge on common bail. (*Ib.*) But although a person cannot be arrested more than once by process out of different courts in the same State for the same cause, the rule does not apply where the first process is absolutely *void* (*Schadle* v. *Chase*, 16 How. 413).

a. Where a party has been once held to bail and discharged for insufficiency in the affidavits, he should not be again arrested in the same action (*Enoch* v. *Ernst*, 21 How. 96).

b. An order staying the plaintiff's proceedings in an action, has reference to the *ordinary* proceedings but does not prohibit him from obtaining an order of arrest. Thus where, after verdict for the plaintiff, in an action for an assault and battery, the defendant obtained an order allowing him thirty days to make a case, and directing *that all proceedings on the part of the plaintiff be stayed in the mean time*, and the plaintiff, while such order was in force, obtained an order of arrest,—on motion to set aside, held that the plaintiff might obtain such order without violating the order to stay the proceedings (*Lapeous* v. *Hart*, 9 How. 541).

§ 180. [155.] *Order of arrest, by whom made.*

An order for the arrest of the defendant, must be obtained from a judge of the court in which the action is brought, or from a county judge.

c. In *Seymour* v. *Mercer* (13 How. 564), held that a person elected a local officer to discharge the duties of surrogate for Cayuga county, had power to make an order of arrest.

§ 181. [156.] (Am'd 1849.) *Affidavit to obtain order. To what actions this chapter applies.*

The order may be made, where it shall appear to the judge by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section 179.

The provisions of this chapter shall apply to all actions included within the provisions of section 179, which shall have been commenced since the thirtieth day of June, 1848, and in which judgment shall not have been obtained.

d. **Requisites of Affidavit.**—The principles of the former practice as to affidavits to hold to bail, showing cause of action, and counter-affidavits, remain as under the former practice (*Martin* v. *Vanderlip*, 1 Code Rep. 41; 3 How. 265; *Adams* v. *Mills*, id. 219).

e. The affidavit should be positive, and make out a *prima facie* case against the defendant. (*Id.*) It must show:—1, that a sufficient cause of action exists; 2, that it is among those specified in the 179th section. (*Id.*) It is not sufficient to state that "the case is one of those mentioned in section 179." It must appear from the facts stated that it is such a case (*Pindar* v. *Black*, 2 Code Rep. 53; 4 How. 95). The affidavit need not state that "an action has been, or is about to be commenced." (*Ib.*) The "name" of the party to be arrested need not be stated, if unknown. He may be designated as "the real defendant", and whose name is not known; or by any name, as for instance, "*The man in command of the Sloop Hornet.*" (*Ib.*) The "entitling the affidavit in a suit" may now be disregarded. (*Ib.*)

a. An affidavit stating that a defendant is "going to California," is not sufficient. It must appear that he is "going out of the State with an intent to take up his residence" at the place indicated (*Brophy* v. *Rodgers*, 7 N. Y. Leg. Obs. 152). The affidavit must show that the defendant has removed or disposed of his property, or is about to do so, *secretly* (*Anon.*, 2 Code Rep. 51).

b. The affidavit may be on information and belief, but must in that case, set forth the source of such information, and a belief in its truth, and the facts and circumstances on which such deponent's belief is founded (*Whitlock* v. *Roth*, 5 How. 143; *Crandall* v. *Bryan*, 5 Abb. 162; 15 How. 48; *Moore* v. *Calvert*, 9 How. 474; *Union Bank* v. *Mott*, 9 Abb. 106; 6 Abb. 318). It should appear how the information was derived, and the terms as near as can be in which it was communicated, and why the person communicating did not himself make the affidavit (*Bell* v. *Mali*, 11 How. 255; see *Peel* v. *Elliot*, 16 How. 481; 28 Barb. 200; 7 Abb. 433; *Blason* v. *Bruno*, 21 How. 112; 12 Abb. 265; 33 Barb. 520; *Cook* v. *Roach*, 21 How. 152; *Satow* v. *Reisenberger*, 25 How. 164); and where the information is derived from written instruments, authenticated copies of such instruments should be furnished to the court (*De Weerth* v. *Feildner*, 16 Abb. 295; *S. C.* 25 How. 419). Where the charge is of obtaining credit on false representations, the representations should be set forth and the respects in which they are false pointed out. A general allegation of falsity will not suffice (*Draper* v. *Beers*, 17 Abb. 163; see *Cummings* v. *Woolley*, 16 Abb. 297, *note*).

c. In an action by a married woman respecting her separate property, she is not required in her affidavit to obtain an order of arrest, to state how she acquired the property, it is sufficient if she states in general terms that the property is her separate and individual property (*Lippman* v. *Petersburgh*, 10 Abb. 254).

d. In an action for a malicious prosecution, an affidavit for holding the defendant to bail is insufficient when it states only in general terms the existence of malice and the want of probable cause. The facts which are relied on as a *prima facie* evidence of a want of probable cause must be set forth in the affidavit, so as to enable the judge to whom the application for the order of arrest is made, to draw the proper conclusions of law (*Vanderpool* v. *Kissam*, 4 Sand. 715). Stating that the magistrate immediately dismissed the case, held sufficient (*Gould* v. *Sherman*, 10 Abb. 411).

e. An affidavit that the defendant "has removed or disposed of his property with intent to defraud his creditors," would be insufficient unless facts and circumstances to warrant such a conclusion, were stated (*Frost* v. *Willard*, 9 Barb. 440).

f. A man may be a citizen of one State and yet reside a large portion of his time in another; an affidavit, therefore, that a defendant is a citizen of another State is not equivalent to an allegation that the defendant is *not a resident of this State* (*M'Kiernan* v *Messingell*, 6 Sme. & M. 377).

g. Where it is chargeu that the defendant is about to dispose of his property with intent to defraud his creditors, the judge must have legal evidence tending to convict the defendant of such a charge, before granting the order. The weight of such evidence is in the discretion of the judge; and his decision is conclusive (*Courter* v. *M'Namara*, 9 How. 255).

h. The complaint sworn to may be considered as an affidavit; and if the complaint and affidavit are together sufficient to warrant the order, although the affidavit alone would not be sufficient, the order will be sustained (*Brady* v. *Bissell*, 1 Abb. 76; *Turner* v. *Thompson*, 2 *id.* 444; see *Corwin* v. *Freeland*, 2 Selden, 463).

i. Putting in and perfecting bail is a waiver of all defects in the affidavit (*Stewart* v. *Howard*, 15 Barb. 26).

§ 182. [157.] *Security by plaintiff before order of arrest.* Before making the order, the judge shall require a written

undertaking on the part of the plaintiff, with or without sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least one hundred dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the State, and worth double the sum specified in the undertaking, over all his debts and liabilities.

a. The undertaking must be filed with the clerk of the court (§ 433) forthwith; (Rule 4), but no copy need be served on the defendant (*Leopold* v. *Poppenheimer*, 1 Code Rep. 39). The sheriff is required to file with the clerk the affidavits on which an [order of] arrest is made, within ten days after the arrest. (Rule 7).

b. The undertaking need not be signed by the plaintiff or any agent of his (*Aiskins* v. *Hearns*, 3 Abb. 184; *Bellinger* v. *Gardner*, 2 *id.* 441; 12 How. 381; *Courter* v. *M'Namara*, 9 How. 255; *Leffingwell* v. *Chave*, 19 How. 54; the case of *Richardson* v. *Craig*, 1 Duer, 666, is overruled). When a foreign state is plaintiff, an undertaking signed by its resident minister is sufficient (*Republic of Mexico* v. *Arrangois*, 5 Duer, 634); an undertaking with one surety would, it seems be sufficient (*Ward* v. *Whitney*, 4 Selden, 446); it rests entirely in the discretion of the judge making the order whether or not the plaintiff shall give an undertaking with sureties (*Courter* v. *M'Namara*, 9 How. 255; *Richardson* v. *Craig*, 1 Duer, 666; *Leffingwell* v. *Chave*, 19 How. 59). See Rule 6.

§ 183. [158.] (Am'd 1849, 1862.) *Order, when made, and its form; Time to answer, or to move to vacate.*

(1.) The order may be made to accompany the summons, or at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him, and hold him to bail in a specified sum, and to return the order at a time and place therein mentioned, to the plaintiff or attorney, by whom it shall be subscribed or indorsed.

(3.) But said order of arrest shall be of no avail, and shall be vacated or set aside on motion, unless the same is served upon the defendant, as provided by law, before the docketing of any judgment in the action; and the defendant shall have twenty days after the service of the order of arrest in which to answer the complaint in the action, and to move to vacate the order of arrest or to reduce the amount of bail.

a. Semble, in the superior court the order of arrest may be made to accompany the summons into the sheriff's hands (see *Gould* v. *Bryan*, 3 Bosw. 626).

a. Semble, an assignee of a cause of action authorizing an order of arrest, is entitled to the order in the same manner as the original creditor (see *King* v. *Kirby*, 28 Barb. 49; *Haight* v. *Hayt*, 19 N. Y. 464).

b. The second paragraph of this section was added in 1862, and prevents the recurrence of such a case as *Barker* v. *Wheeler*, 23 How. 193.

c. In actions for penalties or forfeitures given by statute, an endorsement is required on the order, referring in general terms to the statute upon which the action is brought (2 R. S. 482, § 7).

d. In an action for libel, it appeared that the libel was not of an aggravated character, and that one defendant was a permanent resident of the county, and a freeholder and householder therein, and that the other defendant was a permanent resident of the said county and a householder, the court, on motion to reduce the amount of bail, fixed the same at $500 (*Baker* v. *Swackhamer*, 8 Code Rep. 248).

e. The order should not be made returnable on a Sunday; but if it is, it is an irregularity which may be remedied by amendment (*Gould* v. *Spencer*, 5 Paige, 541; *Wright* v. *Jeffrey*, 5 Cow. 208; *Boyd* v. *Vanderkemp*, 1 Barb. Ch. 273; *Stone* v. *Martin*, 2 Denio, 185).

f. The judgment referred to in this section is a final, not a conditional judgment. Thus, where a judgment was entered against a defendant for default of an answer, and he was afterwards allowed to come in and plead, the judgment, in the mean time, to stand as security, it was held not such a judgment as prevented the defendant's arrest on the original cause of action (*Union B'k.* v. *Mott*, 16 How. 525; 8 Abb. 150).

See section 204, *post*.

§ 184. [159.] *Affidavit and order to be delivered to sheriff, and copy to defendant.*

The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him a copy thereof.

g. The omission to serve a copy of the order of arrest at the time of the arrest is an irregularity only, and does not entitle the defendant to his discharge (*Keeler* v. *Belts*, 3 Code Rep. 183; *Courter* v. *McNamara*, 9 How. 257; *Barker* v. *Cook*, 40 Barb. 254; 16 Abb. 83; 25 How. 190). But the defendant may move for an order on the plaintiff to serve him with a copy of the order of arrest, and his motion will be granted with costs. (*Ib.*) The copy affidavit served, omitting the signature of the deponent or of the officer before whom the affidavit was sworn, does not invalidate the order of arrest (*Barker* v. *Cook*, 16 Abb. 83; 25 How. 190; 40 Barb. 254).

See note to section 182.

§ 185. [160.] *Arrest, how made.*

The sheriff shall execute the order by arresting the defendant, and keeping him in custody until discharged by law; and may call the power of the country to his aid in the execution of the arrest, as in cases of process.

§ 186. [161.] *Defendant to be discharged on bail or deposit.*

The defendant, at any time before execution, shall be dis-

charged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

§ 187. [162.] *Bail, how given.*

The defendant may give bail, by causing a written undertaking to be executed by two or more sufficient bail, stating their places of residence and occupations, to the effect that the defendant shall, at all times, render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he be arrested for the cause mentioned in the third subdivision of section 179, and undertaking to the same effect as that provided by section 211.

a. The common-law disqualifications of bail remain unaffected by the code (*Wheeler* v *Wilcox*, 7 Abb. 74; *Miles* v. *Clarke*, 2 Bosw. 709; 4 Bosw. 632); and the court will take judicial notice of the disqualifications of bail, though unopposed (*Laporte's Bail*, 3 Dowl. 110).

b. The following persons cannot be bail:—Officers of the different courts, as attorneys (15 Johns. 535; 1 Wend. 35; Doug. 467, n.; Cowp. 828; *Miles* v. *Clarke*, 2 Bosw. 709; 4 Bosw. 632). Attorneys' partners and clerks (1 D. & R. 9; 2 East, 182; 1 H. Bl. 76; 2 *ib.* 349; 2 B. & P. 504). Sheriffs and their officers (22 Johns. 129; 2 W. Bl. 799; 2 Stra. 890; 1 Chitt. R. 713). Turnkeys and jailors (2 B. & P. 150). Persons who have been indemnified by the defendant's attorney (1 Bing. 64. 423; 1 B. & P. 103; and 1 Dowl. P. C. 1). Persons who have been once rejected as bail (3 D. & R. 5; 1 Chitt. R. 82, 676). And persons of infamous character (4 T. R. 440; 1 Dowl. P. C. 183; 3 *ib.* 320; 2 Chitt. 98). The sheriff is bound to take the bail, provided they are sufficient; and if he refused, he was liable to an action (2 Saund. 61, c. 5; 15 East, 320; 7 Johns. 138, 512).

c. The statute declaring void securities taken by public officers *colore officii*, has no application to a security taken by a party at whose suit an arrest is made. The latter may take any security he pleases on discharging his debtor from arrest (*Decker* v. *Judson*, 16 N. Y. 443).

d. The bail required by this section is the substitute for special bail under the former practice (*Stewart* v. *Howard*, 15 Barb. 26).

§ 188. [163.] (Am'd 1849, 1851.) *Surrender of defendant.*

At any time before a failure to comply with the undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and shall, by a certificate in writing, acknowledge the surrender;

2. Upon the production of a copy of the undertaking and

sheriff's certificate, a judge of the court, or county judge, may, upon a notice to the plaintiff of eight days with a copy of the certificate, order that the bail be exonerated; and on filing the order and the papers used on said application, they shall be exonerated accordingly. But this section shall not apply to an arrest for cause mentioned in subdivision 3 of section 179, so as to discharge the bail from an undertaking given to the effect provided by section 211.

a. "The execution of the undertaking fixes the character of the parties as *bail*, if they are not excepted to; or if excepted to and they justify as bail, the sheriff is exonerated from liability; if they are excepted to and do not justify, they are liable to the sheriff. Justification does not increase or diminish their liability. It is only a question whether the sheriff shall be exonerated, or whether he shall stand between the bail and the plaintiff in the action." Bail who have not justified, are in the position of bail to the sheriff; and they have the right, as such bail, to surrender the defendant. And in all cases where bail are excepted to and do not justify, they may surrender the defendant (Re *Taylor*, 7 How. 214. *Humphrey*, County Judge).

§ 189. [164.] *Surrender of defendant.*

For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

b. The authority to arrest need not be signed by all the bail; and the authority to arrest of some of the bail would, it seems, be good, although the other bail should object (Re *Taylor*, 7 How. 214. *Humphrey*, County Judge).

c. A sheriff who becomes bail may surrender his principal by re-arresting him (*Seaver* v. *Genner*, 10 Abb. 256).

d. The privilege of a witness from arrest does not extend to an arrest by his bail, *semble* (*Ex parte Lyne*, 3 Stark. 470).

§ 190. [165.] *Bail, how proceeded against.*

In case of failure to comply with the undertaking, the bail may be proceeded against, by action only.

e. The sureties to an undertaking of bail in an action against them after the breach, cannot question the liability of their principal to arrest or imprisonment. The undertaking imports that liability, and the sureties are estopped from controverting it (*Gregory* v. *Levy*, 12 Barb. 610; 7 How. 37). Sureties cannot defend on the ground of the illegality of the order of arrest, or that no execution against the person could issue upon the judgment. Their only remedy is to move for an exoneratur to be entered on the undertaking upon surrender of the judgment debtor to the sheriff (*Id.*; *Jewett* v. *Crane*, 35 Barb. 208).

f. Where the plaintiff has the right to take the persons of all the defendants in satisfaction of his judgment, it carries with it the right to proceed against

the bail of one of them as to whom there may be a return of *non est inventus* (*Penn* v. *Remsen*, 24 How. 503).

a. Properly, the action against the bail should be in the court in which the original action was pending (see 13 Johns. 424; *Matthews* v. *Cook*, 18 Wend. 83; *Otis* v. *Wakeman*, 1 Hill, 604).

b. On moving to set aside the proceedings in a suit on a bail bond, the paper had to be entitled in that suit (*Phelps* v. *Hall*, 5 Johns. 367; *Pell* v. *Jadwin* 3 *id.* 448).

§ 191. [166.] (Am'd 1849.) *Bail, how exonerated.*

The bail may be exonerated, either by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

c. The court may, in the exercise of its discretion, exonerate bail after the lapse of more than twenty days from the commencement of the suit against them (*Gilbert* v. *Bulkley*, 1 Duer, 668). Thus, where, in an action against bail, they had not surrendered their principal within twenty days from the commencement of the action, but after the expiration of such twenty days moved to be exonerated on surrender of their principal, and payment of the costs of the action,—the motion was granted (see *Bank of Geneva* v. *Reynolds*, 20 How. 18).

d. In an action against bail in the supreme court, that court may grant relief to the bail, although the original action was in another court, and may allow a stay of proceedings to enable them to surrender their principal (*Barker* v. *Russell*, 11 Barb. 304).

e. A party offering to surrender himself in a discharge of his sureties, and the sheriff refusing to take him, held a good surrender and a discharge of the sureties (*Babb* v. *Oakley*, 5 Cal. 93).

f. The provision of the revised statutes allowing exoneration of bail on the death of the principal within eight days after return of process, is still in force, and the expiration of the time to answer is deemed the time of the return of process (*Hayes* v. *Carrington*, 12 Abb. 179; 21 How. 143). Presumptive proof of the death of their principal entitles the bail to exoneration (*Merritt* v. *Thompson*, 1 Hilton, 550). The bail may move to be exonerated. (*Id.*)

g. A sheriff's privilege as bail is commensurate with his liability; and whenever other bail can be relieved, he can; and he, as can other bail, may surrender the principal after judgment and execution against the person, and within twenty days after suit commenced against him, the sheriff, on his liability as bail (*McGregory* v. *Willett*, 17 How. 439; *Metcalf* v. *Stryker*, 10 Abb. 12). See section 201 and note.

h. After the twenty days limited by this section have expired, bail cannot properly surrender their principal; and if they do surrender him, the sheriff cannot properly hold him (*Baker* v. *Curtis*, 10 Abb. 279).

i. Bail may be permitted for their own protection to defend the action against their principal (*Jewett* v. *Crane*, 35 Barb. 208).

j. This section has made no change in the practice in respect to the period of time after the commencement of the action against the bail, within which the application for further time to surrender the principal may be made, nor in respect to the grounds upon which the allowance of further time may be granted (*Bank of Geneva* v. *Reynolds*, 12 Abb. 81; 20 How. 18). In a note ap-

pended to the report of this case in 12 Abb. is a collection of authorities on the subject of a surrender in discharge of bail.

a. The granting or refusing an application by bail for leave to surrender the principal after the time therefor has expired, is in the discretion of the court. It should not be granted if the bail are indemnified. (*Id.*) It should be shown as part of the application that the bail are not indemnified. (*Id.*) And the application should be made without unnecessary delay. Continued absence of the principal from *any* cause entitles the bail to make the application on the principal's return (*Id.*; and see *Baker* v. *Curtis*, 10 Abb. 279; *Hayes* v. *Carrington*, 12 Abb. 179; 21 How. 143).

b. Bail are exonerated by a judgment in favor of their principal, but if before an exonatur is entered the judgment in favor of the principal is set aside, the liability of the bail is revived (*Von Gerhard* v. *Lighte*, 13 Abb. 101).

c. This section is not a substitute for the revised statute as defining the whole extent of the sheriff's liability as bail. See *McCreery* v. *Willett*, 22 How. 91; S. C. as *McGregory* v. *Willett*, 17 How. 439; and see *Metcalf* v. *Stryker*, 10 Abb. 21; 31 Barb. 62.

d. Under the former practice, where bail was substituted, the liability of the former sureties remained until an exoneratur was entered (1 Taunt. 427; 6 Bing. 251). They might move for an exoneratur at any time before they were sued, or even after in some cases, and on payment of costs (4 Burr. 2107; Say. 58; 1 W. Bl. 462; 1 Arch. Pr. 107). But *semble*, if bail are excepted to, and fail to justify, they cease to be bail and are discharged (1 Cow. 54, 60; 2 *id.* 514; 9 Wend. 477).

§ 192. [167.] (Am'd 1849.) *Delivery of undertaking to plaintiff, and its acceptance or rejection by him.*

Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff, or attorney by whom it is subscribed, with his return endorsed, and a certified copy of the undertaking of the bail. The plaintiff, within ten days thereafter, may serve upon the sheriff, a notice that he does not accept the bail, or he shall be deemed to have accepted it and the sheriff shall be exonerated from liability.

§ 193. [168.] (Am'd 1849, 1851.) *Notice of justification New bail.*

On the receipt of such notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff, or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail (specifying the places of residence and occupation of the latter) before a judge of the court, or county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking in the form prescribed in section 187.

a. By giving notice of justification, the defendant waives every defect in the notice of exception and irregularity in the service of it (1 H. Bl. 106, 80; 1 Arch. Pr. 108). Further time to serve notice of justification may be obtained (1 Tidd's Pr. 272). Nothing is said either in the former books of practice or in the code, with regard to excepting to the bail where, after notice of exception, the defendant serves notice of the justification of new bail. It seems that the exception to the first named bail extends to those substituted.

§ 194. [169.] (Am'd 1849.) *Qualifications of bail.*

The qualifications of bail must be as follows:

1. Each of them must be a resident, and householder or freeholder, within the State.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, or a justice of the peace, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

See note to § 187.

§ 195. [170.] (Am'd 1849.) *Justification of bail.*

For the purpose of justification, each of the bail shall attend before the judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge, or justice of the peace, in his discretion may think proper. The examination shall be reduced to writing; and subscribed by the bail, if required by the plaintiff.

b. The bail must justify in the county where the defendant shall have been arrested, or where the bail reside (Rule 5).

c. Opposition to bail is usually on the ground, either of some defect or irregularity in the form or service of the notice of bail or of justification, or that the bail are not properly qualified. Under the former practice, if the bail did not attend to justify at the time appointed, and no further time was given, they were said to be out of court. But further time was sometimes given, either to justify the same bail, or to add and justify others (1 Tidd's Pr. 272). Thus if they were prevented from justifying by circumstances happening after they were put in, as by their subsequent bankruptcy (1 Chitt. R. 11), or insolvency (*ib.* 3, 4), or by their having given up housekeeping (*ib.* 6), further time would, in general, be allowed to add and justify other bail (1 Tidd's Pr. 297, 273). But where bail offered themselves, and were rejected on account of some personal insufficiency existing at the time they were put in, as by their being then attorneys (1 Chitt. R. 8), or insolvent debtors, or by their not being then housekeepers (*ib.* 7, 88, 144), time would seldom be allowed to add and justify others (1 Tidd's Pr. 287). So, if the bail, from any unforeseen accident, could not attend (2 Chitt. R. 107), or if, after notice of justification, they refuse to attend (1 Arch. Pr. 113), or if one or both of them failed to justify, by reason of the decision of the court upon any doubtful point of law as to their right to justify

1 Chitt. R. 287; 1 Arch. Pr. 193), further time would, in general, be granted, either to justify the same bail or to add and justify others, on a proper affidavit of the facts.

§ 196. [171.] (Am'd 1849.) *Allowance of bail.*

If the judge, or justice of the peace, find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk; and the sheriff shall thereupon be exonerated from liability.

d. The justification of bail has been set aside on motion, under circumstances of gross imposition and fraud on the part of the bail (1 Chitt. R. 148, 372; but see 1 Bing. 365; 2 Dowl. P. C. 438). A rejection of one of the bail is a rejection of all or both (5 B. & A. 704), unless further time be given to justify another bail instead of the one rejected (1 Arch. Pr. 113). Formerly, a defendant might appeal from a decision rejecting bail. It is supposed there is no appeal now.

e. Justification of bail is not complete until the judge has indorsed his allowance on the undertaking, and filed it with the clerk (*O'Neil* v. *Durkee*, 12 How. 94; *Overill* v. *Durkee*, 2 Abb. 388).

§ 197. [172.] *Deposit with the sheriff.*

The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

§ 198. [173.] (Am'd 1849.) *Payment of deposit into court.*

The sheriff shall, within four days after the deposit, pay the same into court; and shall take from the officer receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited as in other cases of delinquency.

§ 199. [174.] (Am'd 1849.) *Substituting bail for deposit.*

If money be deposited, as provided in the last two sections, bail may be given and justified upon notice, as prescribed in section 193, any time before judgment; and thereupon the judge before whom the justification is had, shall direct, in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly.

§ 200. [175.] (Am'd 1849.) *Deposit, how disposed of.*

Where money shall have been so deposited, if it remain on deposit, at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.

a. The defendant, having been arrested and held to bail in the sum of $500, deposited that amount with the sheriff, and afterwards, having given bail, obtained an order that the deposit be repaid him. Before the deposit had been repaid, the plaintiff commenced a second action against the same defendant, and issued an attachment, which he levied upon the deposit. A third party, upon affidavits stating that the money was his money, not that of the defendant, and advanced by him for the deposit until bail could be found, applied, by the defendant's attorney, for an order that the money be paid over to the defendant's attorney for him. *Held*, that the money, by being deposited, became the property of the defendant, and was liable to the attachment, and that the application must be denied (*Sulter* v. *Weiner*, 6 Abb. 191). [It is said that this decision was reversed on appeal. *Ed.*]

b. Money paid into court is at the risk of the depositor, see *Parsons* v. *Travis*, 5 Duer, 650: *DePeyster* v. *Clarkson*, 2 Wend. 77; Hopk. 505.

§ 201. [176.] (Am'd 1849.) *Sheriff, when liable as bail.*

If, after being arrested, the defendant escape or be rescued, or bail be not given or justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability, by the giving and justification of bail, as provided in sections 193, 194, 195, and 196, at any time before process against the person of the defendant, to enforce an order or judgment in the action.

c. Where the bail given for a defendant, upon his arrest, are excepted to and do not justify, and no other bail are given, nor a deposit made, the sheriff himself becomes liable as bail (*Buckman* v. *Carnley*, 9 How. 180; (see *Decker* v. *Anderson*, 39 Barb. 347). He may at any time before process against the person of the defendant is issued, discharge himself from such liability by the giving and justification of bail, but not after such process. (*Ib.*) But the sheriff, although his liability as bail is fixed by return of [an execution in the nature of] a *ca. sa.* not found, is only liable as bail, and he has the same right to relief within twenty days after action brought against him as is given to bail by § 191 (*id.*), and he is entitled to the same rights and powers as bail. He may, therefore, as bail, arrest the defendant and surrender him in the action; and for this no process is necessary (*Sartos* v. *Merceques*, 9 How. 188).

d. An action against a sheriff on his liability as bail under this section is not an action for neglect of official duty. The damages are the amount of the judgment, and cannot be reduced by evidence of the insolvency of the judgment debtor (*Metcalf* v. *Stryker*, 10 Abb. 12; 31 Barb. 62; *Gallarati* v. *Orser*, 4 Bosw. 94). It is otherwise where the action is for an escape (*Daguerre* v. *Orser*, 10 Abb. 12 *note*).

a. It is not within the province of the court to order a sheriff to take bail for the jail liberties, nor to pass upon the sufficiency of such bail. (*Ib.*)

See note to sections 185, 188, 189, 191, and 14 Common Pleas Rules of 1840.

§ 202. [177.] *Proceedings on judgment against sheriff.*

If a judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

§ 203. [178.] (Am'd 1849.) *Bail liable to sheriff.*

The bail taken upon the arrest, shall, unless they justify, or other bail be given or justified, be liable to the sheriff by action for damages which he may sustain by reason of such omission.

§ 204. [179.] (Am'd 1858.) *Vacating order of arrest, or reducing bail.*

A defendant arrested may, at any time before judgment, apply, on motion, to vacate the order of arrest, or to reduce the amount of bail.

b. The motion to vacate need not necessarily be made to the judge who granted the order (*Dunaher* v. *Meyer*, 1 Code Rep. 87). If made to the judge who granted the order, it may be made *ex parte*, and at chambers, but if made to any other judge, it must be on notice, in the same manner in which other motions are made, and cannot be made at chambers (*Cayuga B'k.* v. *Warfield*, 13 How. 439; *Rogers* v. *McElhone*, 12 Abb. 292; 20 How. 441)

c. A county judge has not power in any case to vacate an order of arrest (*Rogers* v. *McElhone*, 12 Abb. 292; 20 How. 441).

d. A motion to vacate an order of arrest may be made at any time *before* judgment, notwithstanding the defendant has given and perfected bail (*Wickes* v. *Harmon*, 12 Abb. 476; *Warren* v. *Wendell*, 13 Abb. 187); but the motion cannot be made after judgment (*Barker* v. *Wheeler*, 23 How. 193; *Roberts* v. *Carter*, 17 How. 279; 9 Abb. 106 *note*; *Crowell* v. *Brown*, 9 Abb. 107 *note*; and section 183, *ante*).

e. The judgment is an extinguishment of the order of arrest; but where after judgment the defendant is let in to defend, the judgment standing as security, he is estopped from insisting that such judgment avoids the order of arrest (*Union Bank* v. *Mott*, 9 Abb. 106; 17 How. 354).

f. Giving bail is not a waiver of the defendant's right to object to the legality of the arrest (*Col. Ins Co.* v. *Force*, 8 How. 353; *Cady* v. *Edmonds*, 12 *id.* 197). Nor, as it seems, does obtaining time to answer operate as such a waiver. But relief may be denied him on the ground of laches. (*Id.*) Where a party is arrested at a time when he is privileged from arrest (as where he is attending as a witness), by putting in bail, he waives his right to be discharged on account of such privilege (*Stewart* v. *Howard*, 15 Barb. 26); and by putting in and perfecting bail, the defendant waives all technical defects in the affidavit

on which the order was obtained. (*Ib.*) And see *Dale* v. *Radcliffe*, 15 How 71; 25 Barb. 333).

See note to section 183 and 205.

§ 205. [180.] *Affidavits on motion.*

If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made.

a. The motion may be made without affidavits on the part of the defendant, that is, upon the plaintiff's own showing (*Geller* v. *Seixas*, 4 Abb. 104; *Baker* v. *Swachamer*, 3 Code Rep. 248; 5 How. 251); in which case the sole question is whether the affidavits of the plaintiff authorize the granting the order (*Martin* v. *Vanderlip*, 1 Code Rep. 41; 3 How. 265); or upon the affidavit of the defendant or others (*Corwin* v. *Freeland*, 2 Selden, 565). In such a case the plaintiff may, to sustain the order and resist the motion, introduce additional affidavits and show contemporaneous frauds by the defendant (*Scott* v. *Williams*, 23 How. 393; see, however, *Cady* v. *Edmonds*, 12 How. 199).

b. A defendant who moves upon the plaintiffs' affidavits to vacate an order of arrest, admits those affidavits to be true (*Lovell* v. *Martin*, 21 How. 238; *Hathorn* v. *Hall*, 4 Abb. 227).

c. After a defendant has moved upon plaintiffs' affidavits to vacate the order of arrest, and his motion has been denied, he should not have leave to renew it on affidavits contradicting those of the plaintiff (*Lovell* v. *Martin*, 12 Abb. 178).

d. A motion to vacate an order of arrest, cannot be *renewed* in any case without leave of the court (*Lovell* v. *Martin*, 21 How. 238).

e. If the action is one in which the plaintiff cannot be arrested, and he has given bail, his proper remedy is to move to vacate the order of arrest, and not move for an *exoneratur* and the discharge of his bail (*Holbrook* v. *Homer*, 1 Code Rep. N. S. 406; 6 How. 86).

f. Where the right to arrest is derived from the nature of the action, the defendant will not be allowed to introduce affidavits to show that there is no cause of action; for that would be trying the merits of the action by affidavits (*Solomon* v. *Wass*, 2 Hilton, 179). But when the arrest is founded upon extrinsic facts, wholly independent of the cause of action, as where the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors, then the defendant may contest the truth of the facts upon which the arrest was ordered; and if he satisfies the court, either by his own affidavit or otherwise, that there is no foundation for the arrest, he is entitled to be discharged (*Geller* v. *Seixas*, 4 Abb. 104; *Bedell* v. *Sturts*, 1 Bosw. 634; 6 Abb. 319 *n*; *Coope* v. *Wells*, 6 Abb. 540; *Falconer* v. *Elias*, 1 Code Rep. N. S. 155). The code permits the *partial* trial of a cause on a motion to dischage an order of arrest (*Corwin* v. *Freeland*, 2 Selden, 565). On such motion the question is whether upon the whole case, as made by the affidavits on both sides, the court, if called upon to act upon the application as *res nova*, would grant the order of arrest. If it would, then the motion to vacate should be denied. But if, after hearing both parties, it should appear that a case for arrest has not been made out, the order should be vacated (*Chapin* v. *Seeley*, 13 How. 493; *Barron* v. *Sanford*, 14 *id.* 443; 6 Abb. 320 *n*). In other cases it is held that the principle on which the court should act in such a case is to inquire whether, upon the whole case as presented, it appears that a verdict ought to be given for the plaintiff or defendant. If the questions are doubtful, then the plaintiff has not made out his case, and the defendant should be discharged (*Hernandez* v. *Carnobelli*, 10 How. 449; *Republic of Mexico*

v. *Arrangois*, 11 *id.* 576; 5 Duer, 634; *Barron* v. *Sanford*, 14 How. 443; 6 Abb. 320 *n*; *Sachs* v. *Bertrand*, 12 Abb. 433; 22 How. 95; *Allen* v. *McCrasson*, 32 Barb. 662). In *Frost* v. *McCarger* (14 How. 131), Marvin, J., reviewed the cases on this point very fully and concluded that, when the facts justifying the arrest differ from the facts constituting the cause of action, and are not to be passed upon by the jury on the trial there, on a motion to discharge the order of arrest, the court may decide the disputed question of fact; but where the facts on which an order of arrest issued are those which constitute the cause of action, and their truth has to be passed upon by the jury, there the court ought not, except in a very clear case, to try the question on a motion to vacate the order of arrest.

a. Where the facts constituting the cause of action and the facts authorizing the arrest are identical, the order of arrest will not be set aside on the merits, unless the defendant clearly makes out such a case as would call on the judge at the trial either to nonsuit the plaintiff, or direct a verdict for the defendant (*Levis* v. *Noble*, 15 Abb. 475; *Barrett* v. *Gracie*, 34 Barb. 20; and see *Cousland* v. *Davis*, 4 Bosw. 619).

b. A denial by the debtor of the facts sworn to on the part of the plaintiff is not sufficient to vacate an order of arrest, there must be a preponderance of evidence (*Philips* v. *Benedict*, 20 How. 265; see *Allen* v. *McCrasson*, 32 Barb. 662; *Brodsky* v. *Ihms*, 25 How. 471; 16 Abb. 251).

c. In *Mecklin* v. *Berry* (23 How. 380), the order of arrest was vacated, on the ground that the balance of proof as to whether or not there was fraud, was in favor of the defendants.

d. Where the complaint in an action on contract set forth a fraud in contracting the debt, and the defendants took issue on the question of fraud, on which issue, on the trial it was found there was no fraud; held, that on such finding the defendant was entitled to have vacated an order of arrest granted at the commencement of the action (*Warren* v. *Wendell*, 13 Abb. 187).

e. In *Francheris* v. *Henriquez* (24 How. 165), an issue of fraud in contracting the debt being raised by the pleadings, held that the question of fraud was for the jury not the court to decide.

f. In an action to recover the possession of personal property; the plaintiff claimed the immediate delivery of the property, and served the sheriff with the affidavit, notice and undertaking, mentioned in sections 207, 208 and 209. The defendant excepted to the sureties in the undertaking, and they omitted to justify. The sheriff returned that the property in question had been concealed or removed, so that the same could not be taken by him; on this the plaintiff obtained an order of arrest, and the defendant was arrested; on motion to vacate the order of arrest, held, that the defendant was not entitled to his discharge from custody, or to have the action discontinued, either because the plaintiff's sureties omitted to justify, or on showing that such sureties were insufficient. That on such a motion the sheriff's return is *prima facie* evidence that the property has been concealed or removed to prevent its being taken; but the defendant may rebut the presumption thus raised; and on its appearing that the defendant neither concealed, removed, nor disposed of the property to prevent its being taken, the court will vacate the order of arrest (*Manley* v. *Paterson*, 3 Code Rep. 89).

g. When a non-resident comes into this jurisdiction for the purpose of prosecuting a non-resident, and seeks to arrest him under circumstances seemingly oppressive, and indicating a desire to annoy and subject the defendant to unusual inconvenience, the court will inquire much more closely, and scrutinize with greater strictness, if not severity, the case which the plaintiff presents, than would be deemed requisite if this peculiarity did not exist (*Byer* v. *Ayres*, 2 E. D. Smith, 211).

h. It is not a ground for vacating an order of arrest, that the case made by the complaint varies from that made by the affidavits, if the affidavits are themselves sufficient, and disclose a ground of arrest, which is consistent with the allegations of the complaint (*Stelle* v. *Palmer*, 7 Abb. 181). Nor will an order of arrest be vacated because the summons is erroneously entitled (*Bedell* v. *Sturta*, 1 Bosw. 634), nor because since the granting the order the summons

has been amended (*Union B'k* v. *Mott*, 6 Abb. 316), nor because an attachment proceeding between the same parties, and for the same cause of action is pending in another State (*Litheau* v. *Turner*, 1 Code Rep. N. S. 210), nor because the defendant has been sued for the same cause in a foreign tribunal (*Arthurton* v. *Dalley*, 20 How. 311), nor because there is an improper joinder of parties plaintiff (*Webber* v. *Morita*, 11 Abb. 113), nor because the defendant was arrested at a time when he was exempt from arrest (*Hart* v. *Kennedy*, 15 Abb. 290), nor because the debt is barred by the statute of limitations, no such defence being set up in the answer (*Arthurton* v. *Dalley*, 20 How. 311). But the defendant will be discharged from arrest when it appears that the arrest was effected by enticing him by false representations, within the bailiwick of the sheriff holding the process (*Goupil* v. *Simonson*, 8 Abb. 474; *Stein* v. *Valkenhauser*, 27 Law Jour. N. S. Q. B. 236).

a. Where the amount of the defendant's indebtedness is verified in the affidavit on which the arrest is founded, the order will not be modified merely because the affidavits submitted by the defendant on a motion to vacate the order, contain some evidence that the claim is overstated (*Noble* v. *Prescott*, 4 E D. Smith, 139).

b. **Condition upon vacating order.**—Upon vacating an order of arrest, the court assumes the power, in some cases, to make the order conditionally on the defendant's stipulating not to bring any action for false imprisonment, or for damages by reason of his arrest (*Northern Railway Comp.* v. *Carpentier*, 4 Abb. 47; *Alden* v. *Sarson*, id. 102; *Croden* v. *Drew*, 3 Duer, 655; *Merchant's Bank* v. *Dwight*, 13 How. 371; and see *Decker* v. *Judson*, 16 N. Y. 446; *Williams* v. *Riel*, 5 Duer, 603; *Gould* v. *Spencer*, 5 Paige, 541; *Rigney* v. *Tallmadge*, 17 How. 558; *Boyd* v. *Vanderkemp*, 1 Barb. Ch. 273; *Lee* v. *Averill*, 2 Sand. 622; *Aldridge* v. *Barry*, 3 Dowl. Pr. Cas. 450; *Dominick* v. *Eacker*, 3 Barb. 19).

c. The discretion exercised by the court at general term, in imposing such a stipulation, is not to be reviewed at a subsequent general term, nor by the court at special term (*Edgerton* v. *Ford*, 11 Abb. 415).

d. Where on an appeal from an order denying defendant's motion to vacate an order of arrest, the order was to be reversed on defendant stipulating not to sue, or in default of such stipulation, the order was to be affirmed, the defendant declined so to stipulate, held that the order was conclusive on defendant, on his motion to set aside an execution against his person, and the court would not review the order on the ground that the condition was oppressive. (*Id.*)

e. **Appeal from order.**—An order denying a motion that an undertaking given on the arrest of the defendant be delivered up and an *exoneratur* entered is an appealable order to the general term (*Col. Ins. Co.* v. *Force*, 8 How. 353), but not to the court of appeals (*Genin* v. *Tompkins*, 1 Code Rep. N. S. 415).

f. Where the defendant has been arrested, and his motion to reduce the bail been denied by the justice who granted the order, another justice, before whom a motion to vacate the order or reduce the bail is made, founded upon new affidavits, should not reduce the bail unless new facts are presented, bearing on that question; and the fact that, since the denial of the first motion, the defendant has been held to bail in a much smaller amount in criminal proceeding on the same facts, is not a reason for reducing the amount of bail in the action (*Union B'k* v. *Mott*, 6 Abb. 316).

g. An appeal from an order of a county judge vacating an order of arrest, may be taken to the general term of the supreme court (*Lancaster* v. *Boorman*, 20 How. 421).

h. An appeal from an order denying a motion to vacate an order of arrest, is not prejudiced by the entry of judgment against the defendant, and the bail becoming charged pending the appeal (*Pacific Mut. Ins. Co.* v. *Machado*, 16 Abb. 451).

i. An order reducing the amount of bail, will not, under ordinary circumstances be reviewed on appeal (*Hart* v. *Kennedy*, 15 Abb. 290).

j. On an appeal from an order vacating an order of arrest, the court will,

on the absence of the complaint, presume that the complaint is consistent with the affidavit on which the order was granted (*Levins* v. *Noble*, 15 Abb. 475).

a. The defendant moved to vacate the order of arrest; his motion was denied, and he appealed to the general term. Pending the appeal he obtained leave to move again on new facts, and that motion being denied he appealed to the general term; held, on reversing the order on the second motion and vacating the order of arrest, that the first order should be dismissed with costs (*Lambert* v. *Snow*, 9 Abb. 92).

b. Appeals from orders denying motions to vacate orders of arrest after defendant has given bail, are not to be encouraged (*Moers* v. *Morro & Martin*, 17 How. 280; 8 Abb. 257; 29 Barb. 361).

c. On an appeal from an order denying a motion to vacate an order of arrest, the objection that the affidavit on which the order of arrest was granted was made on information and belief, can have but little weight with the appellate court, where the principal allegations in such affidavit are not explained or denied (*Union B'k* v. *Mott*, 9 Abb. 106; 17 How. 354).

d. The court at general term on appeal from a judgment, cannot consider whether an order of arrest in the action was properly granted (*Ross* v. *West*, 2 Bosw. 360).

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CHAPTER II.*

Claim and Delivery of Personal Property.

SECTION 206. Claim of delivery of personal property.
207. Affidavit and its requisites.
208. Requisition to sheriff to take and deliver the property.
209. Security by plaintiff.
210. Exception to sureties.
211. Defendant, when entitled to delivery.
212. Justification of defendant's sureties.
213. Qualification and justification of sureties.
214. Property, how taken when concealed in building or enclosure.
215. Property, how kept.
216. Claim of property by third person.
217. Notice and affidavit, when and where to be filed.

§ 206. [181.] (Am'd 1849.) *Delivery of personal property.* The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter.

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* *e.* The provisions of this chapter are a substitute for the former action of replevin (*Roberts* v. *Randall*, 5 How. 327; 3 Sand. 707; *Rockwell* v. *Saunders*, 19 Barb. 481; *Chappel* v. *Skinner*, 6 How. 339; *B'k of France* v. *Carpenter*, 4 Abb. 51; *Nichols* v. *Michael*, 23 N. Y. 269). And in contingencies not provided for, the former practice in the action of replevin must be resorted to (*Brockway* v. *Burnap*, 16 Barb. 314; *Wilson* v. *Wheeler*, 1 Code Rep. N. S. 402; 6 How. 49).

f. The object of the proceeding under this chapter is the recovery of the property in specie; and if, before action brought, the defendant unconditionally offers to restore the property, the object is already attained, and the proceeding under this chapter is unnecessary. Such an offer is equivalent to a tender before action brought (*Savage* v. *Perkins*, 11 How. 17).

g. In *Wilson* v. *Wheeler* (supra), the question arose whether, in an action for the recovery of the possession of personal property, where the property has been delivered to the plaintiff, and the defendant has answered, the plaintiff can discontinue on payment of costs merely; and it was held he could not. If in such a case the plaintiff neglects to proceed *before issue*, the defendant may, under section 274, have judgment for a dismissal of the complaint, for his costs and a return of the goods; or, if the neglect to proceed is after issue, the defendant may notice the cause for trial under section 258, and have a dismissal, verdict, or judgment, as the case may require (*Schroeder* v. *Kohlenback*, 6 Abb. 66). An order that the complaint be dismissed unless the plaintiff bring the cause to trial within a specified time, is improper in such a case. (*Id.*) Or if the plaintiff serves notice of discontinuance at any stage of the action,

a. "This remedy can be maintained against a party who has not in fact or in law the possession or control of the property claimed" (*Nichols* v. *Michael*, 22 N. Y. 269; see, *contra*, *Roberts* v. *Randal*, 3 Sand. 707; 3 Code Rep. 190; 5 How. 337; *Remin* v. *Nagle*, 1 Code Rep. N. S. 219; 1 E. D. Smith, 256; *Brockway* v. *Burnap*, 12 Barb. 347; 8 How. 188; reversed 16 Barb. 309; *Savage* v. *Perkins*, 11 How. 17; *Nash* v. *Fredericks*, 12 Abb. 147).

b. A plaintiff has his election to proceed under this chapter to recover possession of the property, or to recover damages for the taking or detention; and having made his election, he must abide by it. He cannot have the defendant arrested, and have a delivery of the property too, pending the litigation. The plaintiff's course is, to pursue the proceedings pointed out in this chapter; and if the property cannot be found, and the case is within section 179, sub. 3, to obtain an order of arrest; but in that case he cannot afterwards obtain possession of the property, pending the action (*Chappel* v. *Skinner*, 6 How. 338).

c. The owner of goods unlawfully seized, under a warrant against another person for non-payment of a tax, may take proceedings of "claim and delivery" for such goods, notwithstanding 2 Rev. Stat. 522, providing that replevin shall not lie for goods taken for a tax (*Stockwell* v. *Vietch*, 15 Abb. 412).

d. A warehouse entry, if evidence of the title of its possessor to the goods which it describes, is as properly the subject of an action for its delivery, as a certificate of stock or bill of exchange. And in an action to compel the delivery of a document in writing, the court will not set aside the proceedings upon the ground that the paper, upon its face, has no value, if evidence to prove value may be given upon the trial. The question, whether value can be shown by extrinsic proof, is a question of law, which, when the document is set forth in the complaint, or is annexed, is proper to be raised by a demurrer (*Knehue* v. *Williams*, 1 Duer, 597).

e. See note to subdivision 3 of section 179.

§ 207. [182.] *Affidavit and its requisites.*

Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing,

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the posses-

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the defendant may accept it, and sue on the undertaking given by the plaintiff on procuring the delivery of the property to him.

f. The actions for injuries by force to property, and claims to recover the possession of personal property, are different causes of action. Those actions are what were formerly known by the respective names of *trespass de bonis asportatis* and *replevin*; and these actions, under the present as well as the former practice, are concurrent actions, the same state of facts sustaining the action in either form;—it is the judgment demanded which determines to which class it belongs; and where the complaint asks for damages and not for the possession or return of the property, the action comes within the class which was formerly denominated trespass (§ 167, sub. 6), and not replevin (§ 167, sub. 3); and therefore the plaintiff in such a case is not entitled to the benefit of the proceedings provided by this chapter (*Spalding* v. *Spalding*, 1 Code Rep. 64; 3 How. 297; and see *Dows* v. *Green*, 3 How. 377).

g. Where a defendant in a replevin suit is entitled under the pleadings to try the title to the property replevied, and in case he succeeds, is entitled to a return of the goods, he is bound to try the title in such suit and take a judgment therein for a return or the value of the goods, and he cannot forego such remedy and seek redress in a cross action (*McKnight* v. *Dunlop*, 4 Barb. 36).

sion thereof by virtue of a special property therein, the facts in respect to which shall be set forth;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or if so seized, that it is, by statute, exempt from such seizure; and

5. The actual value of the property.

a. Where an affidavit stated that the property in dispute was taken in execution by the sheriff of Niagara county, under an execution against the property of the plaintiff, and stated further that "the property was exempt from seizure on such execution," but no facts were stated bringing it within any statutory exemption, on motion to set aside the proceedings, the court, Sill, J., held the affidavit insufficient (*Spalding* v. *Spalding*, 3 How. 297; 1 Code Rep. 64). Gridley, J., in a subsequent case held, that where property has been seized under an execution, the affidavit must "show" that the property is by statute exempt from such seizure (*Roberts* v. *Willard*, 1 Code Rep. 100). And the fact of such exemption is sufficiently "shown" by "an allegation" that the property is so exempt; but an allegation of the party that "he believes" the property is so exempt, is insufficient, unless it be added that such belief is founded on a knowledge of the law or the advice of counsel cognizant of all the facts of the case. (*Id.*) An affidavit by the plaintiff that he is the "owner" of the property is sufficient, without setting out the facts proving such ownership (. *urns* v. *Robins*, 1 Code Rep. 62. See also *Vandenburg* v. *Valkenburg*, 8 Barb. 217). Where the substance of the affidavit was that the plaintiff was entitled, as against his co-partner, to the exclusive possession of the property claimed by virtue of the articles of co-partnership between the plaintiff and defendant. On motion to set aside the proceedings, and objection taken to the affidavit, the court said, "This affidavit does not meet the requirements of the section. The facts should be so shown as that the court can say upon these facts, and the best apparent evidence of these facts, that a special property and right of possession are made out. If it appears that the evidence of the facts rests in a writing, that must be set forth as the basis of the conclusion, the substituted conclusion of the plaintiff himself will not do" (*Depeu* v. *Leal*, 2 Abb. 136).

b. On a motion to set aside the proceedings, the court may give the plaintiff leave to amend his affidavit, or introduce new affidavits. This power may be properly exercised in a case where what is to be supplied is an instrument referred to in the original affidavit and matters purely explanatory of the facts therein stated, introducing no new substantive matter. (*Id.*) An appearance in the action or obtaining a re-delivery waives any irregularity in the affidavit (*Id.*; *Hyde* v. *Patterson*, 1 Abb. 248; *Wisconsin Insurance Co. Bank* v. *Hobbs*, 22 How. 494).

§ 208. [183.] *Requisition to sheriff to take and deliver the property.*

The plaintiff may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the

property claimed may be, to take the same from the defendant and deliver it to the plaintiff.

§ 209. [184.] (Am'd 1849.) *Security by plaintiff.*

Upon the receipt of the affidavit and notice, with a written undertaking executed by one or more sufficient sureties approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion.

a. The sheriff must indorse his approval on the undertaking (*Burns* v. *Robbins*, 1 Code Rep. 62). The undertaking can be altered, with the consent of the surety. (*Ib.*) On sufficent cause being shown, further time may be allowed for the sureties to justify. (*Ib.*) Where the undertaking was signed by one Graham, who was described in the body thereof as the surety, and also by the plaintiff, whose name was not mentioned in the body of the undertaking,—held, that the sheriff might erase the plaintiff's name, and if he originally required two sureties, the name of another surety might be added. (*Ib.*) If an undertaking be not executed and delivered to the sheriff, the proceedings will be irregular. It is not in the power of the sheriff to dispense with the undertaking (18 Wend. 521).

b. Where a foreign corporation is plaintiff, the undertaking pursuant to this section dispenses with the security required by the revised statutes (*Wisconsin Ins. Co. B'k* v. *Hobbs*, 22 How. 494); and where an infant is plaintiff his guardian may be surety (Anon. 2 Hill, 417).

b. An assignment by a defendant who prevails in an action of claim and delivery, of the judgment and all moneys to be obtained by means thereof, vests in the assignee the defendant's rights upon the undertaking on the part of the plaintiff (*Bowdoin* v. *Coleman*, 3 Abb. 431).

c. Where a third person on behalf of the plaintiff executes an undertaking pursuant to this section, and the defendants subsequently obtain a judgment against the plaintiff for costs, and on appeal that judgment is affirmed with costs, the two bills of costs are within the undertaking, and the obligor is liable therefor (*Tibbles* v. *O'Connor*, 28 Barb. 538).

d. An error in the recital in an undertaking as to the date on which the affidavit was made held not to vitiate the undertaking (*Hyde* v. *Patterson*, 1 Abb. 248); and *semble*, the court will allow a new undertaking to be given *nunc pro tunc*, when the one given in the first instance is defective (*Newland* v. *Willets*, 1 Barb. 20; 2 R. S., 556).

a. The sheriff can only take the property described in the affidavit of the plaintiff when the property is found in the possession of the defendant himself or of his agent (*King* v. *Orser*, 4 Duer, 431). Where the sheriff took possession of property claimed by a third party, and such third party commenced an action against the sheriff and the plaintiff in the first action for such taking, to recover possession of the same property, and issued a requisition to the coroner to retake the property. *Held*, that the proceedings of claim and delivery in that action were irregular, and that there is only one way in which a third party, claiming goods taken by the sheriff, in proceedings of claim and delivery, can assert his claim, and that is pursuant to section 216 (*Edgerton* v. *Ross*, 6 Abb. 189; see *Stimpson* v. *Reynolds*, 14 Barb. 506).

See note to §§ 210, 216, 423.

§ 210. [185.] *Exception to sureties.*

The defendant may, within three days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice, in like manner as upon bail on arrest. And the sheriff shall be responsible for the sufficiency of the sureties, until the objection to them is either waived as above provided, or until they shall justify or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section.

b. In a case where the plaintiff had claimed the immediate delivery of property, and served the affidavit, notice, and undertaking, required by §§ 207, 208, and 209, the defendant excepted to the sureties; and, they omitting to justify, the defendant moved to have the action discontinued; the motion was denied (*Manley* v. *Patterson*, 3 Code Rep. 89). If the sheriff has taken sham security, and on that the property has been delivered to the plaintiff, or for want of that the defendant has been arrested and held to bail, the plaintiff is entirely without remedy except the responsibility of the sheriff. (*Id.* Edmonds, J.)

§ 211. [186.] (Am'd 1849.) *Defendant, when entitled to re-delivery.*

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the

taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 216.

a. An undertaking, under this section, is not invalid because taken in the name of the plaintiff in the action (*Slack* v. *Heath*, 4 E. D. Smith, 95; 1 Abb. 331; and see *Decker* v. *Judson*, 16 N. Y. 443).

b. Where the defendant claims a re-delivery, and gives an undertaking under this section, which undertaking states that he, defendant, requires a return of the property, such undertaking is competent evidence to go to the jury to disprove an allegation in the answer that the defendant does not detain the property. It is for the jury to say how much weight such an undertaking is entitled to (*Black* v. *Foster*, 28 Barb. 387).

c. During the three days in which the defendant may elect whether or not he will demand a return of the property, the sheriff is required to retain the property in his possession. If the defendant elect to demand a return the sheriff is still to retain possession until the defendant's sureties justify, unless he, the sheriff, is willing to take the risk of such justification. The effect of the defendant's demand of the property within three days is, not to entitle the defendant to the property, but to prevent a delivery to the plaintiff (*Graham* v. *Wells*, 18 How. 376). The time within which the defendant's sureties are to justify, is not limited. (*Id.*)

d. When more than two sureties justify, the whole justification must be equivalent to two sufficient sureties. (*Id.*)

e. Where three sureties justify to the required amount, the sheriff cannot withhold a re-delivery to defendant, because with the undertaking was delivered to the sheriff an affidavit of the sureties in which they deposed to being worth a less sum than the amount required, and less than that in which they afterwards justified. The affidavit was unnecessary (*Grant* v. *Booth*, 21 How. 354).

f. It is no defence to an action against the sureties that having been excepted to they failed to justify. The bringing suit on the undertaking is a waiver of the exception. Where the undertaking is to the party, he may sue on it, without any assignment thereof to him (*Decker* v. *Anderson*, 39 Barb. 346; see *ante*, p. 191, *b*, *c*).

g. There is no provision for the restitution of the property to the plaintiff after its redelivery to the defendant under this section (*Hunt* v. *Mootrey*, 10 How. 478).

h. At any time before the plaintiff is entitled to the delivery, that is, at any time within the three days, the defendant may require the return &c. (*M'Cann* v. *Thompson*, 13 How. 380).

§ 212. [187.] (Am'd 1849.) *Justification of defendant's sureties.*

The defendant's sureties, upon a notice to the plaintiff of not less than two nor more than six days, shall justify before a judge or justice of the peace, in the same manner as upon bail on arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties, until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

a. Where in an action for the delivery of personal property the defendant has been arrested under an order pursuant to subd. 3 of § 179, and has given the undertaking with sureties provided by § 211 for delivery of the property to the plaintiff and been thereupon liberated from arrest and the process returned, but his sureties on being excepted to fail to justify, held, that in such case, the sheriff himself, by such omission became liable as bail (*McKenzie* v. *Smith*, 27 How. 20).

§ 213. [188.] (Am'd 1849.) *Qualifications and justification of sureties.*

The qualifications of sureties, and their justification, shall be as are prescribed by sections 194 and 195, in respect to bail upon an order of arrest.

§ 214. [189.] *Property, how taken when concealed in building or inclosure.*

If the property or any part thereof be concealed in a building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county.

§ 215. [190.] *Property, how kept.*

When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

b. The sheriff is required to use more than ordinary diligence in taking care of the property (*Moore* v. *Westervelt*, 21 N. Y. 103).

§ 216. *Claim of property by third person.*

If the property taken be claimed by any other person than the defendant or his agent, and such person shall make affidavit of his title thereto and right to the possession thereof, stating the grounds of such right and title, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff on demand of him or his agent shall indemnify the sheriff against such claim, by an undertaking, executed by two sufficient sureties, accompanied by their affidavit, that they are each worth double the

value of the property as specified in the affidavit of the plaintiff, and freeholders and householders of the county. And no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity.

a. This section applies only when the property is taken by the sheriff in the proper discharge of his duty, and not when the property is wrongfully taken (*King* v. *Orser*, 4 Duer, 431; see note to section 209, *ante*).

§ 217. *Notice and affidavit, when and where to be filed.*
The sheriff shall file the notice and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

Chapter III.

*Injunction.**

Section 218. Writ of injunction abolished, and order substituted.
219. Temporary injunction, in what cases granted.
220. At what time it may be granted.
221. Injunction after answer.
222. Security upon injunction. Damages, how ascertained.
223. Order to show cause why injunction should not be granted.
224. Security, upon injunction, to suspend business of corporation.
225. Motion to vacate or modify injunction.
226. Affidavits on motion.

§ 218. [191.] *Injunction by order.*
The writ of injunction as a provisional remedy is abolished, and an injunction by order is substituted therefor. The order

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b. * Injunctions in an action with reference to their duration, are of two kinds—*temporary* and *final*. The temporary injunction issues *before*, and the final injunction *contemporaneously* with, the judgment. Injunctions also issue in special cases, as in proceedings supplementary to the execution, &c What it now called a *temporary* injunction was, before the code, known as a *preliminary* injunction. This chapter has no reference to *final* injunctions. The granting or refusing a final injunction was always a matter of strict right, depending on the rules of equity, and these are in no wise affected by this chapter (See *Linden* v. *Fritz*, 3 Code Rep. 165; S. C. 5 How. 188; *Howard* v. *Ellis*, 4 Sand., 374; *N. Y. Life Ins. Co.* v. *Supervisors of N. Y.*, 4 Duer, 200; Willard's Eq. Juris. 343). This chapter relates solely to temporary injunctions; these, as preliminary injunctions, were formerly granted or refused in

may be made by the court in which the action is brought, or by a judge thereof, or by a county judge, in the cases provided in the next section; and when made by a judge may be enforced as the order of the court.

a. The motion for an injunction may be made at a general term (*Drake* v. *Hudson R. R. Co.*, 2 Code Rep. 67), and in certain cases before a county judge. See section 403, *post*.

§ 219. [192.] (Am'd 1849.) *Injunction, in what cases.*

[1] Where it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

[2] When during the litigation it shall appear that the defendant is doing, or threatens, or is about to do, or procuring or suffering some act to be done in violation of the plaintiff's rights, respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

[3] And where, during the pendency of an action, it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

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the discretion of the court (*Potter* v. *Chapman*, Ambl. 99; *Roberts* v. *Anderson*, 2 Johns. Ch. R. 202). But since the code prescribes the cases in which this species of relief may be obtained, at least in the cases prescribed, the granting or refusing a temporary injunction can no longer be a matter resting in judicial discretion. Yet it is said to be still a matter of discretion (*M'Cafferty* v. *Glazier*, 10 How. 475; *Minor* v. *Terry*, 6 id. 210; *Crocker* v. *Baker*, 3 Abb. 183; *Van de Water* v. *Kelsey*, 2 Code Rep. 3). It is considered that this chapter very materially enlarges the class of cases in which a temporary injunction may be allowed (*Cure* v. *Crawford*, 1 Code Rep. N. S. 18; 5 How. 293; *Capel* v. *Parker*, ib. 90; *Perkins* v. *Warren*, 6 How. 341; *Malcomb* v. *Miller*, id. 456; *Thompson* v. *Comm's of Canal Fund*, 2 Abb. 248; *Reubens* v. *Joel*, 3 Kernan, 488; *Merritt* v. *Thompson*, 3 E. D. Smith, 295). But it cannot be construed to create new rights of action or give new remedies (*Wordsworth* v. *Lyon*, 1 Code Rep. N. S. 163; 5 How. 463).

b. **Injunction can only go against a party to the action.**—(*Watson* v. *Fuller*, 9 How. 426: 1 Mad. Ch. Pr. 175, 3d Lond. ed.; Willard's Eq. Juris. 342, citing *Fellows* v. *Fellows*, 4 Johns. Ch. R. 25; *Waller* v. *Harris*, 7 Paige, 167). But a defendant cannot object that a person not a party to the action is enjoined (*Tradesmen's Bank* v. *Merrit*, 1 Paige, 302). The court will discharge the injunction as to such person on his application. (*Id.*) And it has been said the court will not attach him for disobeying the injunction (*Watson* v. *Fuller*, 9 How. 426).

c. **Injunction not retroactive.**—An injunction is never retroactive (*The People* v. *Albany R. R. Co.* 12 Abb. 171).

a. The provisions of this section are *permissive*, not *imperative* (*Bruce* v. *Delaware & Hudson Canal Co.*, 19 Barb. 371).

b. To authorize an injunction, there should not only be a clear violation of the plaintiff's rights, but the rights themselves should be certain, and capable of being clearly ascertained (*Olmstead* v. *Loomis*, 6 Barb. 152; Willard's Eq. Juris. 342; *Androvette* v. *Bowne*, 4 Abb. 440; 15 How. 75; *Crocker* v. *Baker*, 3 Abb. 182). It should be issued with caution (*Woodward* v. *Harris*, 2 Barb. 440); and not be granted in every case in which the plaintiff brings himself within the letter of this section. Some regard should be had to the nature and extent of the injury which the plaintiff would suffer if the injunction should be withheld, and also to the consequences to the defendant if it be granted (*Bruce* v. *Delaware Canal Co.*, 19 Barb. 371; *Gallatin* v. *Oriental Bank*, 16 How. 253; *McCafferty* v. *Glazier*, 10 *id.* 475; *Mace* v. *Trustees of Newburg*, 15 How. 161). It must be shown that defendant is about to do some specific act in violation of plaintiff's rights (*Lewis* v. *Oliver*, 4 Abb. 121). An injunction should not be granted *ex parte* unless pressing necessity is shown (*Androvette* v. *Bowne*, 4 Abb. 440; 15 How. 75; *Redfield* v. *Middleton*, 7 Bosw. 649). An injunction should only be granted where it appears by the complaint that the plaintiff is entitled to the relief demanded, and where also it appears by affidavit that sufficient grounds exist therefor (*Fowler* v. *Burns*, 7 Bosw. 637).

c. It is no ground for refusing an injuction that the plaintiff shows, in addition to the facts entitling him to the injunction, a state of facts entitling him to an order of arrest (*Meritt* v. *Thompson*, 3 E. D. Smith, 284).

d. **Injunction by defendant.**—To enable a defendant to obtain an injunction, he must serve a complaint, &c., in the nature of a cross-suit (*Thursby* v. *Mills*, 1 Code Rep. 83). Except in cases (not very probable) where the defendant's right to an injunction appears by the complaint. (*Id.*)

e. **Injunction, how served.**—The order cannot regularly be served prior to the summons; the summons and order may be served together (*Leffingwell* v. *Chave*, 19 How. 54). Where an injunction is granted by the *court*, and not by a judge out of court, it is properly served by a personal delivery of a certified copy, and no exhibition of the original order is requisite (*Mayor of N. Y.* v. *Conover*, 5 Abb. 244); but if the order is made at chambers, the original must be produced and shown to the party served at the time of the service, unless the court make an order to dispense with personal service (3 Paige, 85). Otherwise the service will not suffice to found a proceeding for contempt (*Coddington* v. *Webb*, 6 Sand. 439; *Watson* v. *Fuller*, 9 How. 426; *Loomis* v. *Brown*, 16 Barb. 330; *contra*, see *Livingston* v. *Swift*, 23 How. 1). An injunction directed to a municipal corporation is properly served upon the mayor, as the chief officer of such corporation (*Davis* v. *Mayor of New York*, 1 Duer, 486; 5 Selden, 277).

f. A copy of the papers upon which an injunction is granted, must in all cases be served with the injunction, or the service of the injunction will be set aside as irregular (*Penfield* v. *White*, 8 How. 87; *Leffingwell* v. *Chave*, 19 How. 55). The object of requiring service of a copy of the affidavit, is to apprise the defendant of the facts alleged on which the injunction was granted. (*Ib.*) Is the omitting to serve the affidavit on which the injunction was granted, such an irregularity as releases the party upon whom the service is made from the duty of obedience? *Semble*, that it does not *Davis* v. *Mayor of N. Y.* (1 Duer, 451); contra *Watson* v. *Fuller* (9 How. 426). The omission, however, to serve the papers on which the injunction was granted does not entitle the defendant of have the injunction vacated, but only to have the service set aside (*Penfield* v. *White*, 8 How. 87).

g. **Order must be obeyed.**—So long as an injunction is in force it must be obeyed, notwithstanding it may have been improperly or *irregularly issued* (2 Edw. Ch. R. 188; 4 Paige, 444; *Smith* v. *Reno*, 6 How. 124; *Smith* v. *Austen*, 1 Code Rep. N. S. 137; *Krom* v. *Hogan*, 2 Code Rep. 144; 4 How, 235; *Davis* v. *Mayor of N. Y.*, 1 Duer, 451; 5 Seld. 263; *Neale* v. *Osborne*, 15 How. 81). And an injunction directed to a corporation is operative and binding, not only on the corporation itself, but upon every person whose personal action

as a member or officer of the corporate body it seeks to restrain or control. (*Id.*) But service of the injunction order on a person not a party, and to whom the order is not directed, does not operate to bind him by the injunction. Its utmost effect is as a notice (*Edmonston* v. *McLoud*, 19 Barb. 356); and *semble* he cannot be attached for disobeying it (*Watson* v. *Fuller*, 9 How. 426). Where an injunction against the further prosecution of a legal proceeding is served upon the promovent therein, it is his duty not only to refrain from taking any further active part in the proceeding enjoined, but also to direct the officers of the court and others who act in the proceeding at his instance and under his control, to refrain from any further steps in the matter, pending the continuance in force of the injunction (*Mayor of N. Y.* v. *Conover*, 5 Abb. 244; *St. John's College* v. *Carter*, 4 My. & C. 497). A party restrained by injunction from doing a particular act, cannot stand by passive and see the injunction violated by his partner in business at the expense of the partnership, without being guilty of a contempt (*Neale* v. *Osborne*, 15 How. 81; see, however, *The People* v. *Albany R. R. Co.*, 12 Abb. 171; *Field* v. *Chapman*, 13 Abb. 320).

a. A corporation may be punished for contempt of an injunction (*The People* v. *Albany R. R. Co.*, 12 Abb. 171; 20 How. 358).

b. An attachment for disobedience of a judgment enjoining a particular act, is a proceeding on the judgment, and will not be granted where defendant has appealed and given security staying proceedings on the judgment (*Howe* v. *Searing*, 11 Abb. 28).

c. **Review of order.**—The propriety of issuing the injunction cannot be reviewed on appeal from an order granting an attachment for the violation of such injunction (*Grim* v. *Grim*, 1 E. D. Smith, 190).

d. An appeal from an order granting an injunction does not stay the operation of the injunction pending the appeal; and, notwithstanding the appeal, an attachment will issue to punish the party enjoined for any violation of the injunction (*Stone* v. *Carlan*, 3 Code Rep. 103).

e. **Effect of dismissal of complaint, or removal of cause.**—Where an injunction is allowed, and the complaint is subsequently dismissed, the injunction, *ipso facto*, falls with it. Nor can an appeal restore the injunction. It can only be restored by a reversal of the judgment. But where an appeal has been taken from such judgment of dismissal, the plaintiff can apply to the court on notice, to restrain the proceedings of defendant until the decision of the appeal (*Hoyt* v. *Carter*, 7 How. 140). If such a motion is granted, it is in fact the granting a new injunction. A new undertaking should be given, as the sureties on the injunction first issued are discharged (*Town of Guilford* v. *Cornell*, 4 Abb. 220; and as to the effect of a discontinuance of the action, see *Hope* v. *Acker*, 7 Abb. 308; *Hoyt* v. *Carter*, 7 How. 140; *Dunkin* v. *Lawrence*, 1 Barb. 447). On the removal of a cause from the State court into the circuit court of the United States, where there is an *injunction*, the order for removal may provide that it (the order) shall not operate of itself to *dissolve* the injunction (*Liddle* v. *Thatcher*, 12 How. 294).

f. **Note to paragraph 1.**—To authorize an injunntion under the first division of this section, the complaint must contain a demand for it as part of the relief sought (*Hovey* v. *McCrea*, 4 How. 31; *Olsen* v. *Smith*, 7 *id.* 481; *Vincent* v. *King*, 13 *id.* 239). It is not enough to show that the continuance of the acts complained of will do him an injury; he must also show that it is a case in which he will be entitled to final relief (*Corning* v. *Troy Iron and Nail Factory*, 6 How. 89; *Ward* v. *Dewey*, 7 *ib.* 17; *Crocker* v. *Baker*, 3 Abb. 182; *Wordsworth* v. *Lyon*, 5 How. 463; *Hartt* v. *Harvey*, 32 Barb. 55; 10 Abb. 322); and therefore an injunction cannot be granted to restrain the doing of acts in relation to property, in respect to which acts or property no final judgment is prayed (*Huice* v. *Thompson*, 8 How. 475). Where the complaint claimed that one defendant purchased a bale of goods of the plaintiff with intent to defraud him, and afterwards sold the goods to the other defendant; and charged the latter with knowledge of the fraud; and claimed the amount of the goods, and that the defendants were insolvent,—was held to be a case for an injunction to restrain the sale or disposition of the goods by the defendants during the lit-

igation (*Malcomb* v. *Miller*, 6 How. 456; *Mitchell* v. *Bettman*, 25 Barb. 408). See apparently *contra*, *Reubens* v. *Joel*, 3 Kernan, 488.

a. **Note to paragraph 2.**—An injunction under this provision can only be for acts done or threatened pending the litigation (*Seabring* v. *Lant*, 9 How. 347; *Malcomb* v. *Miller*, 6 *id.* 456); see however *Merritt* v. *Thompson*, 3 E. D. Smith, 284), and the acts must such as shall "tend to render the judgment" to be obtained "ineffectual" (*Hovey* v. *M'Crea*, 4 *id.* 31; *Olsen* v. *Smith*, 7 *id.* 481; *Vincent* v. *King*, 13 *id.* 239; *Power* v *Alger*, 13 Abb. 284; *Vermilyea* v. *Vermilyea*, 14 How. 470). Where a fraudulent transfer *has been made*, the court is not authorized in an action by a simple contract creditor against the debtor and his fraudulent vendee, to restrain the latter from disposing of the property (*Reubens* v. *Joel*, 3 Kernan, 488; *Bishop* v. *Halsey*, 3 Abb. 400; overruling *Mott* v. *Dunn*, 10 How. 225; and probably *Dillon* v. *Horn*, 5 How. 35; but see *N. Y. Ice Co.* v. *N. West. Ins. Co.* 21 How. 296.)

b. In an action by a wife for a divorce *a mensa*, and for maintenance, the complaint besides stating a cause of action alleged that defendant threatened to dispose of his property, and remove from the State without providing for the plaintiff, and asked that he should be restrained from so doing, an injunction was granted (*Vermilyea* v. *Vermilyea*, 14 How. 470; 6 Abb. 511).

c. **Note to paragraph 3.**—A mere refusal to pay a debt, whether the defendant be insolvent or not, is not sufficient cause for an injunction (*Pomeroy* v. *Hindmarsh*, 5 How. 437). Nor is it sufficient that the defendant threatened, *before the action* was commenced, to make an assignment for the benefit of his creditors. (*Ic.*) But where *during the pendency of an action*, it shall appear by affidavit, that the defendant threatens, or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be issued to restrain such removal or disposition (*Perkins* v. *Warren*, 6 *id.* 341; *Malcomb* v. *Miller*, 6 *id.* 456; *Hovey* v. *M'Crea*, 4 *id.* 31). But such a remedy by injunction is only applicable where the act is threatened, or is about to be done, and not when it has been done. (*Ib.*) Nor is a plaintiff entitled to an injunction in such case, unless he establishes an equitable ground for interference, by showing that he is a creditor, or that he will be injured by the threatened fraudulent transfer (*Ib.*) An injunction ought not to be issued on such an application, where the plaintiff's demand is denied on oath by the defendant, and is unsupported by any evidence, and there is no proof that the plaintiff has any interest in restraining the defendant. (*Ib.*) Where the legal right of the plaintiff is denied by affidavit, as broadly as it is asserted, the application stands upon the same ground, and shall be governed by the same rules, as where the whole equity of a complaint is denied by the answer. (*Ib.*)

d. The effect of the injunction granted under this part of the section, is not to restrain any removal or disposition whatever of the defendant's property, but only such a removal or disposition with an intent to defraud creditors (*Brewster* v. *Hodges*, 1 Duer, 609; and see *Pomeroy* v. *Hindmarsh*, 5 How. 35).

e. **Continuance of temporary injunction.**—On an application to continue a temporary injunction, the court will inquire whether or not it has power to grant the relief demanded (*Hartt* v. *Harvey*, 10 Abb. 322; 32 Barb. 55).

f. **Trade marks.**—In what cases and upon what principles the court will grant an injunction, to protect the use of a trade mark, see *Brooklyn White Lead Co.* v. *Masury*, 25 Barb. 417; *Hobbs* v. *Francais*, 19 How. 567; *Comstock* v. *White*, 10 Abb. 264 *n*; *Howe* v. *Searing*, 10 Abb. 264; *Partridge* v. *Menck*, 2 Barb. Ch. R. 101, affirmed; see 4 How. 296; 1 How. App. Cas. 547; *Peterson* v. *Humphrey*, 4 Abb. 394; *Fenn* v. *Bowles*, 7 Abb. 202; *Stokes* v. *Landgraff*, 17 How. 608; *Christy* v. *Murphy*, 12 How. 77; *Samuel* v. *Buger*, 4 Abb. 88; 13 How. 342; 24 Barb. 163; *Williams* v. *Spence*, 25 How. 366 *Jurgensen* v. *Alexander*, 24 How. 269; *Fetridge* v. *Wells*, 4 Abb. 144; *Fetridge* v. *Merchant*, id. 156; explained, *Corwin* v. *Daly*, 7 Bosw. 222; and see *Howard* v. *Henriquez*, 3 Sand. 725; *Stone* v. *Carlan*, 3 Code Rep. 67; *Merrimack Manuf. Co.* v. *Garner*, 4 E. D. Smith, 387; 2 Abb. 318; *Wolfe* v. *Goulard*, 18 How. 64; *Williams* v. *Johnson* 2 Bosw. 1; *Clark* v. *Clark*, 25 Barb. 76).

An injunction has been refused:—

a. Merely to restrain an act "dangerous to the peace, morals or welfare of the community" (*Woolsey* v. *Judd*, 11 How. 49; *Smith* v. *Lockwood*, 13 Barb. 209).

b. To restrain proceedings on a judgment (*Watt* v. *Rogers*, 2 Abb. 261; *Chappel* v. *Potter*, 11 How. 365; see, however, *Dobson* v. *Pearce*, 1 Abb. 97; 2 Kernan, 166).

c. To restrain the publication of proceedings in another action (*Wood* v. *Marvine*, 3 Duer, 674).

d. To restrain the disclosure of an art or invention taught by plaintiff to defendant under an oath not to divulge it (*Deming* v. *Chapman*, 11 How. 382).

e. To restrain a foreign corporation from issuing bonds (*Rogers* v. *Michigan South. R. R. Co.*, 28 Barb. 539).

g. To restrain State officers proceeding under a State law (*Thompson* v. *Commissioners of Canal Fund*, 2 Abb. 248; see *ante*, p. 402, *a*).

h. To restrain a railroad company from cutting its road (*Baucus* v. *Albany N'ern R. R. Co.*, 8 How. 70; see, also, *Hentz* v. *Long Island R. R.*, 13 Barb. 646).

i. To restrain a receiver (*Winfield* v. *Bacon*, 24 Barb. 155).

j. To prevent the construction of a sewer in a public street by a municipal corporation (*Kelsey* v. *King*, 32 Barb. 410).

k. To restrain the exercise of a trade contrary to a covenant with a specific penalty for a breach (*Vincent* v. *King*, 13 How. 234). It would be otherwise if no penalty was specified (*Id.*; see *Howe* v. *Searing*, 6 Bosw. 354; see *Redfield* v. *Middleton*, 7 Bosw. 649).

l. To prevent a consequential injury from a lawful exercise of a right (*Williams* v. *N. Y. Cent. R. R. Co.*, 18 Barb. 222).

m. To restrain the collection of a tax illegally imposed (*Wilson* v. *Mayor of N. Y.*, 1 Abb. 4; *Chemical Bank* v. *Mayor of N. Y.*, *id.* 79; *N. Y. Life Ins. Co.* v. *N. Y. Supervisors*, *id.* 250; *Livingston* v. *Hollenbeck*, 4 Barb. 10; *Van Rensselaer* v. *Kidd*, *id.* 17; see, however, *Wood* v. *Draper*, 4 Abb. 322).

n. To restrain a foreclosure suit (*Tarrant* v. *Quackenboss*, 10 How. 244; see *Grinnan* v. *Platt*, 31 Barb. 328; *Susquehanna Bank* v. *Supervisors of Broom*, 25 N. Y. 312; *Broderick* v. *Smith*, 26 Barb. 539).

o. To protect a mere nominal interest (*Wetmore* v. *Story*, 3 Abb. 262; 281).

p. To protect a claim on an illegal contract (*Bennett* v. *Amer. Art Union*, 5 Sand. 614).

q. To restrain the continuance of the use of the sign of a dissolved firm by the firm continuing the business (*Peterson* v. *Humphrey*, 4 Abb. 394).

r. To restrain a municipal corporation from paying money under a resolution claimed to be illegal (*Roberts* v. *Mayor of N. Y.*, 5 Abb. 41).

s. To restrain a municipal corporation from selling its real estate (*Roosevelt* v. *Draper*, 7 Abb. 108; *The People* v. *Lowber*, *id.* 158).

t. To restrain, at the instance of an individual tax-payer, an act injurious to all the tax-payers of the city (*Korff* v. *School Trustees*, 16 How. 140).

u. To restrain the imposition or collection of a tax or of an assessment (see *Betts* v. *City of W'msBurg*, 15 Barb. 255; *Wood* v. *Draper*, 24 Barb. 187; 4 Abb. 322; 14 How. 233; *Mace* v. *Trustees of Newburg*, 15 How. 161; *Blake* v. *City of Brooklyn*, 26 Barb. 301; *Beck* v. *Village of Rondout*, 15 Abb. 48; *Murray* v. *Jayne*, 8 Barb. 612; *Chemical Bank* v. *Mayor of N. Y.*, 1 Abb. 79; and see Laws 1853, p. 97, ch. 69; *Mut. Ben. Ins. Co.* v. *Super. of N. Y.*, 20 How. 416; 33 Barb. 322).

v. To restrain a judgment-debtor from compromising suits brought to cancel securities as usurious (*Boughton* v. *Smith*, 26 Barb. 635).

w. When the real object of the action is to obtain a review of a previous decision (*Livingston* v. *Hudson R. R. Co.*, 3 Code R. 143).

a. To restrain a defendant from obtaining payment of debts due him (*Gallatin* v. *Oriental Bank*, 16 How. 253).

b. To restrain the lessee of an inn from discontinuing to keep the inn open, as he had covenanted to do (*Hooper* v. *Brodrick*, 11 Simons, 47).

c. To prevent the publication of a libel (*Brandreth* v. *Lance*, 8 Paige, 24; 2 Swans. 413).

d. Generally where the injury is such as may be amply recompensed by an action for damages (*Marshal* v. *Peters*, 12 How. 218; *Townsend* v. *Tanner*, 27 *id.* 384; 2 Code R. 6; *Spear* v. *Cutter*, 2 Code R. 100; 4 How. 575).

e. To restrain an apprehended trespass (*Mayor of N. Y.* v. *Conover*, 5 Abb. 171, 253; see Willard Eq. Juris. 381).

f. To restrain interference with partnership funds, the partnership being denied (*Goulding* v. *Bain*, 4 Sand. 716; see *Dunham* v. *Jarvis*, 8 Barb. 88; *Mowbray* v. *Lawrence*, 22 How. 107; 13 Abb. 317).

g. To restrain summary proceedings by landlord to recover possession of demised premises (*Smith* v. *Moffat*, 1 Barb. 65; *Wordsworth* v. *Lyon*, 1 Code Rep. N. S. 63; 4 How. 463; *Hyatt* v. *Burr*, 8 How. 168; *Bokee* v. *Hammersley*, 16 How. 461; *Duigan* v. *Hogan*, 1 Bosw. 645; *Marks* v. *Wilson*, 11 Abb. 87; *Seeback* v. *McDonald*, 11 Abb. 95; 21 How. 224). Injunctions were allowed under the circumstances of the cases in *Cure* v. *Crawford*, 1 Code Rep. N. S. 63; 4 How. 463; *Forrester* v. *Wilson*, 1 Duer, 624; *Capet* v. *Parker*, 1 Code Rep. N. S. 90; *Vallotin* v. *Seignett*, 2 Abb. 121).

h. To restrain corporate election (*Hartt* v. *Harvey*, 32 Barb. 55; 10 Abb. 322).

i. Where plaintiff had commenced an action and issued an attachment in another action (*Mills* v. *Block*, 30 Barb. 549).

j. To restrain police officers from exercising supervision of citizens within the sphere of their duty as peace officers (*Sterman* v. *Kennedy*, 15 Abb. 201).

k. To try the right to office in a religious corporation (*Hartt* v. *Harvey*, 10 Abb. 322; 32 Barb. 55).

l. To test the title to a public office (*The People* v. *Draper*, 4 Abb. 333; 14 How. 233; *McCafferty* v. *Glazier*, 10 How. 475; *Lewis* v. *Oliver*, 4 Abb. 121; *Mayor of N. Y.* v. *Conover*, 5 Abb. 171; *Mayor of N. Y.* v. *Flagg*, 6 Abb. 296).

m. To restrain proceedings of commissioners of highways (*Thatcher* v. *Duesbury*, 9 How. 32).

n. Where the rights of the parties were undetermined, and an injury might be occasioned to one party (*Gurnee* v. *Odell*, 13 Abb. 264).

o. To set aside a fraudulent lien on property attached by the plaintiff (*Brooks* v. *Stone*, 11 Abb. 220; 19 How. 395; *Mills* v. *Block*, 30 Barb. 549).

p. To restrain a party from giving his services to another (*Fredericks* v. *Meyer*, 13 How. 566; 1 Bosw. 227; see *Sanquirico* v. *Benedetti*, 1 Barb. 315; *Lumley* v. *Wagner*, 1 De Gex M. & G. 604; 13 Eng. Law & Eq. R. 252; *Butler* v. *Galetti*, 21 How. 465; *Hamblin* v. *Dinneford*, 2 Edw. Ch. R. 529; *Kemble* v. *Kean*, 6 Simons, 333).

§ 220. [193.] *At what time it may be granted. Copy affidavit to be served.*

The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the court or judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

q. **Order may be made prior to service of summons.**—The injunction order may be granted by the justice prior to the service of the summons; to be served therewith (*Leffingwell* v. *Chave*, 19 How. 54; 10 Abb. 472). It is not

indispensable to the validity of an injuncti n order that a complaint should precede or accompany it (*Mattice* v. *Gifford*, 16 Abb. 246); in other cases it is said that an injunction order cannot be granted on affidavits without any complaint (*Morgan* v. *Quackenbush*, 22 Barb. 76; *The People* v. *The N. Y. Common Pleas*, 3 Abb. 181; see *Olmstead* v. *Loomis*, 6 Barb. 153; *Badger* v. *Wagstaff*, 11 How. 562). As an injunction can be granted only when it appears by the complaint that the plaintiff is entitled to the relief demanded. There must therefore be a complaint upon which to found the motion for an injunction (*Morgan* v. *Quackenboss*, 22 Barb. 72). But if the motion is made on an *affidavit* which contains all the requisites of a complaint it is sufficient. (*Id.*)

a. The ground for the injunction must be shown by affidavit (*Milliken* v. *Carey*, 3 Code Rep. 250; 5 How. 272); but a complaint in which the allegations are made unqualifiedly, *i. e.*, not on information and belief merely, and the allegations of which are sworn to be true, will be treated as an affidavit. This seems the result of the decision (*Rooms* v. *Webb*, 1 Code Rep. 114; *Benson* v. *Fash*, ib. 58; *Krom* v. *Hogan*, 2 *id.* 144; *Minor* v. *Terry*, 6 How. 210; *Smith* v. *Reno*, id. 126; *Penfield* v. *White*, 8 *id.* 87; *Woodruff* v. *Fisher*, 17 Barb. 229; *Jones* v. *Atterbury*, 1 Code Rep., N. S., 87; *Levy* v. *Ley*, 6 Abb. 89; S. C. 15 How. 395; *Badger* v. *Wagstaff*, 11 How. 562); but the ordinary form of verification is not sufficient for the purpose (*Bostwick* v. *Elton*, 25 How. 362). The plaintiff cannot make out the cause of action relied upon in the complaint by allegations in his affidavit (*Hents* v. *Long Island R. R. Co.*, 13 Barb. 646).

b. An injunction, as a general rule, will not be allowed on mere information and belief (*Campbell* v. *Morrison*, 7 Paige, 160; *Bank of Orleans* v. *Skinner*, 9 *id.* 305; 1 Barb. Ch. Pr. 617; *Livingston* v. *Bank of N. Y.*, 26 Barb. 304; *Room* v. *Webb*, 1 Code R 114; 3 How. 327; *Pomeroy* v. *Hindmarsh*, 5 How. 437; *Rateau* v. *Barnard*, 12 *id.* 464: and authorities collected, *Crocker* v. *Baker*, 3 Abb. 183); and where facts are stated on information and belief the sources of information and grounds belief should be stated (*The People* v. *Mayor of N. Y.* 9 Abb. 253); but the facts may be shown by the affidavits of any person cognizant of them (*Bank of Orleans* v. *Skinner* 9 Paige, 305.)

c. An injunction will not be granted after a demurrer to the complaint for not stating facts sufficient to constitute a cause of action has been sustained (*Mowbray* v. *Lawrence*, 14 Abb. 160).

d. After an application for an injunction has been denied, an application to another court on the same state of facts is improper (*Mayor of N. Y.* v. *Conover*, 5 Abb. 252; 25 Barb. 514; and see *Harrington* v. *American Insurance Co.*, 1 Barb. 244).

See note to section 226.

§ 221. [194.] (Am'd 1849.) *Injunction after answer.*

An injunction shall not be allowed, after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained, until the decision of the court or judge, granting or refusing the injunction.

See note to section 223, *post.*

§ 222. [195.] (Am'd 1849.) *Security upon injunction. Damages, how ascertained.*

Where no provision is made by statute as to security upon an injunction, the court or judge shall require a written undertaking on the part of the plaintiff, with or without sureties, to

the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

a. **Staying proceedings after judgment.**—Where, on a complaint to set aside a judgment and execution on the ground of fraud, the complaint prayed an injunction, and an injunction was granted *ex parte*, by a justice at chambers on the execution merely of an undertaking as prescribed by this section without the bond or deposit required by the revised statutes in such a case—the injunction order was ordered to be set aside unless the security required by the revised statutes was given in ten days (*Cook* v. *Dickerson*, 2 Sand. 691). "The revised statutes (2 R. S. 189, 190, §§ 141 to 149) require, that before the issuing of an injunction to stay proceedings in a personal action, after judgment, a deposit shall be made of the amount of the judgment; and a bond with sureties executed for the payment of the damages and costs to the adverse party. Power was conferred on the 'chancellor' to dispense with the deposit, and receive a sufficient bond for the amount of the judgment; and when the ground of the injunction is that the judgment was obtained by actual fraud, 'the chancellor' had the power to dispense with both deposit and bond. These provisions are not repealed by the code." (*Ib.*) See *Gee* v. *Southworth*, 10 Paige, 297; *Dickey* v. *Craig*, 5 *id.* 283.

b. It is not necessary that a judgment creditor of an insolvent corporation who brings suit for an injunction to restrain other creditors of the corporation from proceeding at law, and for the appointment of a receiver and an equitable distribution of the corporate assets, should give the bond or make the deposit prescribed by the above provisions of the revised statutes, to entitle him to the injunction prayed (*Hutchinson* v. *N. Y. Central Mills*, 2 Abb. 394).

c. **Superior court practice.**—The practice in the superior court with reference to security on granting an injunction was declared in a note (1 Sand. 700; 1 Code R. 93) to be—

"1. That on an order to show cause why an injunction should not be granted with a restraint in the mean time, the judge will in general require security to the defendant for damages, as in the code, § 195 [now [illegible]].

"2. The plaintiff's own undertaking will not be received, unless he will justify as being a freeholder or householder, and worth double the sum specified, over and above all his debts and liabilities.

"3. When a surety is required, justification must be to the same effect.

"4. When a plaintiff residing [illegible] the State applies for an injunction, he must furnish an undertaking executed by a *resident* surety."

d. **Security.**—An undertaking with *one* surety would, it seems, be sufficient (*Ward* v. *Whitney*, 4 Selden, 446). The plaintiff need not join in the undertaking (*Leffingwell* v. *Chave*, 19 How. 54; 10 Abb. 472). No particular form of security is required; any form of security as a penal bond which substantially complies with the requirements of this section, will suffice (*Episcopal Church of Westchester* v. *Varian*, 28 Barb. 644; *Town of Guilford* v. *Cornell*, 4 Abb. 220). An attorney may be a surety (*Ryckman* v. *Coleman*, 13 Abb. 398). The undertaking given on the issuing of an injunction should be approved by the judge and filed with the clerk (§ 423). An omission to file the undertaking, if done designedly, will entitle the defendant to have the injunction dissolved; and, even if the omission be by oversight or accident, the plaintiff must pay the defendant costs of a motion to have the injunction vacated on the ground that the undertaking has not been filed (*O'Donnell* v. *McMurn*, 3 Abb. 391; *Leffingwell* v. *Chave*, 5 Bosw. 704). No provision for a reference need be contained in the undertaking (*Higgins* v. *Allen*, 6 How. 30). See Rule 4.

a. Where a corporation having authority to sue and be sued commences an action, and its president, for the purposes of an injunction, executes an undertaking prescribed by this section, in his official character, not professing to act as agent for the corporation, the undertaking will be regarded as the act of the corporation, and will bind it and not the officer (*Epis. Ch. of St. Peter* v. *Varian*, 28 Barb. 644).

b. The undertaking is for the benefit of all the defendants enjoined, whether served or not (*Cumberland Coal and Iron Co.* v. *Hoffman Steam Coal Co.* 39 Barb. 16).

c. If the sureties in the undertaking become insolvent, it is in the discretion of the court to order other sureties to be substituted (*Willett* v. *Stringer*, 15 How. 310).

d. Where the security given on the issuing of an injunction is inadequate, it is ground for vacating the injunction, unless the security is increased (*Ryckman* v. *Coleman*, 21 How. 404).

e. The fact that a receiver plaintiff has not given adequate security on his appointment as receiver is no ground for vacating an injunction obtained by him (*Angel* v. *Salisbury*, 19 How. 48).

f. A defect in the undertaking is not ground for vacating the injunction (*Williams* v. *Hall*, 1 Bland, 194).

g. **Damages.**—Where the plaintiff during the progress of the cause serves a notice upon the defendant, waiving the injunction, the defendant is not then entitled to an order of reference to ascertain his *damages*, because the court must "*finally decide that the plaintiff was not entitled thereto.*" Until this point is reached in the progress of the action, the application for a reference to ascertain damages is premature (*Shearman* v. *N. Y. Central Mills*, 11 How. 269). The order may be made after final judgment in the action (*Meth. Churches of N. Y.* v. *Barker*, 18 N. Y. 463). And where, in the progress of an action, an injunction had been dissolved on motion of the defendant, and a report of a referee subsequently made in favor of the defendant, but no judgment had been entered on such report—held that the defendant was not entitled to a reference to ascertain his damages, as until judgment was entered, the court had not finally decided that the plaintiff was not entitled to the injunction. On entering judgment the defendant might then move for a reference (*Weeks* v. *Southwick*, 12 id. 170). Where the plaintiff served a notice that he discontinued the action, and offered to pay the defendant's costs. The costs were adjusted by consent and paid. Afterwards the defendant moved on the notice of discontinuance, the injunction order and the proceedings in the action, for an order that the action be discontinued and the injunction vacated, the court made an order declaring the action discontinued, and said that by the discontinuance the injunction would cease to operate (*Hope* v. *Acker*, 7 Abb. 308; see *Dunkin* v. *Lawrence*, 1 Barb. 447; [illegible] v. *Carter*, 7 How. 140); and the defendant be entitled to a reference [illegible] ain his damages (*Carpenter* v. *Wright*, 4 Bosw. 655). The reference [illegible] ordered, although not provided for in the undertaking (*Higgins* v. *Al*[illegible] w. 30). It was formerly otherwise (*Garcie* v. *Sheldon*, 3 Barb. 232).

h. In *Coates* v. *Coates*, (1 Duer 664) the injunction was dissolved, on motion founded upon the answer and affidavits, and the plaintiff discontinued. On reference to ascertain the defendant's damages, the referee allowed counsel-fees paid by the defendant in procuring the dissolution of the injunction. The court held the allowance proper. (See 4 Edw. Ch. R. 292; 4 Paige, 440; 2 id. 116; *Fitzpatrick* v. *Flagg*, 12 Abb. 189; and further as to the items of damage allowed, see *Wilde* v. *Joel*, 15 How. 320; *Bennett* v. *Brown*, 20 N. Y. 99). Semble, a counsel fee in the cause may be allowed (*Corcoran* v. *Judson*, 24 N. Y. 106; see contra, *Strong v. De Forest*, 15 Abb. 427).

i. Want of jurisdiction in the court over the subject matter of the action does not deprive the defendant of the right to damages on the undertaking given on the issuing of the injunction in the action (*Cumberland Coal Co.* v. *Hoffman Steam Coal Co.* 15 Abb. 78; 39 Barb. 16). A defendant who obeys an injunction, although never served therewith, is entitled to recover the damages he sustained by such obedience. (*Id.*)

a. The sureties upon the undertaking given upon the issuance of an injunction cannot be held liable for damages resulting from the continuance of the injunction pending an appeal from an order vacating it (*Town of Guilford* v. *Cornell*, 4 Abb. 220).

b. Where a referee reports the facts and not the damages which the defendants have sustained by reason of an injunction, the report will not be confirmed (*Taaks* v. *Schmidt*, 19 How. 413).

c. It is in the discretion of the court ordering the reference, to direct that the sureties have notice, or to set aside the report upon their application (*Metho. Churches of N. Y.* v. *Barker*, 18 N. Y. 468).

d. Semble, the court cannot direct a judgment to be entered against the sureties for the amount of defendant's damages, an action must be brought on the undertaking (*Fitzpatrick* v. *Flagg*, 12 Abb. 189: see however *Willett* v. *Scovil*, 4 Abb. 405).

e. The report of the referee must be confirmed by the court before any action can be taken on it (*Griffin* v. *State*, 5 How. 205; 3 Code R. 215). Form of order confirming report, see *Strong* v. *De Forest*, 15 Abb. 427; *Willett* v. *Scovil*, 4 Abb. 405.

f. **Action on undertaking.**—It seems that the undertaking may be prosecuted without leave of the court (*N. Y. Cent. Ins. Co.* v. *Safford*, 10 How. 344; *Higgins* v. *Allen*, 6 How. 30). If there has been a reference to compute the damages, the report of the referee must be confirmed before a motion for leave to sue on the undertaking will be entertained (*Griffin* v. *State*, 5 How. 205; 3 Code R. 215; and see *Wilde* v. *Joel*, 15 How. 320).

g. In an action on the undertaking, the judgment of dissolution is conclusive, and the only question is the amount of damages (*Gelston* v. *Whitesides*, 8 Cal. 309; *Metho. Churches of N. Y.* v. *Barker*, 18 N. Y. 468).

§ 223. [196.] (Am'd 1849.) *Order to show cause. Restraint in mean time.*

If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained.

h. An application for an order under this section is a motion (*Baldwin* v. *City of Brooklyn*, not reported). And cannot be made in the first district in an action triable elsewhere. (*Ib.*) See note to section 401.

i. Upon an order and temporary restraint under this section, security may be required as upon the allowance of an injunction under section 222 (*Methodist Churches of N. Y.* v. *Barker*, 18 N. Y. 468). Whether such security is imperatively required, or is in the discretion of the tribunal granting the order, *query?* (*Id.*)

j. On motion to show cause why an injunction should not issue, the defendant may read in opposition to the motion the affidavits of third persons, although he has put in his answer denying the whole merits of the complaint. The answer in such case is only used as an affidavit (*Florence* v. *Bates*, 2 Code R. 110). The court will, however, permit the plaintiff to put in affidavits in reply to such new matter. (*Ib.*) Where a temporary injunction order had been granted *ex parte*, and notice given to the defendant to show cause why the temporary injunction should not be made permanent, the defendant on the return of the order, showed cause by his answer to the complaint, duly verified, and also by the affidavits of several persons in support of the answer.

The plaintiff's counsel objected to any affidavits being read in support of the answer. But the objection was overruled, on the authority of *Seneca Falls, Village of*, v. *Matthews*, 9 Paige, 504. (*Ib.*)

§ 224. [197.] (Am'd 1849.) *Security upon injunction to suspend business of corporation.*

An injunction to suspend the general and ordinary business of a corporation, shall not be granted except by the court, or a judge thereof. Nor shall it be granted without due notice of the application therefor, to the proper officers of the corporation, except where the people of this State are a party to the proceeding, and except in proceedings to enforce the liability of stockholders, in corporations and associations for banking purposes, after the first day of January, one thousand eight hundred and fifty, as such proceedings are or shall be provided by law, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct.

See note to section 222.

§ 225. [198.] *Motion to vacate or modify injunction.*

If the injunction be granted by a judge of the court, or by a county judge, without notice, the defendant, at any time before the trial, may apply upon notice, to a judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

a. **May an injunction be vacated ex parte.**—Section 324 does not apply to injunctions; and they can only be vacated or modified pursuant to this 225th section (*Mills* v. *Thursby*, 1 Code Rep. 121). But in *Bruce* v. *Delaware and Hudson Canal Co.* (8 How. 440), the supreme court at a general term in the third district, decided that section 324 of the code applies as well to injunction orders as to other orders; that the special provision made by section 225 was in addition to the powers conferred by section 324, and not intended as a substitute for them; and that it was competent for a judge to vacate or modify an injunction order, without notice; but that it was not the better practice, and should never be done, except when from the urgency of the case it was necessary to guard against serious loss, which sometimes might be occasioned by the delay incident to serving notice. The court may in the first instance, in its discretion, hear motions to vacate injunction orders (*Woodruff*

v. *Fisher*, 17 Barb. 230). The provision in section 225, that the application may be made to a judge, is permissive merely, and does not abridge the general jurisdiction of the court. A motion to dissolve an injunction, made directly to the court, was the former practice; and although it was usual to apply to the judge granting certain orders in suits at law, to vacate them, this court has power, both in suits at law and in equity, to vacate any order made in a cause by a judge out of court (*id.*; and see *Peck* v. *Yorks*, 24 How. 363).

a. **Questions on motion to vacate—What papers may be used.**—Upon a motion to dissolve an injunction order, granted during the pendency of an action, under the last clause of section 219, the only question to be considered is that of fraudulent intent. Affidavits denying the debt sworn to by the plaintiff cannot properly be received. The effect of the temporary injunction that can alone be granted in such a case, is not to restrain any disposition whatever of the defendant's property, but only such a removal or disposition with an intent to defraud his creditors (*Brewster* v. *Hodges*, 1 Duer, 609).

b. On motion to vacate an injunction order granted without notice, founded on notice and upon the complaint, the affidavit upon which the injunction was granted, copy injunction order, copy affidavit of the plaintiff, and copies of the pleadings, the moving party is not obliged to prove the existence of a suit and an injunction, proof of service of notice of motion is all that is required (*Newbury* v. *Newbury*, 6 How. 182). On the motion to vacate, a verified answer may be read as an affidavit (*Krom* v. *Hogan*, 4 How. 225; *Schoonmaker* v. *Ref. Dutch Church*, 5 *id.* 216; *Minor* v. *Terry*, 6 *id.* 210). The motion may be made and opposed upon affidavits of any number of witnesses; and it is a matter of discretion, upon balancing the evidence adduced, to dissolve it or not (*Minor* v. *Terry*, 6 How. 211; *Crocker* v. *Baker*, 3 Abb. 183; *Vandewater* v. *Kelsey*, 2 Code R. 3; *Malcomb* v. *Miller*, 6 How. 456). The burden of proof is on the party having the affirmative (*Shearman* v. *Hart*, 14 Abb. 358). The moving party may introduce affidavits to contradict new matter introduced by his opponent, but the moving party may not introduce new matter in avoidance of that set up by his opponent (*Shearman* v. *Hart*, 14 Abb. 358. See § 226.)

c. **Must all defendants answer before moving?**—Must all defendants answer before they can move to dissolve injunction on answer (*Mallett* v. *Weybossett B'k.*, 1 Barb. 217).

d. **Effect of verified answer denying equities of complaint.**—It has been held that a preliminary injunction cannot be sustained when all the equities of the complaint are denied by the answer (*Finnegan* v. *Lee*, 18 How. 186; *Blatchford* v. *N. Haven R. R. Co.*, 5 Abb. 276). Or where the only ground on which the injunction can be sustained is denied in the answer (*Gould* v. *Jacobsohn*, 18 How. 158). According to the practice prior to the code, an injunction would not be dissolved on the coming in of the answer, unless the defendants positively denied all the equity of the bill. A denial on information and belief was not sufficient (*Ward* v. *Van Bokkelen*, 1 Paige, 100; *Apthorpe* v. *Comstock*, Hopk. 148; *Wakeman* v. *Gillespy*, 5 Paige, 112; *Att'y Gen'l* v. *Cohoes Co.*, 6 Paige, 134). Where the answer did not deny the facts charged in the bill positively and fully, although the denial was as full as could be given by the party under the circumstances, the injunction would not be dissolved (*Roberts* v. *Anderson*, 2 Johns. Ch. Rep. 204). And even when all the equity of the bill was denied by the answer, it was not a matter of course to dissolve the injunction, as the granting and continuing an injunction always rested in the sound discretion of the court, to be governed by the nature of the case (*Ib. Moore* v. *Hylton*, Dev. Equity Rep. 429; *Bank of Monroe* v. *Schermerhorn*, 1 Clarke, 303). The statement of the defendant had to be at least credible. Any evasion in not responding to the charges in the bill, or an extreme improbability in the statement of the defendant, would induce the court to retain the injunction (*Moore* v. *Hylton*, supra; *Williams* v. *Hall*, 1 Bland, 195; *Storer* v. *Coe*, 2 Bosw. 661). So, if the defendant's answer was contradictory (*Tong* v. *Oliver*, 1 Bland, 199; see *Litchfield* v. *Pelton*, 6 Barb. 188). And if the equity of the bill was not charged to be in the knowledge of the defendant, and the defendant merely denied all knowledge and belief of the facts

alleged therein, the injunction would not be dissolved on the bill and answer alone (*Rogers* v. *Rogers*, 1 Paige, 426). So, if the court could see in the facts disclosed in the answer good reason for retaining the injunction, it would be retained, notwithstanding a full denial of the equity of the bill (*Bank of Monroe* v. *Schermerhorn*, 1 Clarke, 303; see *Dubois* v. *Budlong*, 15 Abb. 445; *Clark* v. *Law*, 22 How. 426).

a. It was a general rule, however, that if the facts on which the complainant's equity rested were positively denied the injunction must be dissolved (*Gibson* v. *Tilton*, 1 Bland, 355; see *Falconer* v. *Elias*, 3 Sand. 731; 1 Code Rep. N. S. 155; *Perkins* v. *Warren*, 6 How. 349; see *Schermerhorn* v. *Merrill*, 1 Barb. 511). The answer was sufficient if it disproved the facts in the bill (*M'Farland* v. *McDowell*, 1 Car. Law Repos. 110). It needed not to invalidate by full proof the facts in the bill. The defendant needed only to show that the evidence of the complaint was entitled to no credit (*North's Ex'rs* v. *Perrow*, 4 Rand, 1).

b. An injunction against a corporation could not be dissolved on bill and answer; the answer must be duly verified by the oath of some of the corporation, who are acquainted with the facts stated therein (*Fulton Bank* v. *New York and Sharon Canal Co.*, 1 Paige, 311).

c. A defendant might answer an injunction bill, on oath, for the purpose of moving thereon for a dissolution of the injunction, although an oath was waived or was not necessary. But such answer had no other or greater force as evidence than the bill (*Manchester* v. *Day*, 6 Paige, 295; *Dougrey* v. *Topping*, 4 *id.* 94).

d. **A party in contempt may move to vacate.**—"It is no answer to a motion to dissolve an injunction, to show that the defendant has violated it" (*Smith* v. *Reno*, 6 How. 124; *Smith* v. *Austin*, 1 Code Rep. N. S. 137; *Field* v. *Chapman*, 13 Abb. 320; *Field* v. *Hunt*, 22 How. 330; *Gurnee* v. *Odell*, 13 Abb. 264; and see 4 How. 225; 1 Clarke, 28).

e. **Vacation of injunction for non-prosecution of action.**—A want of due diligence in prosecuting the action, is a cause for dissolving the injunction (*De Peyster* v. *Graves*, 2 Johns. Ch. R. 204; *Higgins* v. *Woodward*, Hopk. 342; *Seebor* v. *Hess*, 5 Paige, 85). But only as to the defendants served with process; for a neglect to serve the summons and injunction order on some of the defendants, is not a ground for dissolving the injunction as to those served (5 Paige, 85). And omitting to serve some defendants gives no right to those served to move to vacate the injunction for that cause (*Seebor* v. *Hess*, supra). The court will not vacate the injunction for neglect of the plaintiff to prosecute the action where the defendant may himself proceed (*Schermerhorn* v. *Merrill*, 1 Barb. 511);

See note to section 226.

§ 226. [199.] *Affidavits to oppose motion.*

If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

f. An answer verified as required by the code is not an affidavit, and therefore where the defendant moves to dissolve the injunction solely on his answer verified as required by the code, the plaintiff cannot interpose affidavits in addition to those on which the motion was granted in opposition to the motion (*Blatchford* v. *N. Haven R. R. Co.*, 7 Abb. 322, Gen. T. 1st Dist.; and to the like effect see *Servoss* v. *Stannard*, 2 Code Rep. 56; *Hartwell* v. *Kingsley*, id. 101; 2 Sand. 647; *Benson* v. *Fush*, 1 Code R. 50; *Rooms* v. *Webb*, 1 *id.* 114; 3 How. 327; *Millikin* v. *Carey*, 3 Code R. 250; 5 How. 272; contra, see *Krom* v. *Hogan*, 2 Code Rep. 144; 4 How. 225; *Schoonmaker* v. *Ref. Dutch Church*, 5

How. 267; 2 Code Rep. 232; *Hascall* v. *Madison University*, 1 Code Rep. N. S. 170; *Jacques* v. *Areson*, 4 Abb. 282; and see *Merrimack Mfg. Co.* v. *Garner*, 2 Abb. 322; 4 E. D. Smith, 387; and particularly *Fowler* v. *Burns*, 7 Bosw. 637). In *Hartwell* v. *Kingsley* (2 Code R. 101), it was further held, that where the motion is made on a verified answer only, the plaintiff could not read his reply in opposition. In *Minor* v. *Buckingham* (8 Abb. 68), Ingraham, J., who concurred in *Blatchford* v. *N. Haven R. R. Co.*, held that where the motion to dissolve was made on an answer setting up new matter verified by the defendant's attorney, who, in his affidavit of verification stated his personal knowledge of the facts stated in the answer and that such facts were true, there the plaintiff might introduce additional affidavits. In the N. Y. common pleas, Brady, J., held that, "on motion to dissolve an injunction, the plaintiff cannot support his original application by additional affidavits, nor can such affidavits be permitted to be read unless the answer sets up matter in *avoidance* of the plaintiff's claim or right. If the answer contains not only a denial of the plaintiff's equities, but claims a right in the defendant himself not derived from the plaintiff, that will not present matter in avoidance" (*Powell* v. *Clark*, 5 Abb. 70). This rule is applicable to a motion for an injunction; and the plaintiff will not be allowed to read new affidavits to meet those put in by the defendant unless the latter set up new matter in avoidance. (*Id.*)

a. In the superior court the question was very elaborately discussed in *Fowler* v. *Burns*, (7 Bosw. 637), and the conclusion arrived at was that if the defendant move on a verified answer to vacate the injunction the plaintiff may introduce affidavits in answer: and to the same effect see *Hollins* v. *Mallard* (10 How. 637). Where the verified complaint was before the judge at the time the order was granted, it may be referred to on motion to vacate the order (*Turner* v. *Thompson*, 2 Abb. 444).

b. A motion to vacate an injunction "and for other and further relief," was denied at special term, and on an appeal the general term ordered an additional defendant to be joined in the action, held regular (*Martin* v. *Kanouse*, 2 Abb. 390).

CHAPTER IV.

*Attachment.**

SECTION 227. Property of foreign corporations, and of non-resident or absconding or concealed defendants may be attached.
228. Attachment, by whom granted.
229. In what cases attachments may be issued. Affidavits to be filed.
230. Security on obtaining attachment.
231. Attachment, to whom directed, and what to require.
232. Mode of proceeding in executing attachment.
233. Proceedings in case of perishable property or vessels.
234. Interest in corporations or associations liable to attachment.
235. Attachment, how executed on property incapable of manual delivery.
236. Certificate of defendant's interest to be furnished by corporations.
237. Judgment, how satisfied.
238. When action to recover notes, &c., of defendant may be prosecuted by the plaintiff in the action in which the attachment issued.
239. Bond to sheriff on attachment, how disposed of on judgment for defendant.
240. Discharge of attachment, and return of property or its proceeds to defendant, on his appearance in the action.
241. Undertaking on the part of defendant.
242. When sheriff to return attachment with his proceedings thereon.
243. Sheriff's fees.

* § 227. (Am'd 1857.) *Property of foreign corporations, and of non-resident or absconding or concealed defendants, may be attached.*

In an action for the recovery of the money against a corporation created by or under the laws of any other State,

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* *a.* A creditor who has an attachment cannot before judgment in the action impeach the *bona fides* of a judgment confessed by the debtor (*Bentley* v. *Goodwin*, 38 Barb. 633).

b. **New remedy.**—"The attachment authorized by this chapter is a new remedy which did not exist under the old system. Unlike the attachment against absent or absconding debtors under the revised statutes, which was for the benefit of all the creditors, and to which the jurisdiction of the justices of the superior court is not taken away (*Renard* v. *Hargous*, 3 Kernan, 259), this attachment is for the benefit of the individual creditor (*Frazer* v. *Greenhill*, 3 Code Rep. 172; *Fisher* v. *Curtis*, 2 *id.* 62; 2 Sand. 68; *Furman* v. *Walter*, 13 How. 348). But the provisions of the revised statutes concerning attachments against foreign corporations, and absconding, concealed, and non-resident debtors, and the remedies provided by the revised statutes, may be pursued in appropriate cases. See *Renard* v. *Hargous* (2 Duer, 540).

c. The remedy afforded by this chapter is not merely cumulative. They

* *Amended—See Appendix.*

government, or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself, or whenever any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with intent to defraud creditors, as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of such defendant or corporation attached in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover.

a. An attachment may be executed before the summons is served (*Treadwell* v. *Lawlor*, 15 How. 8). This was in the supreme court; as to the superior court, see *Cole* v. *Kerr* (2 Sand. 660), *Gould* v. *Bryan* (3 Bosw. 626). The law contemplates a summons being *issued* before or with the attachment (*Hulbert* v. *Hope Mut. Ins. Co.*, 4 How. 275). But a summons may be considered as *issued* if made out and placed in the hands of a person authorized to serve it, and with a *bona-fide* intent to have it served (*Mills* v. *Corbett*, 8 *id.* 500). Where

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are the only remedies known to the law in the cases prescribed (*Skinner* v. *Stuart*, 39 Barb. 206).

b. **Foreign corporation.**—"A foreign corporation is not authorized, either by the code or the revised statutes, to sue another foreign corporation in the court of this State by attachment, unless the cause of action has arisen or the subject of the action is situate within this State" (*Western Bank* v. *City Bank of Columbus*, 7 How. 238). Where a note was made at the office of the defendants in the State of Iowa and was payable at a bank in the city of New York, held the cause of action arose out of the State (*Cantwell* v. *Dubuque West R. R. Co.*, 17 How. 16).

c. A non-resident plaintiff cannot have an attachment against a foreign corporation unless the cause of action arose within the State. (*Id.*; and see *McDonough* v. *Phelps*, 15 How. 372). It is not necessary in an attachment against a foreign corporation under laws of 1842, ch. 197, to serve a copy of the proof upon one to whom lands have been conveyed in trust for the corporation (*Wright* v. *Douglass*, 3 Selden, 564; *Willett* v. *Equit. Ins. Co.*, 10 Abb. 193); in an action on a policy issued and delivered in this State, the cause of action arises within this State (*Burns* v. *Provincial Ins. Co.*, 35 Barb. 525; 13 Abb. 425).

d. Where the demand upon which the action was brought arose upon written contracts for the payment of money, executed and delivered and payable in Canada; and all the work done and materials furnished were under those contracts, and upon work located in Canada, for a corporation created by the laws of Canada, and existing there, except a small part of the labor, which was performed in this State under said contracts,—held not to be the case where the cause of action arose in this State, and although the defendant, the foreign corporation, had property in this State liable to attachment, the attachment could not be sustained by a non-resident plaintiff (*Campbell* v. *Proprietors of Champlain & St. Lawrence R. R.*, 18 How. 413; and see *Whitehead* v. *Buffalo & Lake Huron R. R. Co.*, 18 How. 218; *Harriott* v. *New Jersey R. R. Co.*, 8 Abb. 284).

e. See a special act as to proceedings against The Great Western Railroad of Canada, 1 Laws 1857, p. 188.

a summons and attachment were made out together, and the attachment was delivered to the sheriff for service, and the attorney undertook to make service of the summons, but was not able to find the defendant until after the attachment was executed,—on motion to set aside the attachment for irregularity, it was held that the attorney had the same right to make service of the summons as the sheriff would have had if delivered to him—and the motion was denied. (*Id.*)

a. The court acquires jurisdiction from the time of the allowance of the attachment (*Burkhardt* v. *Sanford*, 7 How. 329).

b. An attachment may issue against the property of one of several joint debtors (*Stoughtenburg* v. *Vandenberg*, 7 How. 229; *Brewster* v. *Honigsbergher*, 2 Code R. 50; *Baird* v. *Walker*, 1 Code Rep. N. S. 329; 12 Barb. 298; *Goll* v. *Hinton*, 8 Abb. 120; see *Sears* v. *Gearn*, 7 How. 383). In an action in the supreme court, on a promissory note made by the defendants as co-partners, one of the defendants resided in the city of New York, and was there served with the summons and complaint. The other defendants were non-residents. The plaintiffs obtained an attachment against the non-resident defendants, and under it levied co-partnership property. A motion to set aside the attachment was denied (*Brewster* v. *Honigsbergher*; *Goll* v. *Hinton*, *supra*).

c. Where in an action on contract in the superior court against two defendants jointly liable, the summons had been personally served on one defendant only, and it appeared that the defendant served, who had not appeared, was a non-resident, it was held that a judge of the superior court had power, in such a case, to issue an attachment against the property of the defendant not served, and that there "was no longer any distinction in such cases between the power of the judges of that (superior) court and of the supreme court" (*Anon*, 1 Duer, 662). And as to the power and authority of the superior court judges to issue attachments under the revised statutes, see *Renard* v. *Hargous* (2 Duer, 540; 3 Kernan, 259).

§ 228. *Warrant, by whom granted.*

A warrant of attachment must be obtained from a judge of the court in which the action is brought, or from a county judge.

d. Is the warrant process? (*Peters* v. *Finney*, 12 Sme. & M. 449; *Morgan* v. *Avery*, 2 Code Rep. 91; *Conklin* v. *Dutcher*, 1 Code Rep. N. S. 49; *Camman* v. *Tompkins*, *id.* 16; 12 Barb. 265; *Frazer* v. *Greenhill*, 3 Code Rep. 172; *Bank of Lansingburgh* v. *M'Kie*, 7 How. 364; affirmed on appeal, so said *Niles* v. *Vanderzee*, 14 How. 549; *Furman* v. *Walton*, 13 *id.* 353; *Houghton* v. *Ault*, 16 *id.* 77; *Cruyt* v. *Phillips*, 16 *id.* 124).

e. Where an attachment is issued against an absent debtor, in an action in the supreme court, by a justice of that court, he acts *as* a judge of that court and not as a commissioner (2 Wend. 298), and the proceedings are not abated by the expiration of the term of his office. Therefore where in such a case pending the proceedings the term of office of the justice expires, an application is properly made to any other judge of the court (*Davis* v. *Ainsworth*, 14 How. 346).

§ 229. (Am'd 1857, 1860.) *In what cases warrant may be issued; affidavits to be filed.*

The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and

that the defendant is either a foreign corporation, or not a resident of this State, or has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keep himself concealed therein with the like intent, or that such corporation or person has removed or is about to remove any of his or its property from this State, with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property, with the like intent, whether such defendant be a resident of this State or not.

It shall be the duty of the plaintiff procuring such warrant, within ten days after the issuing thereof, to cause the affidavits on which the same was granted to be filed in the office of the Clerk of the County in which the action is to be tried.

a. **When attachment may issue.**—In order to justify the issuing of an attachment, it is not necessary that the plaintiff should have a cause of action for the payment of money merely. It is enough that a cause of action exists against the defendant (*Ward* v. *Begg*, 18 Barb. 139; *Hernstein* v. *Matthewson*, 5 How. 196); but an attachment cannot issue in an action for a tort (per Hogeboom, J., *Gordon* v. *Gaffey*, 11 Abb. 1; *contra*, per James, J., *Floyd* v. *Blake*, 19 How. 542; 11 Abb. 349).

b. In an action by a simple contract creditor to recover his debt, the plaintiff may, on sufficient evidence of fraud, in an assignment by the debtor of his property, have an attachment against such property (*Skinner* v. *Ostlinger*, 14 Abb. 109; but not where the fraud was prior to the assignment (*Belmont* v. *Lane*, 22 How. 365). The fraud must be *actual*, not merely constructive. (*Id.*)

c. An attachment may issue where both plaintiff and defendant reside, and the cause of action arose out of the State (*Ready* v. *Stewart*, 1 Code Rep. N. S. 297). And a non-resident plaintiff is entitled to the like benefit of the provisions of the code relating to attachments as if he were a resident of this State, except as against foreign corporations (17 How. 16); *aliter* as regards attachments under the revised statutes. (*Id. Re Coates*, 12 How. 344). See, however, as to the last proposition, 1 Hill, 482; *Re Marly*, 2 Barb. 436; 3 Barb. 229; and laws of 1845, cap. 153, enact, "Such application may be made by any creditor resident within this State, or out of it." And in *Renard* v. *Hargous* (3 Kernan, 259), it was held that it is not requisite that all the members of a firm doing business in this State should reside therein, to authorize an attachment under the revised statutes in their favor for a debt due from non-resident debtors, on a contract made without the State.

d. A threat by a debtor, on proposing a compromise with his creditors, that if they do not accept it he will make an assignment, and they will get nothing, is not sufficient to authorize an attachment; in the absence of any proof of a fraudulent intent, the threat will be construed to refer to a legal assignment (*Wilson* v. *Britton*, 26 Barb. 562; 6 Abb. 97; reversing S. C. 6 Abb. 33; and to the like effect is *Dickinson* v. *Benham*, 10 Abb. 390; 19 How. 410, affir'd 20 How. 343).

e. An assignee of a demand may issue an attachment in a suit to recover such demand. (1 Hill, 482.) The trustees of a non-resident, &c. debtor may issue an attachment (21 Wend. 316.) An attachment does not lie against an administrator, or executor, for a demand against his intestate (9 Wend. 465), except where he has made himself personally liable. (21 Wend. 32).

The fact of a man closing his store, and packing his goods till midnight, and the store being closed next morning—his family having been removed for two days, without his neighbors being informed of it, is not a necessary or pre-

sumable legal conclusion that he meant to remove his property from the county with the fraudulent intent mentioned in the statute (*Mott* v. *Lawrence*, 17 How. 559).

a. **Affidavit for attachment.**—Where an affidavit for an attachment sets forth enough to call on the officer for the exercise of his judgment upon the weight and importance of the evidence stated, it is sufficient to give jurisdiction (*Conklin* v. *Dutcher*, 1 Code Rep. N. S. 49). But the affidavit should make out a *prima facie* case (*St. Amant* v. *Biaxcedon*, id. 204; *Hawley* v. *Delmas*, 4 Cal. 195); and if the warrant is granted on an insufficient affidavit, it may be set aside on motion (*Camman* v. *Tompkins*, 1 Code Rep. N. S. 12; *Morgan* v. *Avery*, 2 Code Rep. 91; *Re Griswold*, 13 Barb. 412). In an action for the recovery of money the affidavit is sufficient by which it appears that a cause of action exists against the defendant, together with the amount of the claim and the grounds thereof, and that the defendant is not a resident of this State (*Gould* v. *Bryan*, 8 Bosw. 626). The affidavit should make out a clear *prima facie* case. The justice should not only be satisfied personally, but judicially upon legal proof (*Mott* v. *Lawrence*, 17 How. 559). The affidavit to obtain an attachment need not state that a summons has been issued (*Conklin* v. *Dutcher*, supra). But where the affidavit omitted the title of the cause, did not state who "deponent" was, whether plaintiff or defendant, and in no part of which was either plaintiff or defendant individually named, nor was it anywhere stated who was the plaintiff, or who defendant—it was held to be entirely insufficient, and that it could not be properly connected with a summons in the action so as to uphold it, especially where it appeared that the affidavit was made and sworn to a day previous to the issuing of the summons (*Burgess* v. *Stitt*, 12 How. 401). Where, however, one of several plaintiffs made an affidavit on which to obtain an attachment, in which he stated that "the plaintiffs aver" certain facts, held that this was proof by affidavit of the existence of those facts so as to authorize the attachment (*Jamison* v. *Beecher*, 4 Abb. 280).

b. It *seems* that an affidavit for an attachment, stating positively in the words of the code the single fact that the defendant had departed from the State with intent to defraud his creditors, or had departed from the State, standing alone, unaided by any other fact or circumstance, is not any legal evidence of a departure from the State with an intent to defraud creditors (*Furnam* v *Walter*, 13 How. 349).

c. As to the mode of stating the requisite facts to entitle the plaintiff to an attachment, Parker, J., said: It is not enough to state them on information and belief; that is no proof of the fact. In *Ex parte Haynes* (18 Wend. 611), an attachment had been issued on an affidavit in which the witnesses stated, that they were informed and believed that the debtor was a non-resident; but the supreme court held the affidavit insufficient, and set aside the attachment.

d. Attachment should not issue on an affidavit of information and belief *only* (*Hill* v. *Bond*, 22 How. 272; *Brewer* v. *Tucker*, 13 Abb. 76; *Ackroyd* v. *Ackroyd*, 11 Abb. 345; 20 How. 93; *Re Haynes*, 18 Wend. 611; *Smith* v. *Luce*, 14 Wend. 237; *Ex parte Robinson*, 20 Wend. 672; *Kingsland* v. *Coleman*, 5 Hill, 611; *In re Bliss*, 7 Hill, 187; *Thatcher* v. *Powell*, 6 Wheaton R. 119; *Williamson* v. *Doe*, 7 Blackf. R. 12; *In re Faulkner*, 4 Hill, 598; *Brisbane* v. *Peabody*, 3 How. 109; see, however, *Morgan* v. *Avery*, 7 Barb. 656; 2 Code Rep. 91; *Camman* v. *Tompkins*, 1 Code Rep. N. S. 12; *Donnelly* v. *Corbett*, 3 Selden, 500). And where facts are alleged on information and belief, the sources of the information should be stated (*Brewer* v. *Tucker*, 13 Abb. 76; *Fulton* v. *Heaton*, 1 Barb. 552; *Butler* v. *Benson*, 1 Barb. 527, 537).

e. **Motion to set aside attachment.**—The propriety of issuing an attachment may be tested by motion at special term (*B'k of Commerce* v. *Rutland R. R. Co.*, 10 How. 6, see § 241, *post*; and *Lawrence* v. *Jones*, 15 Abb. 110); but not in a collateral proceeding (*Re Griswold*, 13 Barb. 412). The motion can only be made by a person in some way injured by the attachment (*Furman* v. *Walter*, 13 How. 350; *Re Griswold*, 13 Barb. 412). Such a motion may be made on affidavits on the part of the defendant (*Houghton* v. *Ault*, 16 How. 77); and after judgment in the action (*Thompson* v. *Culver*, 24 How. 286; 15 Abb. 97). On such a motion the court will not try the merits of the action (*B'k. of Commerce* v. *Rutland R. R. Co.*, 10 How. 6).

a. Where the motion to vacate is based solely on the affidavits of the plaintiff, the plaintiff cannot introduce additional affidavits (*Hill* v. *Bond*, 22 How. 272); even to show as a preliminary objection, that the defendants have parted with their interest in the property (*Dickinson* v. *Benham*, 10 Abb. 390; 19 How. 410; affirmed, 20 How. 343). And a defendant making an affidavit in order to obtain an order to show cause so as to dispense with a notice of motion to vacate, does not entitle the plaintiff to use additional affidavits on the motion (*Brewer* v. *Tucker*, 13 Abb. 76). But where the motion is based on affidavits on the part of the defendant, there the plaintiff may introduce affidavits in addittion to those on which the attachment issued (*Morgan* v. *Avery*, 7 Barb. 656; 2 Code Rep. 91; *Furman* v. *Walter*, 13 How. 350; *Erie B'k.* v. *Codd*, 11 How. 221, 576; *Genin* v. *Tompkins*, 12 Barb. 265; *Wilson* v. *Britton*, 6 Abb. 97; *Gasherie* v. *Apple*, 14 Abb. 64). But it seems these affidavits are not allowed to supply any defects in the affidavit on which the attachment issued, but only to explain or contradict the affidavits made in support of the motion to vacate (*Genin* v. *Tompkins*, 12 Barb. 265; *Wilson* v. *Britton*, 6 Abb. 34; 2 Code Rep. 92, 121; 1 Code Rep. N. S. 104; 7 Barb. 616; 3 Sand. 703). *Semble*, that if the plaintiff introduces new matter to explain the affidavits of the defendant, the defendant may answer them (*Davis* v. *Hackley*, 14 Abb. 64 *note*).

b. The fact of defendant having made an assignment for the benefit of his creditors, either before or after the issuing of the attachment, does not toll his right to move to vacate the attachment (*Brewer* v. *Tucker*, 13 Abb. 76; *Dickinson* v. *Benham*, 10 Abb. 390; 19 How. 410; affirmed 20 How. 343; *Gasherie* v. *Apple*, 14 Abb. 64).

c. Every allegation on which an attachment is granted may be disproved on a motion to vacate (*Boscher* v. *Roullier*, 4 Abb. 396).

d. Where pending a motion to set aside an attachment, the plaintiff procures the report of a referee, to whom the action had been referred, in his favor, finding that the transfer of the property by the defendant was fraudulent, such report cannot affect the decision of the motion (*Rigney* v. *Tallmadge*, 17 How. 557).

e. Where an attachment has been vacated after a hearing on the merits, application for another attachment on the same state of facts will not be granted (*Schlemmer* v. *Myerstein*, 19 How. 412).

f. It is said, that where an order for an attachment against an absconding debtor is *regularly* issued upon sufficient evidence to confer jurisdiction, the order can be reversed *only on appeal;* see *Niles* v. *Vanderzee* (14 How. 547).

§ 230. (Am'd 1862.) *Security on obtaining warrant.*

Before issuing the warrant, the judge shall require a written undertaking on the part of the plaintiff, with sufficient surety, to the effect that if the defendant recover judgment, or the attachment be set aside by the order of the court, the plaintiff will pay all costs that may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which shall be at least two hundred and fifty dollars.

g. "Recover judgment" in this section means *finally* recover judgment, so that if the plaintiff recovers judgment, and the judgment is afterwards reversed, the sureties are liable on the undertaking (*Bennett* v. *Brown*, 31 Barb. 158; 20 N. Y. 99).

h. An objection to the insufficiency of the undertaking may be removed by allowing a new undertaking to be filed, and this, too, after a motion to vacate the attachment for the defect in the undertaking (*Kissam* v *Marshall*, 10 Abb. 424).

i. In an action on the undertaking, the plaintiff need not, in order to recover, establish a claim exceeding $100 (*Thompson* v. *Dickerson*, 12 Barb. 108).

a. An attachment issued without an undertaking of a plaintiff and a surety would be irregular, and perhaps void (*Bennett* v. *Brown*, 1 Code Rep. N. S. 267; 4 Coms. 254; and see note to section 182).

§ 231. (Am'd 1851.) *Warrant, to whom directed, and what to require.*

The warrant shall be directed to the sheriff of any county in which property of such defendant may be, and shall require him to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses; the amount of which must be stated in conformity with the complaint, together with costs and expenses. Several warrants may be issued at the same time to the sheriffs of different counties.

b. An attachment under the code is simply the written order of the judge issued upon and as a judicial determination from the facts presented to him, that the case is one in which an attachment should be granted. The warrant of the judge alone is sufficient; it does not require formal *teste*, signature of clerk, or seal. The signature of the attorney to the warrant should be required. No return day need be inserted (*Genin* v. *Tompkins*, 12 Barb. 287; see 1 Code Rep. N. S. 16). The warrant of attachment may be allowed to be amended by supplying the signature of the plaintiff's attorney, even on the motion to vacate for the want of such signature (*Kissam* v. *Marshall*, 10 Abb. 424).

§ 232. *Mode of proceeding in executing warrant.*

The sheriff to whom such warrant of attachment is directed and delivered, shall proceed thereon in all respects in the manner required of him by law in case of attachments against absent debtors; shall make and return an inventory; and shall keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action; and shall, subject to the direction of the court or judge, collect and receive into his possession all debts, credits, and effects of the defendant. The sheriff may also take such legal proceedings, either in his own name or in the name of such defendant, as may be necessary for that purpose, and discontinue the same at such times and on such terms as the court or judge may direct.

a. The manner in which a sheriff is required *by law* to proceed on a warrant in cases of attachment against absent debtors, is prescribed by 2 R. S. 4.

§ 7. The sheriff to whom any such warrant shall be directed and delivered, shall immediately attach all the real estate of such debtor, and all his personal estate, including money and bank notes, except articles exempt from execu-

tion; and shall take into his custody all books of account, vouchers, and papers, relating to the property, debts, credits, and effects of such debtor, together with all evidences of his title to real estate; which he shall safely keep to be disposed of as hereinafter directed.

§ 8. He shall, immediately on making such seizure, with the assistance of two disinterested freeholders, make a just and true inventory of all the property so seized, and of the books, vouchers, and papers taken into his custody, stating therein the estimated value of the several articles of personal property, and enumerating such of them as are perishable; which inventory after being signed by the sheriff and the appraisers, shall within ten days after such seizure be returned to the officer who issued the warrant; and the sheriff shall, under the direction of such officer, collect, receive, and take into his possession, all debts, credits, and effects of such debtor, and commence such suits and take such legal proceedings in the name of such debtor as may be necessary for that purpose; and which suits and proceedings may be continued by the trustees to be appointed as hereinafter directed, until a final termination thereof (As am'd 1840, ch. 354, § 1).

§ 10. If any goods or effects seized as the property of the debtor, other than vessels, shall be claimed by or in behalf of any other person as his property, the sheriff shall summon and swear a jury to try the validity of such claim, in the same manner and with the like effect as in case of seizure under execution.

§ 11. If, by their inquisition, the jury find the property of the goods and effects so seized to be in the person so claiming them, the sheriff shall forthwith deliver them to the claimant or his agent, unless the attaching creditor shall by bond, with sufficient sureties, indemnify the sheriff for the detention of such goods and effects. In case of such indemnity, the sheriff shall detain such goods and effects to be disposed of as hereinafter directed.

§ 12. If the property in such goods be found to be in the claimant, the costs and charges arising from such inquisition, to be allowed by the officer issuing the warrant, shall be paid by the attaching creditor; but if it be found to be in the debtor, then the costs and charges, to be ascertained in the same manner, shall be paid by the claimant.

a. The duty of sheriff is the same on attachments as on executions. In both cases the sheriff is bound to keep possession of the property, if indemnified, although the jury may have found the title to be a third person (*The People* v. *Schuyler*, 5 Barb. 166).

b. The sheriff may lawfully require a bond of indemnity before executing an attachment upon goods not in the possession of the debtor, but of a third person, who claims them as his own. Such a bond is not within the prohibition of obligations, taken by color of office, although the statute under which the attachment issues provides for indemnity only after the verdict of a sheriff's jury (*Chamberlain* v. *Bellar*, 18 N. Y. 115). The sheriff having incurred costs in successfully defending an action brought by such claimant, may recover the whole amount on the indemnity bond from the obligors, although other creditors derived a benefit from the levy. (*Id.*)

c. Where the sheriff neglected to levy sufficient property to satisfy the debt, defendant having sufficient property within reach, held that the sheriff was liable for the deficiency (*Ransom* v. *Halcott*, 18 Barb. 56; 9 How. 119).

d. A sheriff who has seized property under attachment, and subsequently sold it under an execution on the judgment in the action, may, in an action against him by an alleged assignee of the attachment debtor to recover the value of such property, attack the validity of the alleged assignment (*Jacobs* v. *Remsen*, 12 Abb. 390; *Schlussel* v. *Willet*, 9 Abb. 325; 12 Abb. 397; 34 Barb. 615; 22 How. 15; *Rinchly* v. *Stryker*, 26 How. 75; the case of *Hall* v. *Stryker*, 29 Barb. 105, was reversed on appeal).

e. A levy under an attachment does not amount to a satisfaction of the debt (*McBride* v. *Farmers' Bank of Salem*, 28 Barb. 476).

f. A plaintiff who directs a sheriff to take property which does not belong

to the defendant is liable in an action for the property taken (*Marsh* v. *Backus*, 16 Barb. 483). A sheriff seizing goods of one not named as a debtor in the attachment is a trespasser (*Kuhlman* v. *Orser*, 5 Duer, 543).

a. On the entry of judgment, an attachment previously issued ceases to be in force, and no levy can be made under it (*Schieb* v. *Baldwin*, 13 Abb. 469; 22 How. 278; this is apparently overruled *Thompson* v. *Culver*, 24 How. 286).

b. This section does not authorize an action by the plaintiff in the attachment to obtain possession of the tangible property attached, nor to collect debts due the defendant in the attachment (*Skinner* v. *Stuart*, 39 Barb. 206).

c. **What property may be attached.**—Property in this section means, property within the definition in sections 463 and 464 (*Coddington* v. *Gilbert*, 17 N. Y. 489). Any property in the defendant's possession to which he claims title (*Treadwell* v. *Lawlor*, 15 How. 8). Partnership property may be levied upon an attachment against one partner (*Goll* v. *Hinton*, 8 Abb. 120; *Brewster* v. *Honigsberger*, 2 Code R. 50; *Hergman* v. *Dettleback*, 11 How. 46); but only the *interest* of the defendant can be sold (*Abels* v. *Westervelt*, 24 How. 284). Money deposited in lieu of bail (*Salter* v. *Weiner*, 6 Abb. 191). Property in the custody of the law cannot be attached (*Jenner* v. *Jolliffe*, 6 Johns. 9; 9 *id.* 381). But this rule does not apply to the cases where the property seized belongs to a stranger to the action and the seizure is void (*Fairbanks* v. *Bloomfield*, 5 Duer, 434). Bonds executed by a railroad company, and in the hands of its agents, to be negotiated for its use, cannot be seized on an attachment against the company, so as to give the attaching creditor a right to enforce the bonds against the company, or any claims against parties who had guaranteed such bonds to negotiate them (*Coddington* v. *Gilbert*, 2 Abb. 242; 5 Duer, 72; 17 N. Y. 489). Goods shipped by a vendor, for transportation to the purchaser,—held, not such a delivery as rendered them liable on the ship to an attachment against the vendee (*Jones* v. *Bradner*, 10 Barb. 193).

d. A mortgagor in a chattel mortgage not due, has an interest in the mortgaged chattels, subject to seizure on an attachment (*Hall* v. *Sampson*, 23 How. 84). Whatever may be taken on execution may be taken on attachment. But a bill of lading in the hands of a consignee is not property within the meaning of section 464, and is not leviable upon by attachment (*Patterson* v. *Perry*, 10 Abb. 83). A debt due by a foreign corporation which has no agency in this State, to a non-resident of this State, is not the subject of attachment under this chapter, in an action by a third party against the non-resident (*Willett* v. *Equit. Ins. Co.*, 10 Abb. 193). Goods in the hands of a consignee who has made advances thereon, cannot be levied upon and taken possession of under an attachment against the property of the consignor. But the *interest* of the consignor in such goods may be levied upon (*Brownell* v. *Carnley*, 3 Duer, 9).

e. A foreign corporation contracted with a manufacturer in this State for certain articles to be made for them and delivered to them at New Orleans, the corporation to pay the charges of transportation. The articles were made within this State, and here delivered to an express company, directed to the corporation at New Orleans. *Held* that the title did not pass to the corporation until delivered to them at New Orleans, and that consequently the goods were not liable to be attached in a suit against the corporation during their transit to the border of the State. A claim contingent upon the happening of a future event is not, while the contingency lasts, a debt liable to attachment. A debt due from a debtor not within this State, to a creditor also not within this State, is not liable to attachment here, although the *evidence of debt*—*e. g.* the bond, note, &c.,—may be within the State (*Bates* v. *New Orleans, Jackson & G't. North R. R. Co.*, 4 Abb. 72; 13 How. 516; *Lyman* v. *Cartwright*, 3 E. D. Smith, 117).

f. Letters and correspondence are not among the papers which the statute authorizes to be taken under process (*Hergman* v. *Dettleback*, 11 How. 46)

g. **Lien of attachment.**—An attachment binds real estate from the time of being levied (*Burkhardt* v. *McClellan*, 15 Abb. 243, *note*, affirming 7 How. 329); and upon personal estate from the time when it is allowed (*Thacher* v. *Bancroft*,

15 Abb. 243; see, however, *Kuhlman* v. *Orser*, 5 Duer, 250). An attachment in an action on a money bond payable by instalments, is a lien only for the instalments actually due (*Syracuse B'k.* v. *Coville*, 19 How. 385).

a. For the purpose of securing the lien on real estate, it is only necessary that it should be included in the inventory returned by the sheriff; he is under no necessity to enter upon the land, or see it, or go into its vicinity, nor do any other act than return it in his inventory (*Learned* v. *Vandenburg*, 7 How. 381; affirmed, 8 *id.* 77; *Yale* v. *Matthews*, 20 How. 430; 12 Abb. 379). In respect to personal property, it is otherwise. To render the seizure effectual it must be accompanied by possession. The sheriff is bound to see that it is safely kept, to satisfy the judgment when recovered. He must, therefore, not only seize the property, but take it into his custody. (*Ib.*) Where there are several attachments against the same property, they will have priority according to the order of their delivery to the sheriff. To secure the lien on real estate, as against subsequent *bona-fide* purchasers, notice under section 132 must be filed.

b. **Action by sheriff.**—Form of complaint by sheriff suing under the authority of this section (*Kelly* v. *Breusing*, 32 Barb. 601; 33 Barb. 128).

c. The power given to the sheriff by this section is merely cumulative, and does not deprive the plaintiff of his right to enforce his lien by action (*Skinner* v. *Stuart*, 13 Abb. 443; see, however, S. C. on appeal, 24 How. 489; 15 Abb. 391).

§ 233. *Proceedings in case of perishable property or vessels.*

If any property so seized shall be perishable, or if any part of it be claimed by any other person than such defendant, or if any part of it consist of a vessel, or of any share or interest therein, the same proceedings shall be had in all respects as are provided by law upon attachments against absent debtors.

d. **Ships, &c.**—The revised statutes, as to attachments against ships, were amended by laws of 1860, p. 347, 906; 1862, p. 956. "The property attached is a vessel belonging to the defendants. It has been in the sheriff's custody since November 5, 1851. [It was then January, 1852]. No one has claimed it; no bond has been given by the defendant, or by any one, as owner. The expenses of keeping it would eat up its value, without benefit to any one. An order must therefore be made that it be sold by the sheriff" (*Ready* v. *Stewart*, 1 Code Rep. N. S. 300). See note to the preceding section.

e. **Perishable property.**—Potatoes are perishable property. And where a part of the property attached, consisted of potatoes, the court ordered them to be sold (*Davis* v. *Ainsworth*, 14 How. 346).

§ 234. *Interest in corporations or associations, liable to attachment.*

The rights or shares which such defendant may have in the stock of any association or corporation, together with the interests and profits thereon, and all other property in this State of such defendant, shall be liable to be attached and levied upon, and sold to satisfy the judgment and execution.

§ 235. *Attachment, how executed on property incapable of manual delivery.*

The execution of the attachment upon any such rights,

shares, or any debts, or other property incapable of manual delivery to the sheriff, shall be made by leaving a certified copy of the warrant of attachment with the president or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or with the debtor or individual holding such property, with a notice showing the property levied on.

b. An attachment issued under the code must, in order to reach a debt due to the defendant in attachment, or other preperty held by a third person, be executed by the sheriff, by the delivery to the defendant or person holding property of the defendant, *in person*, of a copy of the warrant, with a notice showing the property levied on. Leaving such copy and notice at the place of business of the debtor with a third person found there, is not a sufficient service of the attachment by the sheriff. Whether the defect can be supplied and the attachment made effectual, by proof that the papers were afterwards delivered by such third person to the debtor or person holding property of the defendant; whether service of a copy of the warrant, with a notice in general terms by the sheriff, that he "attaches all property in the hands of" the debtor, or person having property of the defendant, is sufficicnt to make the attachment effectual,—*query?* (*Orser* v. *Grossman*, 11 How. 520; 4 E. D. Smith, 443.)

c. The execution of an attachment upon a promissory note may be made by leaving with the holder a certified copy of the warrant, with a notice showing the property levied on (*Russell* v. *Ruckman*, 3 E. D. Smith, 419).

d. Whether property incapable of manual delivery is attached where the sheriff simply serves a copy of the warrant without making and returning an inventory under section 232, and without the notice prescribed by section 235 (*Lyman* v. *Cartwright*, 3 E. D. Smith, 117; *Wood* v. *Orser*, 25 N. Y. 353).

e. This notice must describe particularly the property levied on, so as to enable the holder to identify it and deliver it to the sheriff when his own claims are satisfied. A notice referring to the property in general terms as belonging to the debtor in the attachment, is insufficient and void (*Kuhlman* v. *Orser*, 5 Duer, 242; *Wilson* v. *Duncan*, 11 Abb. 3; *Orser* v. *Grossman*, 11 How. 520; 4 E. D. Smith, 443).

§ 236. *Certificate of defendant's interest to be furnished by corporations.*

Whenever the sheriff shall, with a warrant of attachment, or execution against the defendant, apply to such officer, debtor, or individual, for the purpose of attaching, or levying upon, such property, such officer, debtor, or individual, shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation, with any dividend or any incumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of or debt owing to the defendant. If such officer, debtor, or individual refuse to do so, he may be required by the court or

judge to attend before him, and be examined on oath, concerning the same, and obedience to such orders may be enforced by attachment.

a. A sheriff on demanding a certificate under this section should disclose the fact that he has an attachment or execution in his hands (*Schieb* v. *Baldwin*, 13 Abb. 469; 22 How. 278).

b. The remedies given by this section are merely cumulative and do not toll any remedies the creditor before possessed (*Skinner* v. *Stuart*, 13 Abb. 443; see however, S. C. on appeal, 24 How. 489; 15 Abb. 391).

c. In *Hoagland* v. *Stodolla*, 1 Code Rep. N. S. 210, the attachment was served on R., who, it was alleged, was indebted to the defendant, and a certificate demanded under section 236. R. certified having in his hands $75, which the plaintiff not deeming satisfactory, obtained an order for R's examination. Held, that the order should not have been made; that the order under section 236 cannot be made where a certificate has been given; although the party served merely certifies that he has *no* property (*Carroll* v. *Finley*, 26 Barb. 61, overruling *Hopkins* v. *Snow*, 4 Abb. 368). But if the plaintiff can establish to the satisfaction of the judge that the certificate is untrue, then such a certificate may be regarded as a refusal to give a certificate. (*Ib.*)

d. Laws of 1848, cap. 50, p. 69, enact,—§ 1. In case any cashier, secretary, clerk, or individual, upon whom any sheriff shall serve any such attachment or execution, shall refuse to furnish him with the certificate required in and by the third section of the act passed April 11, 1842, entitled "An act to amend the law in relation to suits against foreign corporations," chapter 197, then it shall be lawful for the plaintiff in such attachment or execution to require the examination of such cashier, secretary, clerk, or individual, before any officer of the court out of which such attachment or execution shall have issued.

§ 2. The provisions of sections 12, 13, 14, 15, and 16, of art. 8, of title 1, chapter 5th, part 2d, of the revised statutes, in relation to the mode of examining non-resident debtors, or persons indebted to them, or having property of theirs in his or their possession, shall apply to and govern the examinations authorized to be had in and by this act, so far as the same may be applicable.

§ 237. (Am'd 1859.) *Judgment, how satisfied.*

In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose,—

1. By paying over to such plaintiff the proceeds of all sales of perishable property, and of any vessel, or share or interest in any vessel, sold by him, or of any debts or credits collected by him; or so much as shall be necessary to satisfy such judgment;

2. If any balance remain due, and an execution shall have been isued on such judgment, he shall proceed to sell under such execution, so much of the attached property, real or personal, except as provided in subdivision four of this section, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association,

the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all the rights and privileges in respect thereto which were had by such defendant.

3. If any of the attached property belonging to the defendant shall have passed out of the hands of the sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment, and any person who shall wilfully conceal or withhold such property from the sheriff, shall be liable to double damages at the suit of the party injured.

4. Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant of attachment, and to prosecute any bond he may have taken in the course of such proceedings, and apply the proceeds thereof to the payment of the judgment.

At the expiration of six months from the docketing of the judgment, the court shall have power, upon the petition of the plaintiff, accompanied by an affidavit, setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff, that he has used diligence and endeavored to collect the evidences of debt in his hands so attached and that there remains uncollected of the same any part or portion thereof, to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order as to the service of notice and the time of service, as shall be deemed just.

When the judgment and all costs of the proceedings shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the residue of the attached property or the proceeds thereof.

a. Where property is seized by a sheriff by virtue of an attachment, under the code, he must retain it in his possession until the determination of the action in which the attachment was issued, and, if the plaintiff recovers judg-

ment, until the property is sold under an execution issued thereon; unless the judgment is otherwise satisfied, or unless, in case of perishable goods, &c., he is ordered by the officer who issued the attachment, to sell the same (*McKay* v. *Harrower*, 27 Barb. 463; *Dodge* v. *Porter*, 13 Abb. 253). If he has the goods when a proper execution is presented to him, and proceeds to sell thereon, it is all the plaintiff has a right to require of him. (*Id.*) Where the person who was the sheriff when the attachment was issued, and executed it, ceases to be sheriff by the expiration of his term of office, before the plaintiff obtains his judgment and issues his execution, the execution should be directed, and delivered, to the former sheriff, and not to his successor. (*Id.*) The execution issued in such a case should be a special one, directed to the former sheriff as such, reciting the issuing of the attachment, and taking of the property thereon, and requiring the sale of that property by him; after which it should direct him to sell the property of the defendant generally. (*Id.*) Until a proper execution has been put in his hands, directing a sale of the property seized, such former sheriff cannot be placed in default in respect to such property. He is not bound to deliver the property to his successor in office to be sold on an execution directed and delivered to the latter; and cannot be made liable for a refusal so to deliver it. (*Id.*)

a. Moneys on deposit in a trust company were levied on by the sheriff. Defendants appeared and defended unsuccessfully, but did not procure the attachment to be discharged, nor did the sheriff collect said moneys; pending the action the trust company failed. Held that said meneys were not to be regarded as paid upon the plaintiff's judgment (*McBride* v. *Farmers' Savings B'k.*, 7 Abb. 347).

b. Where the defendant dies after the allowance of an attachment and before judgment, the right to order an execution is with the court in which the action was pending, and not with the surrogate. The execution should be indorsed to levy only upon the property taken by the attachment (*Thacher* v. *Bancroft*, 15 Abb. 243).

c. A sheriff of this State has no power to sell, upon an execution issued on a judgment in an action commenced by attachment, the real estate of a foreign corporation, situated in another State (*Runk* v. *St. John*, 29 Barb. 585).

§ 238. *When action to recover notes, &c., of defendant, may be prosecuted by plaintiff in the action in which the attachment issued.*

The actions herein authorized to be brought by the sheriff, may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff from all damages, costs, and expenses on account thereof, not exceeding two hundred and fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify by making an affidavit that each is a householder, and worth double the amount of the penalty of the bond, over and above all demands and liabilities.

a. Where the sheriff levies on a promissory note in course of prosecution, he may continue the action in the name of the plaintiff, or may be substituted as plaintiff at his election (*Russell* v. *Ruckman*, 3 E. D. Smith, 419).

a. No action can be maintained until the requirements of this section have been complied with (*Skinner* v. *Stuart*, 15 Abb. 391; 24 How. 489; 39 Barb. 206); and the fact of such compliance must be specified in the complaint. (*Id.*)

§ 239. *Bond to sheriff on attachment, how disposed of on judgment for defendant.*

If the foreign corporation, or absent or absconding or concealed defendant, recover judgment against the plaintiff in such action, any bond taken by the sheriff, except such as are mentioned in the last section, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged, and the property released therefrom.

§ 240. (Am'd 1862.) *Discharge of attachment, and return of property or its proceeds to defendant, on his appearance in the action.*

Whenever the defendant shall have appeared in such action, he may apply to the officer who issued the attachment, or to the court, for an order to discharge the same; and if the same be granted, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered or paid by him to the defendant or his agent, and released from the attachment.

And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may apply to the officer who issued the attachment for relief under this section.

b. The application on the part of the defendant to discharge the attachment is "purely *ex parte*." The plaintiff has no right to except to defendant's sureties (*Sanborn* v. *Elizabethport Manuf'g Co.* 22 How. 106; 13 Abb. 433). The court may direct notice of the application to be given to the plaintiff, and if a notice is so given and the defendant does not attend at the time specified, the court cannot give plaintiff the costs of his attendance. (*Id.*)

c. After judgment for the plaintiff in the action, it is too late for the defendant to avail himself of this section (*Spencer* v. *Rogers' Locomotive Works*, 13 Abb. 180).

d. A surety in an undertaking given pursuant to this section is not discharged by an order on the principal to furnish further security, that order not being complied with (*Jewitt* v. *Crane*, 13 Abb. 97; 35 Barb. 208).

e. A motion to compel a party to furnish further sureties on the ground that he has imposed on the court; as for instance that one of the sureties is an infant, is not an exception to the sufficiency of the sureties (*Jewitt* v. *Crane*, 35 Barb. 208).

a. Sureties may be allowed for their own protection to defend an action against their principal; and even after judgment has been entered, they may on a prompt application have the judgment set aside and be let in to defend (*Jewitt* v. *Crane*, 35 Barb. 208). In such an action the sureties cannot avail themselves of any mere *irregularities* in the original action. (*Id.*)

§ 241. (Am'd 1857, 1862.) *Undertaking on the part of the defendant; discharge of attachment.*

Upon such application, the defendant shall deliver to the court or officer an undertaking executed by at least two sureties, who are residents and freeholders or householders in this State, approved by such court or officer, to the effect that the sureties will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint. If it shall appear by affidavit that the property attached be less than the amount claimed by the plaintiff, the court or officer issuing the attachment, may order the same to be appraised, and the amount of the undertaking shall then be double the amount so appraised. And in all cases, the defendant may move to discharge the attachment, as in the case of other provisional remedies.

And where there is more than one defendant, and several property of either of the defendants has been seized by virtue of the order of attachment, the defendant whose several property has been seized may deliver to the court or officer an undertaking, in accordance with the provisions of this section, to the effect that he will, on demand, pay to the plaintiff the amount of judgment that may be recovered against such defendant. And all the provisions of this section applicable to such undertaking shall be applied thereto.

b Where a party has been attached as a non-resident, he may move to have the attachment discharged on the ground of his being a resident, and the court will grant a reference to ascertain the fact, without the undertaking required by this section (*Killian* v. *Washington*, 2 Code Rep. 78).

c. The issuing an attachment against a debtor on the ground that he is a non-resident, when in fact he is a resident, is an irregularity only, and must be taken advantage of at the earliest opportunity, or it will be waived (*Lawrence* v. *Jones*, 15 Abb. 110).

d. Giving an undertaking under section 241 does not preclude the defendant from afterwards moving to set aside the attachment (*Garbutt* v. *Hanff*, 15 Abb. 189).

e. A motion to set aside an attachment as improvidently issued must be on the plaintiff's affidavits *only*. Additional affidavits cannot be used (*White* v.

Featherstonhaugh, 7 How. 357; see also *Bank of Lansingburg* v. *McKie*, 7 How. 360).

a. Where an undertaking was given on discharging an attachment against a non-resident defendant, and subsequently the plaintiff movedfor other sureties, on the ground that one of them was insolvent,—held that the court had no power to order additional sureties in such a case (*Dudley* v. *Goodrich*, 16 How. 189; 7 Abb. 26).

b. In an action on a bond given to obtain the release of property seized under an attachment regularly issued against a person as a non-resident debtor, the defendants are estopped from denying that the person proceeded against was a non-resident (*Haggart* v. *Morgan*, 1 Selden, 422); or any fact recited in the undertaking (*Coleman* v. *Bean*, 14 Abb. 38).

§ 242. *When sheriff to return warrant, and proceedings thereon.*

When the warrant shall be fully executed or discharged, the sheriff shall return the same with his proceedings thereon, to the court in which the action was brought.

* § 243. *Sheriff's' fees.*

The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements, under this title, as are allowed by law for like services and disbursements, under the provisions of chapter five, title one, and part two of the revised statutes.

c. Where attached property has not been sold, the sheriff is not entitled, as a matter of right, to poundage (*Alburtis* v. *Dudley*, 21 How. 456; 12 Abb. 361; *Hoge* v. *Page*, 11 How. 207). All, in such a case, he can tax, as a matter of right, is 82 cents, and all further compensation depends on what the officer issuing the attachment shall certify to be reasonable. (*Id*). In one case the sheriff was allowed $5 for putting a person in charge, and $2 a day keeper's fees. *Semble*, on a settlement of the action after service of the attachment, the sheriff is entitled to his necessary disbursements, and to commission on the amount paid to settle, although the money does not come to his (the sheriff's) hands (*Trenor* v. *Fachin*, 20 How. 405; 12 Abb. 136); and after the levy upon an attachment (for which the sheriff is entitled to fifty cents) he is entitled to a "compensation for his trouble and expenses in taking possession of and preserving the property," whether sold or not; which compensation must be fixed by the officer issuing the attachment (*Hoge* v. *Page*, 11 How. 207).

d. The duties formerly discharged by the trustees of the debtor's estate now devolve upon the sheriff, and he is entitled to the like compensation as the Revised Statutes award to the trustees. For collections he is entitled to his necessary disbursements and a commission of five per cent. on the amount collected. If he employs agents to assist him, he must himself remunerate them; but the cost of employing attorney and counsel is a necessary disbursement (*Mayhew* v. *Duncan*, 31 Barb. 87; and see *Mayhew* v. *Wilson*, 10 Abb. 289).

e. A sheriff must, in his bill of charges, specify the items of disbursements under oath of himself or his deputy (*Mayhew* v. *Wilson*, 10 Abb. 289).

* *Amended—See Appendi*

CHAPTER V.

Provisional Remedies.

* § 244. [200.] (Am'd 1851, 1852, 1857, 1858, 1862.) *Powers of court as to receivers, deposit of money, &c., in court, and other provisional remedies. Judgment for sum admitted due.*

A receiver may be appointed,—

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had without application to the court;

2. After judgment, to carry the judgment into effect;

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment-debtor refuses to apply his property in satisfaction of the judgment;

* 4. In the cases provided in this code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases, of the property within this State of foreign corporations. Receivers of the property within this State of foreign corporations, shall be allowed the same commissions as are allowed by law to the trustees of the estates of absconding, concealed, and non resident debtors.

5. In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided in this act.

When it is admitted by the pleading or examination of a party, that he has in his possession, or under his control, any

**Amended—See Appendix.*

money or other thing capable of delivery, which being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court.

Whenever, in the exercise of its authority, a court shall have ordered the deposit, delivery, or conveyance of money or other property, and the order is disobeyed, the court, besides punishing the disobedience, as for contempt, may make an order, requiring the sheriff to take the money or property, and deposit, deliver, or convey it in conformity with the direction of the court.

When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the court, on motion, may order such defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy.

See Laws 1858, ch. 314. An act to extend the powers of executors, assignees, receivers, and other trustees, &c.

a. **Receiver, when and how appointed.**—A receiver had to be prayed for, in the bill, under the former practice (3 Atk. 689; 1 Molloy, 29). A receiver cannot be appointed until a suit is commenced (*Anon.* 1 Atk. 419), except in cases of idiots and lunatics (*Ex parte Whitefield*, 2 Atk. 315), or where defendant designedly keeps out of the way to avoid service of the process (*Quinn* v. *Gunn*, 1 Hogan, 75; *Sandford* v. *Sinclair*, 3 Edw. Ch. R. 393). He cannot be appointed without notice to the party interested, except under peculiar circumstances, demanding immediate action, to be made to appear upon the papers upon which the application was made (*People* v. *Norton*, 1 Paige, 17; *Verplank* v. *Mercantile Ins Co.*, 2 *id.* 438; *Sandford* v. *Sinclair*, 8 *id.* 373; *Gibson* v. *Martin*, 8 *id.* 481; *Field* v. *Ripley*, 20 How. 26). And in such cases, the receiver was appointed for the protection of property *pendente lite*, and the order did not assume to make a final disposition of the property without a hearing of the parties (Allen, J., *Kemp* v. *Harding*, 4 How. 178; *Dorr* v. *Noxon*, 5 *id.* 29; and see note to section 298). An order to show cause why a receiver should not be appointed, served before the action is commenced, is irregular (*Kattenstroth* v. *The Astor Bank*, 2 Duer, 632). After judgment for default of answer, a receiver may be moved for without notice (*Austin* v. *Figueira*, 7 Paige, 56; *Nesmith* v. *Halsted*, 11 *id.* 647). Upon a motion for a receiver, the merits are not inquired into. Such motion relates only to the preservation of the property in controversy (4 Wend. 173; see 2 Barb. 533).

b. The pendency of a motion for leave to amend or to dissolve an injunction is no objection to a motion to appoint a receiver (*Barnard* v. *Darling*, 1 Barb. Ch. R. 76).

c. A receiver is appointed only for the benefit of the parties, and not of strangers to the action. But a stranger may apply as to any rights interfered with by the receiver (*Howard* v. *Ripley*, 10 Paige, 43).

d. A party applying for a receiver, pending the litigation, must show a probable interest in the property, and that it is in danger of being lost if not so

protected (*Goodyear* v. *Belts*, 7 How. 187; *Patten* v. *Access. Transit Co.*, 4 Abb. 235; *Hamilton* v. *Access. Trans. Co.*, 3 Abb. 255; *McCarthy* v. *Peake*, 9 Abb. 164).

a. A receiver would not be appointed in a creditor's suit if the remedy at law had not been exhausted (*Starr* v. *Rathbone*, 1 Barb. 70).

b. A receiver would be appointed of an estate assigned for the benefit of creditors, where the assignee was shown to be insolvent (*Connah* v. *Sedgwick*, 1 Barb. 210).

c. Receiver of effects of dissolved or insolvent corporation (see *Conro* v. *Gray*, 4 How. 166; *Livingston* v. *B'k. of N. Y.*, 5 Abb. 338).

d. The motion for a receiver does not involve the merits (*Sheldon* v. *Weeks*, 2 Barb. 532; *Conro* v. *Gray*, 4 How. 166).

e. The selection and appointment of a receiver and taking of security fror him is a proper matter for a reference (*Wetter* v. *Schlieper*, 7 Abb. 92; *Jackson* v. *De Forrest*, 14 How. 82). Where it is referred to a referee to report a proper person to be appointed a receiver, an order of appointment by the court is necessary; but where the reference is to appoint a receiver and take the requisite security, the appointment by the referee needs no confirmation by the court (*Re Eagle Iron Works*, 8 Paige, 385). A party dissatisfied with the appointment may petition to have the appointment reviewed. (*Id.*)

f. The regularity of the appointment of a receiver cannot be questioned by any third party (*Tyler* v. *Willis*, 33 Barb. 327).

g. A stockholder of a corporation having joined in an application for a receiver cannot question the validity of his appointment (*Battershall* v. *Davis*, 31 Barb. 323).

h. On an appeal from the special term, held that: An order directing the continuance of the receivership pending the appeal, continued the receiver not only on the appeal to the general term but also during an appeal from another order to the court of appeals (*McMahon* v. *Allen*, 14 Abb. 220).

When a receiver will or will not be appointed.—A receiver will be appointed:

i. In all cases of fraudulent trusts (*Chautauque Co. B'k.* v. *White*, 2 Selden, 252).

j. Where fraud is shown in the defendant and the fund is in danger (*Podmore* v. *Gunning*, 7 Simons, 485; 1 Barb. Ch. R. 664; 1 Hopk. 429; 3 Johns. Ch. 48; see *Reubens* v. *Joel*, 3 Kernan, 488).

k. To prevent the removal of the subject of the action out of the jurisdiction of the court, and against a defendant out of the jurisdiction (*Gibbins* v. *Mainwaring*, 9 Simons, 77; *Tanfield* v. *Irvine*, 2 Russ., 149; see 5 Law. Jour. Rep. Ch. 79).

l. Where a trustee is charged with violating his trust (*Boyd* v. *Murray*, 3 Johns. Ch. 48; see, however, *Orphan Asylum Soc.* v. *McCartee*, Hopk. 429; *Jenkins* v. *Jenkins*, 1 Paige, 243).

m. To preserve the property of a corporation (*Lawrence* v. *Greenwich Fire Ins. Co.*, 1 Paige, 587).

n. Receiver appointed in a proceeding to foreclose a mechanics' lien (*Webb* v. *Van Zandt*, 16 Abb. 314 *note*).

A receiver will not be appointed:

o. Unless there is strong probability the court will decide in favor of the party applying, and the fund is in danger (*Hamilton* v. *Access. Transit Co.*, 3 Abb. 255).

p. In an action to stay waste (*Robinson* v. *Preswick*, 3 Edw. Ch. R. 246).

q. On the application of one defendant against another before trial (*Trumbull* v. *Ogden*, Halst. Dig. 178).

r. Over real property, unless in extraordinary cases (*Willis* v. *Corlies*, 2 Edw. Ch. R. 281; *Congden* v. *Lee*, 3 id. 304; *Parker* v. *Moore*, id. 234; *Cairns* v. *Chabert*, id. 312; see *Receiver in Mortgage cases*).

In ejectment, see note to section 455.

a. Before answer, unless in special cases (*West* v. *Swan*, 3 Edw. Ch. R. 420; and see *Vann* v. *Barrett*, 2 Bro. C. C. 158; *Bloodgood* v. *Clark*, 4 Paige, 577 *Osborn* v. *Heyer*, 2 Paige, 343).

b. Over a mortgage of chattels in possession (*Bayard* v. *Fellows*, 28 Barb. 451; *Patten* v. *Accessory Transit Co.*, 4 Abb. 235).

c. **Who may be receiver.**—Formerly, a master in chancery could not be receiver (6 Ves. 427), nor a solicitor in the cause, or under a commission of lunacy (2 Mer. 452), nor the next friend of an infant plaintiff (2 Mad. 64), nor a trustee (8 Ves. 72; 11 *ib.* 363; 15 *ib.* 584). An officer of an insolvent bank is not a proper person to be appointed its receiver (*Att. Gen.* v. *Bank of Columbia*, 1 Paige, 511; 3 Wend. 588). But on the voluntary dissolution of a bank, an officer or stockholder may be appointed receiver (*Re Eagle Iron Works*, 8 Paige, 385; 3 Edw. Ch. R. 385; *Bowery Bank case*, 5 Abb. 417; 2 R. S. 417). A party to the action may be appointed receiver (*Fenn* v. *Bolles*, 7 Abb. 203).

d. Where the same property is involved in two suits, it is the practice to appoint the same person receiver in both suits (*Howell* v. *Ripley*, 10 Paige, 43; *Osborn* v. *Heyer*, 2 id. 342: *Cagger* v. *Howard*, 1 Barb. Ch. R. 368; see 4 E. D. Smith, 191).

e. **Receiver is an officer of the court.**—A receiver is an officer of the court which appoints him (*Booth* v. *Clark*, 17 How. U. S. Rep. 322; *Lottimer* v. *Lord*, 4 E. D. Smith, 183); and entitled to the instructions of the court as to his duty (*Re Van Allen*, 37 Barb. 225; *Curtis* v. *Leavitt*, 1 Abb. 274). And the court will give such directions to a receiver, on the application of one not a party to the suit, as may be necessary to protect his rights (*Vincent* v. *Parker*, 7 Paige, 65; see 10 id. 46; 2 Duer, 685).

f. **When title vests in receiver.**—When an order of reference is made for the appointment of a receiver, and a receiver is subsequently appointed, his title vests by relation from the date of the order of reference, and attaches upon all the property to which the receivership could properly extend, exactly in the same manner and with the same effect as if the order directing a reference had named and appointed the receiver (*Rutter* v. *Tallis*, 5 Sand. 612; *Deming* v. *N. Y. Marble Co.*, 12 Abb. 66). On the order for the receiver being consummated by his giving security the *personal* estate and equitable interests of the party of whom he is receiver, vests in him without any assignment, as of the date of the order of his appointment (*Wilson* v. *Allen*, 6 Barb. 542; *Wilson* v. *Wilson*, 1 Barb. Ch. R. 592; *Porter* v. *Williams*, 5 Selden, 142; 12 How. 107; *Lotimer* v. *Lord*, 4 E. D. Smith, 183; *West* v. *Frazer*, 5 Sand. 654; *Albany City Bank* v. *Schumacher*, 1 Clark, 278, 300; *Van Wyck* v. *Brady*, 3 Code Rep. 157). Where intermediate the appointment of a receiver and his filing security, the property of which he was appointed receiver was levied on by the sheriff, the court, on motion, after the receiver had filed security, ordered a return of the property to the receiver (*Steel* v. *Sturges*, 5 Abb. 442; *Rutter* v. *Tallis*, 5 Sand. 612; see *Rich* v. *Loutrel*, 9 Abb. 356; 18 How. 121; *Re N. Amer. Gutta Percha Co.*, 17 How. 549).

g. A receiver does not by force of his appointment as receiver become possessed of property in a foreign state (*Field* v. *Ripley*, 20 How. 26); nor of real property (*Moak* v. *Coates*, 33 Barb. 498.

h. **Delivery of property to Receiver.**—Where an order is made for the delivery of property to a receiver, the demand of delivery must be made by the receiver personally, a demand by the plaintiff in the action, his attorney or the referee appointed to see the delivery made will not warrant an attachment for disobeying the order to deliver (*Panton* v. *Zebley*, 19 How. 394).

i. **Taking property from Receiver.**—Where a receiver is in possession of property which is claimed by a third person, the proper course is to apply by petition to the court which appointed such receiver for an order on him to deliver such property to the claimant, an attempt to obtain possession by suit against the receiver is a contempt (*Riggs* v. *Whitney*, 15 Abb. 390; see *Noe* v. *Gibson*, 7 Paige, 513; *Albany City Bank* v. *Schermerhorn*, 9 *id.* 372, 10 *id.* 263; *Parker* v. *Browning*, 8 *id.* 388; *Chautauque Co. Bank* v. *Risley*, 19 N. Y. 370).

a. **Receiver represents creditors.**—The receiver does not, as has been sometimes supposed, merely stand in the shoes of the party whose estate is entrusted to him, but he represents the creditors and other persons interested therein (*Porter* v. *Williams*, 5 How. 441; 5 Selden, 142; *Wilson* v. *Allen*, 6 Barb. 544; *Gillett* v. *Moody*, 3 Coms. 479; *Talmadge* v. *Pell*, 3 Selden, 328; *Curtis* v. *Leavitt*, 15 N. Y. 12; *Brower* v. *Hill*, 1 Sand. 629). The case of *Seymour* v. *Wilson* (16 Barb. 294), *Haynor* v. *Fowler* (id. 300), are overruled (15 How. 355).

b. **Compensation to receiver.**—A receiver is entitled to commissions at the rates prescribed by the revised statutes; and he is also entitled to be repaid actual disbursements prudently made or incurred in the care of the trust property (*Howes* v. *Davis*, 4 Abb. 71). But his commissions are intended by law to be a full compensation for his personal services, and if he acts as counsel in the business of the receivership, he is not entitled to special remuneration beyond taxable fees as counsed (*Re Bank of Niagara*, 6 Paige, 213).

c. Sometimes in the order appointing the receiver, a clause is inserted limiting his compensation to such as is allowed to executors and administrators; in which case he can claim only five per cent. for the first one thousand dollars, two and a half per cent. on the next four thousand, and one per cent. on the residue (*Bennett* v. *Chapin*, 3 Sand. 673).

d. Where the order directs the money to be deposited from time to time as received, and the receiver, in compliance with the terms of the order, makes deposits from time to time, each deposit is not to be considered in the light of an annual rest, for the purpose of calculating the commission in cases where it is limited to the amount allowed to executors and administrators (*Bennett* v. *Chapin*, 3 Sand. 673); citing with approbation, the case of *The Receiver of the Bank of Niagara* (6 Paige, 213). But if the receiver renders periodical accounts in conformity with the standing rule of the court, then each rendition of account may be regarded as a rest. (*Ib.*)

e. Where an order was made by consent, directing the receiver to pay over, and deliver all the moneys, property, and effects in his hands to certain of the parties, and at the time there were book-accounts and other things in action unconverted and in the hands of the receiver, it was held that the receiver was entitled to his commission on the value of the property thus unconverted; and that if the value could not be agreed upon by consent, the court would order a reference to ascertain the value (*Bennett* v. *Chapin*, 3 Sand. 675; see also in *Re De Peyster*, 4 Sand. Ch. R. 511).

f. **Receiver chargeable with interest.**—A receiver who mixes the trust fund with his own, or with other moneys held in trust, or uses or loans the money is chargeable with interest (*Utica Ins. Co.* v. *Lynch*, 11 Paige, 520).

g. **Receiver's accounts.**—A receiver is to account to the court only. He cannot be compelled to account and show his books to a party in the suit (*Musgrove* v. *Nash*, 3 Edw. Ch. R. 172).

h. A report upon a receiver's accounts need not be confirmed; and cannot be excepted to. A party dissatisfied may move to review the principle on which the accounts are taken (*Brown* v. *Brown*, 2 Edw. Ch. R. 621.

i. **Order for receiver to discharge liens.**—When judgment creditors have acquired a lien upon a fund in the hands of a receiver, the court will not, upon their petition, make an order upon the receiver to satisfy the judgment out of the moneys in his hands, until a decree has been made in the action in which the receiver was appointed, and notice has been given to all other creditors interested in the distribution of the fund. But in order to protect the petitioners, an order will be made upon the receiver forbidding him to make any payments out of the fund without notice to the petitioners, or their attorney, and allowing the petitioners to institute such an action against the receiver and other parties as they may be advised (*Hubbard* v. *Guild*, 2 Duer, 685; see *Re Ingraham*, 2 Barb. Ch. R. 35).

j. **When a receiver may sue or be sued.**—A receiver could not bring ejectment without leave of the court (1 Ves. jun. 165; 3 Bro. C. C. 88; 16

Wend. 410). Nor could such an action be brought against him without leave of the court (9 Ves. jun. 335). Nor could he make any payment (1 *ib.* 85). He cannot sue in a foreign jurisdiction for the property of the debtor of whose estate he is the receiver (*Booth* v. *Clark*, 17 How. U. S. Rep. 322).

a. Commencing an action against a receiver as such, without leave of the court for that purpose first obtained, is a contempt (*Taylor* v. *Baldwin*, 14 Abb. 166; *De Groot* v. *Jay*, 30 Barb. 483; 9 Abb. 356; 18 How. 121); and see *Bailey* v. *Devereux*, 1 Vernon Ch. Cas. 269), and proceedings in the action will be stayed. (*Id.*) But it has been held that leave to sue a receiver is usually granted of course, and, if necessary, can be granted at any stage of the action; and the irregularity in suing a receiver without leave of the court is waived by an appearance in the action without objection (*Hubbell* v. *Dana*, 9 How. 424; see 8 Paige, 389).

b. A receiver should apply for an order for leave to sue for a debt (*Merritt* v. *Lyon*, 16 Wend. 410; *Smith* v. *Woodruff*, 6 Abb. 65). Having obtained leave, he is bound to sue (*Winfield* v. *Bacon*, 24 Barb. 154). And if he does not obtain leave, and fails in the suit, he will be personally liable for costs. Thus, where a receiver had prosecuted an action as such receiver, without leave of the court for that purpose first obtained, and had failed in the action, on motion for costs against him personally, the motion was granted (*Phelps* v. *Cole*, 3 Code Rep. 157; *Smith* v. *Woodruff*, 6 Abb. 65; see however *Devendorf* v. *Dickinson*, 21 How. 275).

c. A receiver may maintain an action to set aside a fraudulent assignment made by a party of whose estate he is receiver (*Porter* v. *Williams*, 5 Selden, 142; 12 How. 107); and he may interplead (*Winfield* v. *Bacon*, 24 Barb. 155).

d. An action against a receiver should not be restrained on the ground that a former judgment has disposed of the matters involved in the action; but the receiver should be left to set that up as a defence (*Jay's Case*, 6 Abb. 293); nor should an injunction issue to restrain the prosecution of an action by a receiver, commenced by leave of the court; the proper mode of restraining him is by application to the court appointing him for instructions (*Winfield* v. *Bacon*, 24 Barb. 154).

e. A receiver appointed in another State may sue in his character as receiver in this State (*Runk* v. *St. John*, 29 Barb. 585; and see *Hoyt* v. *Thompson*, 1 Selden, 320).

f. **What attorney the receiver is to employ.**—A receiver should not employ a person to bring suit for him as such receiver who has been employed for either of the parties to the action in which the receiver was appointed (*Warren* v. *Sprague*, 4 Edw. Ch. R. 416; *Re Ainsley*, 1 id. 576; *Ray* v. *Macomb*, 2 id. 165; *Panton* v. *Zebley*, 19 How. 394). If he does, the proceedings may be set aside for irregularity; but the irregularity is so far waived by appearance without objection that on a motion afterwards made to set aside the proceedings, the courts will not do more than stay the proceedings until another attorney is substituted, and perhaps saddle the plaintiff with costs of the motion. (*Ib.*) The rule is for the benefit of the parties, and a stranger sued by the receiver cannot raise the objection (*Warren* v. *Sprague*, 11 Paige, 200). Although the receiver is prohibited from employing the attorney or counsel of either of the parties to the suit, adversely to either of the parties to the suit, he may employ the attorney or counsel of either of the parties in a matter in relation to the joint fund, in which both plaintiffs and defendants are interested, or to obtain or create a fund for the joint benefit of both parties (*Bennett* v. *Chapin*, 3 Sand. 675; *Ryckman* v. *Parkins*, 5 Paige, 543).

g. **Changing receiver.**—It is by no means a matter of course to change a receiver upon his own application. He must show some reasonable cause why he should be relieved from the performance of duties which he has voluntarily agreed to perform, and then he will be entitled to costs of his application (6 Mad. Ch. R. 266; Edw. on Rec. 547); and especially should this be required where his discharge and the appointment of another in his place may inconvenience parties in interest and third persons (*Beers* v. *The Chelsea Bank*,

4 Edw. Ch. R. 278). Relationship to one of the parties is not alone a ground for his removal (*Wetter* v. *Schlieper*, 7 Abb. 92; 6 Abb. 123; see 1 Bland, 427).

a. The employment by a receiver of the judgment debtor to collect a portion of the estate, is not in itself ground for removing the receiver (*Ross* v. *Bridge*, 15 Abb. 150).

b. On motion to substitute one person for another as receiver, the regularity of the appointment of a receiver is not to be considered (*Fassett* v. *Tallmadge*, 13 Abb. 12).

c. **Discharg of Receiver.**—The discontinuance of the action is not a discharge of the receiver, but on its discontinuance he may apply for a discharge (*Whiteside* v. *Pendergast*, 2 Barb. Ch. R. 471).

d. **Costs against receiver.**—A receiver stands in some respects on the same footing as to costs as an executor, he is not liable for costs for not proceeding to trial where sufficient reason is shown for the omission (*St. John* v. *Denison*, 9 How. 343; see note to § 317).

e. **Receiver in mortgage cases.**—Receivers in mortgage cases are allowed with great caution, and will be appointed only where there is a clear inadequacy of security, or the rents have been expressly pledged for the debt. The best criterion of adequacy or inadequacy of ,the security is the amount of rental (*Shotwell* v. *Smith*, 3 Ed. Ch. R. 588; see *Jenkins* v. *Hinman*, 5 Paige, 309; *Frelingheysen* v. *Colden*, 4 Paige 204; *Sea Ins. Co.* v. *Stebbins*, 8 Paige, 565; *Bank of Ogdensbury* v. *Arnold*, 5 *id.* 38; *Astor* v. *Turner*, 2 Barb. 444; *Warner* v. *Governors Exor.* 1 Barb. 36; *Quinn* v. *Brittain*, 2 Edw. Ch. R. 314; *Wall Street Fire Ins. Co.* v. *Loud*, 20 How. 95).

f. A receiver will not be appointed if the validity of the mortgage is impeached (*Leahy* v. *Arthur*, 1 Hogan, 92; *Darcy* v. *Blake*, 1 Molloy, 247).

g. A receiver of chattel property held by a mortgagee in possession is to be directed only in cases of pressing necessity (*Patten* v. *Accessory Transit Co.*, 4 Abb. 235; reversing S. C. 4 *id.* 139; and see *Thompson* v. *Van Vechten*, 5 Duer, 618; 5 Abb. 458; *Bayard* v. *Fellows*, 28 Barb. 451).

h. **Receiver of Partnership.**—Upon a bill filed by one of several partners to close up a partnership, it is a matter of course to appoint a receiver * * * on the application of either party [partner] (*Marten* v. *Van Schaick*, 4 Paige, 480; *Low* v. *Ford*, 2 Paige, 310; *Goulding* v. *Bain*, 4 Sand. 717; *Whitewright* v. *Stimpson*, 2 Barb. 379; *Dayton* v. *Wilkes*, 17 How. 510; *Jackson* v *De Forest*, 14 How. 81; *Williamson* v. *Wilson*, 1 Bland, 423; *McCracken* v. *Ware*, 3 Sand. 688; *Henn* v. *Walsh*, 2 Edw. Ch. R. 129; *Roberts Adm* v. *Law*, 4 Sand. 644; *Dillon* v. *Horn*, 5 How. 35; *Innes* v. *Lansing*, 7 Paige, 583).

i. The principle on which the court interferes between partners by appoint- a receiver, is merely with a view to the relief by winding up and disposing of the concern, and dividing the produce, not to carry it on (*Waters* v. *Taylor*, 15 Ves. 10, 329; *Goodman* v. *Whitcomb*, 1 Jac. & W. 569). Therefore, as a general rule, a receiver will not be appointed of a subsisting and continuing partnership, unless it is evident a dissolution will be decreed (*Garretson* v. *Weaver*, 8 Edw. Ch. R. 385; *Jackson* v. *De Forest*, 14 How. 81). But, to preserve the good-will, the receiver may be directed to carry on the business until a sale can be effected (*Marten* v. *Van Schaick*, 4 Paige, 479). But the court will not continue the publication of a political newspaper by a receiver longer than is absolutely necessary to prevent a sacrifice of the property (*Id.*); nor will it continue to run steamboats for an indefinite time (*Crane* v. *Ford*, Hopk. 114).

j. There is no ground for a receiver where the partner applying to the court has the property in his own possession, and the other does not object to such possession (*Smith* v. *Lowe*, 1 Edw. Ch. R. 33). On a creditor's bill against two partners, one of whom has assumed the debt, the other has a right to insist that the receivership shall be extended to the co-partnership effects, and to the individual property of the owner primarily liable (*Henry* v. *Henry*, 11 Paige, 314).

k. Where a limited co-partnership becomes insolvent, and the members thereof neglect to place their assets in the hands of a proper person to dis

tribute ratably among the creditors of such firm; any creditor is entitled to have a receiver appointed (*Whiteright* v. *Simpson*, 2 Barb. 379; and see *Levy* v. *Ley*, 6 Abb. 89; *Lachaise* v. *Marks*, 4 E. D. Smith, 611; 1 Abb. 213; *Wetter* v. *Schlieper*, 6 Abb. 123; 7 Abb. 92; and see *Geortner* v. *Trustees of Canajoharie*, 2 Barb. 625).

a. **The rights, powers, and duties of receivers of insolvent or dissolved corporations.**—The receiver of an insolvent corporation represents both the creditors and stockholders, and may assert their rights when affected by the fraudulent or illegal acts of the institution. And where an association formed under the general banking law, being insolvent, transferred to one of its directors certain bonds in exchange for shares of its own stock, the transaction was adjudged void, and it was held that a receiver of the bank, subsequently appointed, might maintain a suit to reclaim the bonds for the benefit of the creditors of the bank (*Gillett, Receiver, &c.*, v. *Moody*, 3 Coms. 479; *Talmadge* v. *Pell*, 3 Selden, 328; *Brower* v. *Hill*, 1 Sand. 629).

b. For most, if not for all purposes, a receiver "takes the place and stands as the representative of the company." He is as much bound by a settlement which the company are authorized to make as was the company itself. It would be strange indeed if the *legal* acts of a corporation did not bind the receiver of its effects. If the rule were not so no one would dare venture to deal with a corporation This is not like *Leavitt* v. *Palmer* (3 Coms. 19), and *Gillett* v. *Moody* (*id.* 479). In each of those cases the act of the company which the receiver sought to avoid was forbidden by law: it was an illegal act. The case of *Brower* v. *Hill* (1 Sand. 629) stands on the same ground (see *Hyde* v. *Lynde*, 4 Coms. 392; *Hoyt* v. *Thompson*, 3 Sand. 416; rev'd, 1 Selden, 320; *Milink* v. *Morris Canal Banking Co.*, 3 Green's Ch. R. 400). The receiver "is in fact a trustee not only for the stockholders but creditors also" (3 Coms. 480). (Gardner, J. *Talmage* v. *Pell*, 3 Selden, 347.)

c. A receiver of a corporation is vested with all the rights of action which the company had when he was appointed, and he can sue for a tort committed before his appointment (*Gillett* v. *Fairchild*, 4 Denio, 80; *Brower* v. *Hill*, 1 Sand. 629).

d. It is the duty of the receiver of an insolvent corporation to require the solvent stockholders to pay up the balance due from them on their stock (*Pentz* v. *Hawley*, 1 Barb. Ch. R. 122; and see *Nathan* v. *Whitlock*, 9 Paige, 152). He may allow every claim against the corporation which he is satisfied is justly due (*Attorney General* v. *Life & Fire Ins. Co.*, 4 Paige, 224). He may discharge subsisting policies, but not reinsure (*Re Croton Ins. Co.*, 3 Barb. Ch. R. 642). And he may apply for a warrant to bring up for examination any person who is indebted to the corporation, or who has property belonging to it in his custody (*Noble* v. *Halliday*, 1 Coms. 330).

e. The provision of the revised statutes authorizing the receivers of insolvent corporations to sue for and recover any sum remaining due upon any share of its capital stock, is merely a cumulative remedy. And the rule is the same, whether the stock be held by any original stockholder or by an assignee (*Mann* v. *Currie*, 2 Barb. 294).

f. The deposit notes of a mutual insurance company are its capital, and the receiver should collect them (*Van Buren* v. *Chenango Mutual Ins. Co.*, 12 Barb. 671).

g. A receiver may be invested by the court with a general power to compromise disputed claims (*Re Croton Ins. Co.*, 3 Barb. Ch. R. 642). There can be no compromise without the consent of the receiver (*Att'y Gen'l* v. *Life & Fire Ins. Co.*, 4 Paige, 224).

h. The receiver may, under the direction of the court, continue a suit commenced by the insolvent company in its own name, before his appointment (*Talmage* v. *Pell*, 9 Paige, 410).

i. Where a moneyed corporation had transferred its property on a contract it had no power to make, and become insolvent, held that its receiver could reclaim the property (*Talmage* v. *Pell*, 3 Selden, 328; and see *Gillett* v. *Moody*, 3 Coms. 479, reversing 5 Barb. 185).

a. A receiver appointed under the 41st section of the revised statutes (2 R. S. 464), unless his powers are restricted by the order appointing him, is absolutely vested with all the property and effects of the corporation, and has full power to sell and dispose of the same, and to settle its affairs (*Verplank* v. *Mercantile Ins. Co.*, 2 Paige, 448). But a receiver appointed on the application of a judgment creditor under the 36th section (2 R. S. 463) is a mere common-law receiver, appointed to protect the fund, and has no authority except what is conferred upon him by the order of the court (*Id.*; *Mann* v. *Pentz*, 3 Coms 415).

b. A receiver appointed in proceedings taken under Laws of 1853, p. 918, ch. 466, § 24, to close the business of a fire insurance company, should be required to give security (*Re Mechanics' Fire Ins. Co.*, 5 Abb. 444).

c. A receiver of an insolvent mutual insurance company is entitled to his commission on the whole amount of the premium notes, whether he collects them wholly, or collects assessments merely for the full satisfaction of the debts, &c., and then surrenders them (*Van Buren* v. *Chenango Mut. Ins. Co.*, 12 Barb. 671).

d. Receivers appointed under the 36th section of the provisions of the revised statutes entitled "Of proceedings against corporations in equity" (2 R. S. 464), have no "other or greater powers than receivers in ordinary creditors' suits" (*Mann* v. *Pentz*, 3 Coms. 423). Such receivers are under the power of the court (*Re Globe Ins. Co.*, 6 Paige, 102. See *Dambman* v. *Empire Mill*, 12 Barb. 341; *Re Van Allen*, 37 Barb. 225).

e. A receiver of the effects of an insolvent corporation of another State, appointed under the laws of such State, may dispose of property of such corporation situate within this State, and of debts due such corporation from residents of this State (*Hoyt* v. *Thompson*, 1 Selden, 320, rev'g 3 Sand. 416).

f. In the appointment of a receiver under 2 R. S. 464, "of proceeedings against corporations in equity," the Supreme Court acts as one of general jurisdiction, and not as exercising a special statutory power (*Bangs* v. *Duckinfield*, 18 N. Y. 592).

g. Chapter 71 of Laws of 1852, relating to receivers of insolvent corporations, is not unconstitutional in relation to its operation on corporations not before dissolved. (*Id.*)

h. See laws of 1852, ch. 71, amended laws 1860, ch. 403, to facilitate the collection of debts against corporations (*Re Campbell*, 13 How. 481).

i. Receiver in action against manufacturing corporation (*Galway* v. *U. S. Steam Sugar Refining Co.*, 13 Abb. 211; 36 Barb. 256).

j. As to receivers in actions in the nature of creditors' bills and in proceedings supplementary to the execution, see supplementary proceedings, *post*; and see *Lent* v. *McQueen*, 15 How. 313; *Seymour* v. *Wilson*, *id.* 355.

k. **Order to pay amount admitted to be due.**—The order was made where it appeared that the plaintiff deposited money with the defendant, to pay for him to a third party (the defendant being surety for the payment thereof to such third party), which money was in the defendant's possession (*Burhans* v. *Casey*, 4 Sand. 706). Also where there was no defence other than a counterclaim, less by $310 than the sum claimed by the plaintiff, the defendant served an offer for judgment for $310 (*Meyers* v. *Trimble*, 1 Abb. 220; 3 E. D. Smith, 607). Also when a fund in litigation has been brought into court, and the defendant, in his answer, admits that a part of the fund is due to the plaintiff, disputing his claim to the residue (*Merritt* v. *Thompson*, 10 How. 428; 1 Abb. 223; 3 E. D. Smith, 599). And so where a surviving partner, defendant, admitted having in his hands partnership funds belonging to the estate of his deceased partner, although there were outstanding debts against the firm, the plaintiff giving security to contribute to the payment of such debts (*Roberts* v. *Law*, 4 Sand. 642). The fact that before action the plaintiff had offered to pay the amount admitted due, is no reason for refusing to make the order (*Quinlard* v. *Secor*, 3 E. D. Smith, 614; 1 Abb. 393; *Merritt* v. *Thompson*, 3 E. D. Smith, 599; 1 Abb. 223; 10 How. 428; *Meyers* v. *Trimble*, 1 Abb. 220; 3

E. D. Smith, 607). See, however, *Smith* v. *Olsen*, 4 Sand. 711; *St. John* v. *Thorne*, 2 Abb. 166. The order will be made where one of several causes of action is admitted (*Quintard* v. *Secor*, 3 E. D. Smith, 614; 1 Abb. 393; *Russel* v. *Meacham*, 16 How. 193; *Tracy* v. *Humphrey*, 5 How. 155). Where in an action on contract the defendant makes an offer pursuant to section 385, which is not accepted he may be ordered to pay the plaintiff the amount of such offer (*Dusenbury* v. *Woodward*, 1 Abb. 443).

a. The order made in *Slauson* v. *Conkey*, 1 Abb. 228, was said to have been improvidently issued. (10 How. 57).

b. The order was refused where the answer transversed the plaintiff's claim as stated, and then stated that the work was not worth more than a certain sum, less than that claimed (*Dolan* v. *Petty*, 4 Sand. 673). Also where the defendants admitted they had the fund the plaintiff sought to have paid over to him, but they were ignorant whether it belonged to him or to a third party who claimed it and asked leave to pay the money into court (*Bender* v. *Sherwood*, 15 How. 258).

c. On motion to strike out part of an answer and for judgment on the ground of the frivolousness of the residue of the answer, the court may direct the defendant to satisfy the amount admitted by the answer to be due (*Foedick* v. *Groff*, 22 How. 158).

d. A part of an entire demand admitted by the answer to be due, may be ordered to be paid, and payment to be enforced as a judgment. Thus, in an action on a note for $351, the answer admitted $276 to be due; on motion of the plaintiff, the defendant was ordered to pay the sum so admitted due, and that payment might be enforced as a judgment (*Guiet* v. *Murphy*, 11 How. 411; and to the like effect is *Baker* v. *Nussbaum*, 1 Hilton, 549; contra, see *Russell* v. *Meacham*, 16 How. 193).

e. Rule 35, allowing twenty days for the payment of costs &c., imposed by an order, has no application to an order to pay a sum admitted due. (*Id.*)

See sect. 246, *post*.

f. **Order, how enforced.**—When an order is made to satisfy the part of the plaintiff's claim admitted by the answer to be due, and such order is personally served on the defendant, and he refuses to obey it, he may be attached for his disobedience, and if he does not show an excuse for it, may be punished as for a contempt (*Meyers* v. *Trimble*, 1 Abb. 399; 3 E. D. Smith, 607). The apparent contempt may be purged by showing inability to pay, unless he has voluntarily disabled himself; and the creation of the disability is itself a contumacious act (*Id.*; *Quintard* v. *Secor*, 3 E. D. Smith, 614).

g. If the action is one on contract for the payment of money only, the court may order the amount admitted to be due to be satisfied by an execution (*Russel* v. *Meacham*, 16 How. 193). *Semble*, it will not enforce by attachment payment of an amount admitted due in any case in which on a final judgment the plaintiff would not be entitled to an execution against the person (*Lane* v. *Losee*, 11 How. 360; 2 Abb. 129; *Duncan* v. *Ainslie*, 26 Barb. 199; *Merritt* v. *Thompson*, 3 E. D. Smith, 600; 1 Abb. 223; 10 How. 428).

h. **Appeal from order.**—An order directing the defendant to pay the amount admitted due by the answer, is an appealable order (*Merritt* v. *Thompson*, 1 Abb. 223; 3 E. D. Smith, 600; 10 How. 428). But whether on appeal the general term will review the discretion exercised at special term in respect to the *terms* or *conditions* upon which such order should be granted, where no right of the appellant and no rule of law is violated—*query?* It seems not. (*Ib.*)

TITLE VIII.

Of the Trial and Judgment in Civil Actions.

CHAPTER I. JUDGMENT UPON FAILURE TO ANSWER.
II. ISSUES AND THE MODE OF TRIAL.
III. TRIAL BY JURY.
IV. TRIAL BY THE COURT.
V. TRIAL BY REFEREES.
VI. THE MANNER OF ENTERING JUDGMENT.

CHAPTER I.

Judgment upon failure to answer.

SECTION 245. Judgment defined.
246. Judgment on failure of defendant to answer, or for excess over counter-claim.
247. Judgment on frivolous demurrer, answer, or reply.

§ 245. [201.] *Judgment, what.*

A judgment is the final determination of the rights of the parties in the action.

a. A discontinuance is a "final determination" of the rights of the parties in the action (*Crockett* v. *Smith*, 14 Abb. 62); and so an order after trial that a fund be paid into court to await a further order (*Gray* v. *Cook*, 24 How. 432).

b. A determination on a motion under § 247 is a judgment (*Roberts* v. *Morrison*, 7 How. 396; see however note to subd. 4 of § 307, *post*).

c. As to what is a judgment, and the distinction between a judgment and an order, see note to § 400, *post*.

§ 246. [202.] (Am'd 1849, 1851, 1858.) *Judgment on failure of defendant to answer; or for excess over counterclaim.*

Judgment may be had if the defendant fail to answer the complaint, as follows:

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint, on one or more of the defendants, or of the summons according to the provi-

sions of section 130, and that no answer has been received. The clerk shall thereupon enter judgment for the amount mentioned in the summons, against the defendant or defendants, or against one or more of several defendants, in the cases provided for in section 136. But if the complaint be not sworn to, and such action is on an instrument for the payment of money only, the clerk, on its production to him, shall assess the amount due to the plaintiff thereon; and in other cases shall ascertain the amount which the plaintiff is entitled to recover in such action, from his examination under oath, or other proof, and enter the judgment for the amount so assessed or ascertained. In case the defendant give notice of appearance in the action, he shall be entitled to five days' notice of the time and place of such assessment.

Where the defendant by his answer in any such action shall not deny the plaintiff's claim, but shall set up a counter-claim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counter-claim, in like manner in any such action, upon the plaintiff's filing with the clerk of the court a statement admitting such counter-claim, which statement shall be annexed to and be a part of the judgment-roll.

2. In other actions the plaintiff may, upon the like proof apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into affect the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of money only, or of specific real or personal property with damages for the withholding thereof, the court may order the damages to be assessed by a jury, or, if the examintion of a long account be involved by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to eight days' notice of the time and place of application to the court for the relief demanded by the complaint.

3. In actions where the service of the summons was by publication, the plaintiff may in like manner apply for judgment, and the court must thereupon require proof to be made

of the demand mentioned in the complaint, and if the defendant be not a resident of the State, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may, in its discretion, require the plaintiff to cause to be filed satisfactory security, to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under, or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defence.

a. As to judgment for want of an answer after service by publication, see Rule 25; in action for foreclosure, see Rule 71; for a divorce, Rule 86; for partition, see section 448, *post*; in ejectment, section 455, *post*.

b. **Proof that no answer has been received.**—"The intent of the code is that the plaintiff shall show to the court, that *when* he makes his application no answer has been served on him" (*Brian* v. *Casey*, 2 Abb. 416). And, therefore, where the application for judgment was founded on an affidavit that no answer had been received, which was sworn more than five years before making the application, the application was refused. (*Id.*) The proof need not necessarily be by affidavit (*Phillips* v. *Prescott*, 9 How. 430).

c. The plaintiff cannot take judgment if a demurrer has been served (*Broadhead* v. *Broadhead*, 4 How. 308; 3 Code R. 8). But if the defendant has demurred and the demurrer has been overruled, or there is a direction for judgment under section 247; there is in that case a failure to answer; and the like proceedings may be had as where neither answer nor demurrer is put in (*King* v. *Stafford*, 5 How. 30; *Aymar* v. *Chase*, 1 Code Rep. N. S. 141; *Saltus* v. *Kip*, 2 Abb. 332; 12 How. 342; 5 Duer, 646).

d. Where two defendants were sued on a joint liability, and one answered and the other made default, on the trial plaintiff took judgment against both defendants—held, that he was regular, and that in such a case no affidavit of no answer having been received was necessary (*Catlin* v. *Billings*, 13 How. 511; S. C., 4 Abb. 248; and see *Sluyter* v. *Smith*, 2 Bosw. 673). Thus, in an action against the maker and indorsers of a promissory note, the indorsers (Fowler & Billings) being partners, and the indorsement being in their firm's name, all the defendants were served with the summons. Billings did not defend; the other defendants answered and defended separately. The cause was brought to trial on the issues raised by the defendants who answered. On the trial there was a verdict for the plaintiff, and the jury then and there assessed the damages against Billings. Judgment was entered against all the defendants, and without any affidavit that the defendant Billings had not answered. Subsequently Billings moved to set aside the judgment for irregularity, on the ground that the judgment roll contained no affidavit of no answer having been received from him. Motion was denied, it being held that in such a case no such affidavit was necessary. It was further held, that if such an affidavit was in fact necessary, the plaintiff might be permitted to supply the defect; and see *Ford* v. *David*, 1 Bosw. 570; *Jones* v. *U. S. Slate Co.* 16 How. 129.

e. If a judgment is entered without an affidavit of no answer having been received, it is an irregularity in a matter of practice only, and furnishes no ground for an appeal from the judgment, at least to the court of appeals (*Cat-*

lin v. *Billings*, 16 N. Y. 622). The proof of service should be inserted in the judgment roll (*Macomber* v. *Mayor of N. Y.* 17 Abb. 36).

a. **Judgment against one of several defendants.**—"The right to take judgment against one defendant on default, before the other has answered or made default, only applies to cases where a several judgment is proper, and cannot authorize a judgment against both defendants, even so far as to affect only partnership property." And in an action on contract against defendants jointly liable, no judgment can regularly be entered until the time to answer, of all the defendants served, has expired (*Jacques* v. *Greenwood*, 1 Abb. 230); and if one of two defendants jointly liable answer, and one does not, the plaintiff cannot take judgment against the defendant who does not answer until the issue raised by the defendant who does answer is disposed of (*Catlin* v *Latson*, 4 Abb. 248; S. C., 13 How. 511; *Sluyter* v. *Smith*, 2 Bosw. 673).

b. **Order for judgment.**—A judgment, except in the cases specified, cannot be entered without the order of the court (*Beach* v. *Shaw*, 4 Barb. 288).

c. **Death of defendant.**—Where a defendant dies after being served with process, and before his time to answer expires, the plaintiff cannot enter judgment in the action (*Borsdorff* v. *Dayton*, 17 Abb. 36, *note*).

d. **Where application for judgment is to be made.**—The application for judgment, in actions within the second subdivision of this section, must be made at special term (*Ryan* v. *McCannell*, 1 Sand. 709; 1 Code Rep. 93; *Aymar* v. *Chase*, 12 Barb. 301). And such application may be made at any special term, in the district embracing the county in which the action is triable, or in an adjoining county; such application may also be made at a circuit court in the county in which the action is triable; but when a reference, or a writ of inquiry, shall be ordered, the same shall be executed in the county in which the action is triable, unless the court otherwise order. (Rule 24.) In the superior court, an application for judgment may be made at chambers (*Porter* v. *Lent*, 2 Abb. 116; 4 Duer, 671).

e. **When notice of the application must be given.**—In all actions on contract to recover money only (except actions on an instrument for the payment of money only), where the complaint is not verified, the clerk is to ascertain by the examination of the plaintiff, under oath, or by other proof, the amount which the plaintiff is entitled to recover (*Cook* v. *Pomeroy*, 10 How. 103). And if the defendant has given notice of appearance, five days' notice of such ascertainment is indispensable. (*Ib.*) And where, in an action on a promissory note, the complaint purported to be verified, but in fact was not verified, what purported to be a verification being a nullity, the defendant gave notice of appearance, but did not put in any answer, and the plaintiff, without any notice to the defendant, entered up his judgment, it was held that the judgment was irregular, and that notice should have been given to the defendant (*Van Horn* v. *Montgomery*, 5 *id.* 238). Where, *after* the time for answering had expired, the defendant served notice of appearance, and a demand of a copy of the complaint, and the plaintiff on the same day, but after the receipt of such notice of appearance, entered judgment, it was held regular, and that he was not, under the circumstances, bound to delay the entry of judgment for the purpose of giving notice of assessment of damages (*White* v. *Featherstonhaugh*, 7 *id.* 357). The practice on this point remains substantially as under the former system; and there a notice of retainer not served until after default, might be disregarded (*Lynd* v. *West*, 12 Wend. 336). Where a notice of appearance is not given until after the application for judgment, the plaintiff is not bound to serve the defendant's attorney with notice of the assessment of damages (*Lynd* v. *West*, 12 Wend. 235). In an action on contract to recover money only, and the complaint verified, the defendant gave notice of appearance, but did not answer; and at the expiration of the time to answer, the plaintiff took judgment without any notice to the defendant. It was held, that he was regular, and that the defendant was not entitled to any notice; that in such a case there was no assessment (*Dix* v. *Palmer*, 3 Code Rep. 214; 5 How. 233; *Southworth* v. *Curtis*, 6 *ib.* 271).

a. In an action for an assault, the defendant gave notice of appearance, but did not answer. Thereupon the plaintiff, without notice to the defendant, applied for and obtained an order to have his damages assessed by a jury. Held that he was irregular in applying for the order without notice, and the order was on motion set aside (*Saltus* v. *Kip*, 2 Abb. 382; 12 How. 342). In an action against a common carrier for loss of goods, where the defendant appeared, but did not answer in due time, and the plaintiff took judgment without any notice to the defendant, the court set aside such judgment as irregular (*Clor* v. *Mallory*, 1 Code Rep. 126; *Flynn* v. *Hudson R. R. R. Co.*, 6 How. 308). Both these cases proceeded on the ground that an action against a common carrier for the loss of goods sounded in tort and not in contract. But in *Campbell* v. *Perkins* (4 Selden, 430), the court of appeals held that a claim against a common carrier for the loss of goods intrusted to him to carry is a claim arising upon contract. *Trap* v. *N. Y. & Erie R. R. Co.*, 1 Code Rep. N. S. 384; 6 How. 237, was a suit against common carriers for the non-delivery of goods entrusted to them to carry; and it was held that it was an action to recover money only, and was within the 1st subdivision. It does not appear, however, that there was any allegation in the complaint that the defendants were common carriers, or that the cause of action arose against them as such.

b. Where a defendant demurs to the complaint, it is an appearance, and although such demurrer be set aside or held to be frivolous, the defendant is nevertheless entitled to notice of the assessment of damages or of the amount due the plaintiff, in like manner as if he had given a simple notice of appearance (*King* v. *Stafford*, , 5 How. 30; *Aymer* v. *Chase*, 1 Code Rep. N. S. 141; *Saltus* v. *Kipp*, 2 Abb. 382; 12 How. 342; 5 Duer, 646).

c. And where in an action on a promissory note the complaint was not verified, the defendant demurred to the complaint, and the plaintiff obtained a direction for judgment under section 247, unless the defendant put in an answer within ten days. The defendant did not answer within ten days; and thereupon the plaintiff gave the defendant's attorney notice of adjusting costs, filed with the clerk an affidavit stating the direction made by the judge, that ten days had elapsed, and that no answer had been put in, had the amount due on the note assessed by the clerk, and entered a final judgment for the amount so assessed. No notice of assessment of damages was given the defendant's attorney. The court held the judgment irregular.

d. In an action on an undertaking of bail, the summons was in the form prescribed by subd. 2, of sect. 129. Defendant in effect appeared. The plaintiff assessed his damages without notice,—held he was irregular (*Kelsey* v. *Covert*, 6 Abb. 336, note; 15 How. 92).

e. **Proof of plaintiff's demand, when necessary and how taken.**—In actions arising on contract for the recovery of money only (and as to what actions are within that description, see note to section 129, *ante*) (1) *if the complaint be verified*, the clerk enters judgment without more; (2) if the complaint be *not verified*, in an action on an instrument for payment of money only, the clerk, *on its production to him*, assesses the amount due thereon; (3) in other cases *of actions arising on contract for the payment of money only*, the clerk ascertains the amount the plaintiff is entitled to recover from the examination of the plaintiff under oath or other proof (*Hurd* v. *Leavenworth*, 1 Code Rep. N. S. 279). In such a case it is not essential to the regularity of the judgment, that the judgment-roll should show on its face what was the proof before the clerk, or if the action was on a note and the complaint was not verified; that the note was produced to him, and that he assessed the amount due to the plaintiff thereon, as the clerk in such cases must enter the judgment for the amount he has assessed, the judgment-roll is evidence that he did his duty in respect to assessing the amount due (*Am. Exchange Bank* v. *Smith*, 6 Abb. 1). See however, what is said (*Squire* v. *Elsworth*, 4 How. 77); and (4) in other actions, *i. e.* actions other than "actions arising on contract for the recovery of money only," the court may either take the proof, order a reference or an assessment by a jury. If in this class of cases a reference is ordered, a report must be

made and filed as part of the judgment-roll (*American Exchange B'k* v. *Smith*, 6 Abb. 1).

a. Where a reference is ordered the reference must be had in the county named in the complaint as the place of trial (*Brush* v. *Mullany*, 12 Abb. 344); a reference out of such county would be irregular, and all proceedings thereon void, and may be set aside on motion at special term. (*Id.*)

b. A reference to ascertain the amount of damages sustained by the plaintiff will not be granted after a default for want of a plea, upon a mere general affidavit that the inquiry involves the examination of a long account, but the production of a sworn copy of the account on which the action is brought will be required (*Brown* v. *Miller*, 1 Barb. 24).

c. Where in a foreclosure action plaintiff after a report of a referee adverse to the defendants who had answered, gave notice of motion for the relief demanded in the complaint and the defendants not appearing to oppose the motion took an order of reference to compute the amount due and after the report on such reference noticed the cause for trial and obtained judgment for sale and foreclosure, held that he was regular (*Hill* v. *McReynolds*, 30 Barb. 488).

d. In an action for damages for non-performance of a contract to sell real estate, no special damage being alleged, there was no answer, and plaintiff obtained an inquisition to have his damages assessed by a sheriff's jury; held irregular, and the inquisition was set aside. The damages could be assessed by the clerk (*Bownes* v. *Logan*, Superior Court, Feb'y 1857); and see *Croden* v. *Drew* (3 Duer 652).

e. In an action against a common carrier to recover damages for the loss of goods delivered him to carry (the summons followed the first subdivision of section 129), the defendant not having appeared or put in an answer, the plaintiff took an order for a reference to estimate his damages. On motion to set aside such order, it was held irregular, and that the plaintiff ought to have had his damages assessed by a jury (*Hewett* v. *Howell*, 8 How. 348).

f. Where the summons was for relief, and the complaint prayed for an accounting and for judgment for the balance ascertained to be due, and stated the plaintiff's belief that such balance was at least $550; the defendant not having answered, on plaintiff's application for judgment for the sum of $550, it was held that he was not entitled to judgment for that sum, but only to a reference to take the account mentioned in the complaint (*Porter* v. *Lent*, 2 Abb. 115; 4 Duer, 671).

g. In an action for the recovery of specific personal property, with damages for its detention, if the defendant does not answer, the regular course is to direct an assessment by the sheriff's jury, and a reference cannot be ordered unless the examination of a long account is involved. But if the plaintiff will waive all damages for the detention, he may have judgment for the recovery of the property without any reference or assessment (*Horn* v. *Doody*, 2 Abb. 92; 4 Duer, 670). The court may take the proofs without a jury (2 Abb. 138 *n.*)

h. Notice of appearance or retainer may be served after the time to answer has expired and before judgment has been entered, in all cases where an assessment of damages is necessary (*Abbott* v. *Smith*, 8 How. 463).

i. In action of tort, as for assault, &c., the plaintiff, on proof of service of summons and that no answer has been received, and if the defendant has appeared on notice to him, should apply for an order to assess damages by a sheriff's jury, not by a referee (*Richards* v. *Swetzer*, 3 How. 418; 1 Code Rep. 117; *Dutch Reformed Church of Canajoharie* v. *Wood*, 8 Barb. 421; *Stanley* v. *Anderson*, *id.* 52; *Saltus* v. *Kip*, 2 Abb. 382; 5 Duer, 646; 12 How. 342; *Boyce* v. *Comstock*, 1 Code Rep. N. S. 290). In which case, a writ of inquiry issues to the sheriff to assess the damages; but in cases of difficulty and importance the court, on a proper affidavit showing grounds therefor, may order the writ of inquiry to be executed before a judge, in which event the judge acts as assistant to the sheriff (2 Johns. 71). In *Dillaye* v. *Hart* (8 Abb. 394; and see *Hays*

v. *Berryman*, 6 Bosw. 679), an action for an assault, the plaintiff asked to have the assessment before a judge, on the ground that he could not challenge the jurors if the inquisition was before the sheriff. The motion was granted. See 15 Johns. 177. In *Cameau* v. *Bryant* (6 Duer, 668; 4 Abb. 402), an action for libel, the superior court said that on its being shown that difficult questions of law might arise respecting the construction of the complaint, and respecting the admissibility of evidence in mitigation, it might order the assessment to take place before a judge.

a. A commission may issue to take the testimony of a witness on an assessment of damages. Laws 1862, ch. 375, p. 628.

b. Like notice of the assessment of damages by a jury, on a writ of inquiry, is necessary, as is required on an assessment by the clerk where the defendant has appeared in the action (*Kelsey* v. *Covert*, 15 How. 92; 6 Abb. 336, note). Notice of executing a writ of inquiry at a certain day, "provided an interlocutory judgment shall have then been obtained in the cause," is good (*Oothout* v. *Rooth*, 12 Johns. 151; and see *Anon.* 4 Sand. 693).

c. The same proceedings may be had under the code on assessing damages on a default to answer, as were allowed under the old practice on executing a writ of inquiry. A defendant may call witnesses and prove any matter which properly goes to mitigate damages. He may, of course, prove all the facts and circumstances relating to, and any immediate provocation which, in the judgment of law, tends to mitigate, damages (*Saltus* v. *Kipp*, 2 Abb. 383; 12 How. 342; *Warner* v. *Kenny*, 3 *id.* 323; 1 Code Rep. 96; *Lane* v. *Gilbert*, 9 How. 150; *Gilbert* v. *Rounds*, 14 *id.* 47). But he cannot prove a partial defence (*Ford* v. *David*, 1 Bosw. 570).

d. The verdict on a writ of inquiry will not be set aside for irregularities in summoning the jury, and as to which no objection was taken on the assessment, nor because the complaint was read to the jury (*Jennings* v. *Asten*, 5 Duer, 695; 3 Abb. 373). On moving to set aside such a verdict for excessive damages, the evidence must be disclosed on the moving papers. (*Id.*)

Note to subd. 3. (*See Rule* 25.)

e. In *Chapman* v. *Lemon and wife* (11 How. 239), an action to charge the separate property of the wife, there was an order to serve the summons on the defendant (the husband) by publication; and he was so served. The other defendant (the wife) was personally served. Neither of the defendants appeared or answered. Thereupon the plaintiff obtained an order of reference "to hear and take material proofs in the action and report the material facts to the court." The referee reported and a judgment was entered. On a motion on the part of the wife to set aside the proceedings as irregular, it was held that the proceedings *might* be irregular as against the husband, because as he was served by publication, it was the duty of *the court* to require proof to be made of the demand mentioned in the complaint, and that there was no authority in such a case to order a reference. But that only the husband could avail himself of the irregularity.

f. Where the service of the summons is by publication, the judment cannot be regularly entered except by the special order of the court, and upon due proof of the service of the summons, in conformity with the order for publication. And the fact of such conformity should appear on the face of the record, or the judgment will be void (*Hallett* v. *Righters*, 13 How. 43).

g. **Restitution.**—The restitution to which a party is entitled upon the reversal of an erroneous judgment, is not restitution to everything he has lost thereby, at least not to everything he has lost in consequence of such erroneous judgment; he recovers what is still in possession of his adversary, but not everything else. For instance, land sold under execution issued on the judgment, and bought by a third party, does not revert to the original owner on the reversal of the judgment (*Lovett* v. *German Ref. Ch.*, 12 Barb. 83). Where money has been collected on a judgment which is subsequently re-

versed, such money may be recovered by action; the remedy by order for restitution is merely cumulative (*Lott* v. *Sweezey*, 29 Barb. 87).

a. See §§ 330, 369, *post.*

b. **Judgment for amount admitted due.**—Where the plaintiff's claim is admitted by the answer, and defendant sets up a counter-claim of less than the sum claimed by the plaintiff, the plaintiff may enter judgment for the balance without any assessment by the clerk (*Robbins* v. *Watson*, 22 How. 293).

c. **Irregular judgment.**—Judgment for want of an answer based on a service of the summons on an elector on an election day, is irregular (*Bierce* v. *Smith*, 2 Abb. 411). A mere irregularity in the service of the summons, as that it was served by a party to the action does not render the judgment irregular (*Hunter* v. *Lester*, 10 Abb. 260; and see *Collins* v. *Ryan*, 32 Barb. 647; and in note to section 133, p. 162, *g. ante*). The plaintiff cannot, where an answer had been served in due time, disregard it and enter judgment as for want of an answer (*Ross* v. *Longmuir*, 15 Abb. 326). Where a default is regular it is not to be set aside merely because subsequent proceedings are irregular (*Griswold* v. *Stoughton*, 1 Cal. 6).

d. Where by reason of the summons not having been served the court never acquired jurisdiction of the action, it will set aside the judgment at any time after its entry. The application to set it aside need not be made within a year after the entry (*Hallett* v. *Righters*, 13 How. 43).

e. **Opening judgment for default of answer.**—If a defendant omit to answer within the time prescribed, the court has power to let him in to make a defence (*Lynde* v. *Verity*, 1 Code Rep. 97; *Salutat* v. *Downes*, id. 120; *Clark* v. *Lyon*, 2 Hilton, 91; *Allen* v. *Ackley*, 4 How. 5; 2 Code Rep. 21; *Foster* v. *Udell*, 2 *id.* 30); before judgment is entered (*McGuin* v. *Cace*, 9 Abb. 160); or if judgment has been entered it will set aside the judgment and let him in to defend, and without reference to his remedy against his attorney. As where an attorney appears without authority or suffers judgment by fraud or neglect (*Elsworth* v. *Campbell*, 31 Barb. 134; *Sharp* v. *Mayor of N. Y.*, 31 Barb. 578; 20 How. 439; see however, *Bogardus* v. *Livingston*, 2 Hilton, 236). The indulgence is usually on terms, sometimes paying costs and undertaking not to set up a defence of the statute of limitation (*Allen* v. *Ackley*, supra; *Hawes* v. *Hoyt*, 11 How. 454); or usury (*Toole* v. *Cook*, 16 How. 142; and see *Morris* v. *Slattery*, 6 Abb. 74), but on opening a default the court refused to impose the terms that the defendant should not set up the defence of usury (*Grant* v. *McCaughin*, 4 How. 216); or the defence of a former recovery (*Audubon* v. *Excelsior Fire Ins. Co.*, 10 Abb. 64); or the defence, that the note in suit was given for money won at play (*B'k. of Kinderhook* v. *Gifford*, 40 Barb. 659). These terms are discretionary, and cannot be reviewed (*Lord* v. *Vandenburgh*, 15 How. 363; *Jacobs* v *Marshall*, 6 Duer, 689).

f. The motion to open a judgment by default and let defendants in to defend, may, in New York city, be made to a justice out of court (*Lowber* v. *The Mayor of N. Y.*, 5 Abb. 325). And a motion to set aside a judgment not for a mere technical irregularity need not be made the first opportunity (*Lucas* v. *Trustees of Baptist Church*, 4 How. 353).

g. Where a defendant moves pursuant to leave, to be admitted to answer; *semble*, he should serve a copy of this answer with the moving papers (*Marquise* v. *Brigham*, 12 How. 399).

h. An affidavit of merits to be let in to defend need not be special when there are no suspicious circumstances. If there are such circumstances the affidavit must be special (*Dix* v. *Palmer*, 5 How. 234; *Van Horne* v. *Montgomery*, 5 How. 238).

i. One of several joint debtors not served with the summons was permittted after judgment against *all*, on default of an answer, by the defendant served, to come in on terms and defend the action (*Ford* v. *Whitridge*, 9 Abb. 416). And where a judgment against several joint debtors was obtained on a service against one only, by a supposed connivance with the defendant served, the judgment was opened on motion of one of the defendants not served (*Cleveland* v. *Porter*, 10 Abb. 407; and see 174 *c*, *ante*).

a. A judgment should not be set aside, and leave given to the defendant to come in and defend, unless he shows that he has a good defence on the merits, and that the omission to answer in time was the result of accident or mistake without culpable negligence (*Macomber* v. *Mayor of N. Y.*, 17 Abb. 37; *Quinn* v. *Case*, 2 Hilton, 467; *Excise Comm's of N. Y.* v. *Hollister*, 2 Hilton, 588). He should show the nature of the answer he desires put in (*Hunt* v. *Wallis*, 6 Paige, 371; *Wells* v. *Cruger*, 5 Paige, 164). A motion to vacate a judgment taken for want of an answer in a foreclosure action, and to allow defendant to answer was denied; where it appeared that the answer would not constitute a defence (*Dwight* v. *Webster*, 10 Abb. 128). And where a married woman was sued alone for a debt contracted during coverture, and judgment was taken against her for default of an answer, the courts would not open the judgment to allow her to set up the defence of coverture, she having obtained the credit by representing herself as unmarried (*Genet* v. *Dusenbury*, 2 Duer, 679). An affidavit of a meritorious defence, alleging that the note in suit had been paid, without stating when, where, or how, is insufficient to support a motion to open a judgment (*Hunter* v. *Lester*, 10 Abb. 260).

b. Although upon a motion to open a judgment the defendant should make an affidavit of merits, yet the absence of such an affidavit is not a conclusive answer to the motion, the defect may be supplied on terms (*Fassett* v. *Tallmadge*, 15 Abb. 206).

c. A default was opened on stringent terms where the excuse was that both the client and attorney neglected to attend to the case (*Selover* v. *Forbes*, 22 How. 477); and so where the answer was prepared, but by neglect of the attorney's clerk was not served (*Clark* v. *Lyon*, 2 Hilton, 91).

d. The motion to open the default should be made promptly (*Bogardus* v. *Livingston*, 2 Hilton, 236).

e. Where upon a motion to open a regular judgment, entered upon failure to answer, it appeared that an answer was prepared by defendants' counsel in due season, but was not served, for the reason that he believed plaintiffs' proceedings to be irregular; that defendants' counsel made repeated efforts to see plaintiffs personally, in order to have the irregularity corrected, but was unsuccessful; and that he understood from plaintiffs' attorney that no further steps would be taken until he could have an interview with plaintiffs: held, that this was a case of surprise, or excusable neglect, authorizing the court to open the judgment upon terms (*Mann* v. *Provost*, 8 Abb. 446). In general where a defendant seeks to open a judgment he has suffered voluntarily, and under the advice of counsel, he must show specifically what is his intended defence, and make an affidavit of merits (*Ellis* v. *Jones*, 6 How. 296).

f. The defendant, by reason of an irregularity in the service of an order giving him more time to answer, suffered his time to elapse without answering. He then moved before entry of judgment for leave to answer: held, (1) that, he showing a substantial defence, his motion should have been granted; and (2) that an order denying his motion, was appealable without a certificate under the common pleas rule (*McGuire* v. *Cace*, 9 Abb. 160).

g. An order vacating a judgment entered for default of an answer, and letting the defendant in to answer, is not appealable to the general term (*Churchill* v. *Mallison*, 2 Hilton, 70). In the common pleas it might be appealed on a certificate under the rule of March 22, 1851. (*Id.*) And an order refusing to open a default taken for want of an answer is not appealable (*Millard* v. *Van Ranst*, 17 Abb. 319, *note*).

h. In *Kane* v. *Demarest*, 13 How. 465, a judgment for default of an answer was set aside, and plaintiff charged with costs of the motion.

i. The court refused to open judgment for default of answer in *Catlin* v. *Latson*, 4 Abb. 248; *Martin* v. *Lott*, 2 Abb. 365; *Pope* v. *Dinsmore*, 8 Abb. 429).

j. Leave to renew a motion to open a default will not be granted to admit a defence known to defendant, but not urged, on the motion sought to be renewed (*Pattison* v. *Bacon*, 12 Abb. 142).

k. When after judgment facts arise which make it clear that the judgment

ought not to be enforced, relief against the judgment may be had on motion (see *Gilchrist* v. *Comfort*, 26 How. 394, and cases there cited).

a. The courts will in certain cases entertain an action to set aside a judgment as contrary to equity. To entitle a party to maintain such an action, it must appear that the facts relied upon were unknown to him during the pendency of the action in which the judgment was recovered, or that he was prevented from making a defence by the fraud of the plaintiff in such action *Hamel* v. *Grimm*, 10 Abb. 150).

Judgments against New York city.—Judgments against the city of New York, set aside pursuant to laws of 1859, p. 1123: see *Sharp* v. *Mayor of N. Y.* 31 Barb. 572; id. 578; 20 How. 439; *Joyce* v. *Mayor of N. Y.* 12 Abb. 309; *Macomber* v. *Mayor of N. Y.* 17 Abb. 35; *Martin* v. *Mayor of N. Y.* 11 Abb. 295; 12 Abb. 243; *Outwater* v. *Mayor of N. Y.* 20 How. 213; *The People* v. *Mayor of N. Y.* 11 Abb. 66; *Lowber* v. *The Mayor of N. Y.* 5 Abb. 325; id. 484; *Sharp* v. *Mayor of N. Y.* 9 Abb. 426: id. 243; *Baker* v. *Mayor of N. Y* 9 Abb. 82).

§ 247 *Judgment on frivolous demurrer, answer, or reply.*

If a demurrer, answer, or reply be frivolous, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of the court, for judgment thereon, and judgment may be given accordingly.

c. **What is a frivolous pleading.**—A frivolous answer denies no material allegation of the complaint, and sets up no defence (*Hull* v. *Smith*, 8 How. 150; *Kelly* v. *Burnett*, 16 *id.* 135). It is an answer which if true does not contain any defence, and the insufficiency of which is so glaring as to appear upon a bare inspection without argument (*Nichols* v. *Jones*, 6 How. 358; *Sixpenny Savings Bank* v. *Sloan*, 12 *id.* 544; *Lefferts* v. *Snediker*, 1 Abb. 41; *Leach* v. *Boynton*, 3 *id.* 3; *Hecker* v. *Mitchell*, 5 *id.* 455; *Brown* v. *Jennison*, 3 Sand. 732; 1 Code, Rep. N. S. 156; *Struver* v. *Ocean Ins. Co.* 2 Hilton, 475; *Smith* v. *Mead*, 14 Abb. 262). It is not simply an answer bad upon its face, but one which in the opinion of the court, has been certainly interposed in bad faith for the mere purpose of delay (*Hull* v. *Swith*, 8 How. 150). "It is not the motive with which an answer is put in, or its truth or falsity, that is the test, on a motion for judgment on the ground of its frivolousness. If it is a good defence on its face the motion must be denied" (*Hecker* v. *Mitchell*, 5 Abb. 455). "No pleading can be called frivolous which traverses a material allegation in the complaint, or sets up matter which if true constitutes a defence to the action" (*id. Richter* v. *McMurray*, 15 Abb. 346; *Davis* v. *Potter*, 2 Code Rep. 99; 4 How. 155; *Temple* v. *Murray*, 6 How. 331; *Metropolitan Bank* v. *Lord*, 1 Abb. 185; 4 Duer, 630; *Caswell* v. *Bushnell*, 14 Barb. 393); whether or not the pleading is verified makes no difference (*Reed* v. *Latson*, 15 Barb. 17). Although a verification may possibly save an answer from being struck out as false, it has no such potency to protect it from being adjudged *frivolous* (*Thorn* v. *N. Y. Central Mills*, 10 How. 25; *Sherman* v. *N. Y. Central Mills*, 1 Abb. 187). A pleading will be held to be frivolous where there is a decision in point adverse to its sufficiency (*Bank of Wilmington* v. *Barnes*, 4 Abb. 226; *The People* v. *McCumber*, 15 How. 193; *Strong* v. *Stevens*, 4 Duer, 688; *Langdale* v. *McLean*, 10 Jurist, 642; *Withers* v. *McLean*, 6 Lond. Law Times, 352). But the court will not hold a pleading frivolous and give judgment on it, "unless it clearly appears to be taken for the purpose of delay, or unless the grounds stated in it are clearly untenable" (*Sixpenny Savings Bank* v. *Sloan*, 2 Abb. 414; 12 How. 544; and see *Munn* v. *Barnum*, id. 563; *Neefus* v. *Kloppenburgh*, 2 Code Rep. 76; *Temple* v. *Murray*, 6 How. 331; *Rae* v. *Wash. Mut. Ins. Co.*, 1 Code Rep. N. S. 185; 6 How. 21; *Niblo* v. *Harrison*. 7 Abb. 447, *n.*)

d. **Answers adjudged to be frivolous.**—An answer in an action of tort, *i. e.* assault which merely states matter controverting the degree of aggravation

by which it was characterized (*Lane* v. *Gilbert*, 9 How. 150; *Gilbert* v. *Round*, 14 *id.* 46); an answer denying that plaintiff is the lawful owner of the note in suit (*Catlin* v. *Gunter*, 1 Duer, 253; *Fleuret* v. *Roget*, 5 Sand. 646; *Higgings* v. *Rockwell*, 2 Duer, 653; *De Santes* v. *Searle*, 11 How. 477; *Fosdick* v. *Groff*, 22 How. 158; *Chadwick* v. *Booth*, 13 Abb. 249; 22 How. 23; *Smith* v. *Mead*, 14 Abb. 265; see, however, *McKnight* v. *Hunt*, 3 Duer, 615); an answer stating that the note was made for the accommodation of the payee without more (*Andrews* v. *Storms*, 5 Sand. 609; *Pettigrew* v. *Chave*, 2 Hilton, 546). An answer which denies knowledge or information sufficient to form a belief that the defendant (a corporation) made its promissory note, *as it is set out in the complaint* (*Sherman* v. *N. Y. Central Mills*, 1 Abb. 191; 10 How. 20; overruled, see 7 Bosw. 675); an answer that the note was not presented for payment at the time it became due, and at the place at which it was made payable (*Tompkins* v. *Acer*, 10 How. 309): an answer by a married woman that the mortgage in suit was not acknowledged by her on a separate examination (*Cramer* v. *Comstock*, 11 How. 486); an answer setting up a levy under a foreign attachment (*Hecker* v. *Mitchell*, 5 Abb. 454); an answer denying indorsement to the plaintiff (*Kamlah* v. *Saltus*, 6 Abb. 226; 1 Hilton, 558; see *Duncan* v. *Lawrence*, 6 Abb. 304; 3 Bosw. 103). An answer stating only such facts, as under the former system, if set out in a special plea, would have made the latter bad on a general demurrer, according to decisions determining the precise question (*Strong* v. *Stevens*. 4 Duer, 668). An answer by the payee to a complaint in an action on a promissory note against the maker and payee, that the payee indorsed the note for the accommodation of the maker and that fact was known to plaintiff when he received the note (*Pettigrew* v. *Chave*, 2 Hilton, 546; *Andrews* v. *Storms*, 5 Sand. 609). An answer that the defendant at the time of the commencement of the action was and ever since has been and still is Envoy Extraordinary and Minister Plenipotentiary of the United States of America to Brazil (*Mechanics' Bank* v. *Webb*, 21 How. 450). An answer which merely denies the allegation of indebtedness set up in the complaint (*Fosdick* v. *Groff*, 22 How. 158). An answer in an action on a promissory note which sets up a parol agreement between the parties without consideration inconsistent with the tenor of the note, is frivolous (*Elizabethport Manuf. Co.*, v. *Campbell*, 13 Abb. 87; see also *Bailey* v. *Lane*, 13 Abb. 354); and where the complaint alleged that plaintiff as agent of *A.* sold and delivered certain goods to defendant and that defendant promised plaintiff to pay for said goods, an answer, setting up that said goods belonged to *A.* and not to plaintiff, and that *A.* and not plaintiff sold them to defendant, but which did not deny either the delivery by plaintiff nor plaintiff's agency, nor the promise to pay plaintiff, was held to be frivolous (*Reilly* v. *Cook*, 13 Abb. 255; 22 How. 93). To a complaint against the sureties on an undertaking on appeal, an answer that the appellant owned real property, and that the execution was returned by the sheriff before the expiration of sixty days, at the respondent's request and without any attempt to collect the judgment out of such real estate, is frivolous (*Wood* v. *Derrickson*, 1 Hilton, 410).

a. **Answers adjudged not to be frivolous.**—Answer in an action against a married woman to charge her separate estate, that she has no separate estate (*Aitken* v. *Clark*, 15 Abb. 319). An answer which denies knowledge or information sufficient to form a belief as to all the material allegations of the complaint (*Richter* v. *McMurray*, 15 Abb. 346). An answer by an endorsee of a note where the complaint alleges a transfer to the plaintiff and possession of the note denying the transfer only without denying that the plaintiff had possession of the note (*Chadwick* v. *Booth*, 13 Abb. 249; 22 How. 23; and see *Metropolitan Bank* v. *Lord*, 1 Abb. 185). An answer which did not constitute a defence, but which stated facts that might, by being properly alleged, constitute a defence (*Alfred* v. *Watkins*, 1 Code Rep. N. S. 343; *Struver* v. *Ocean Ins. Co.*, 9 Abb. 23). An answer that prior to the commencement of the action the plaintiff sold and delivered the cause of action to A., who is still the holder and owner of it (*Smith* v. *Mead*, 14 Abb. 262); and it being *doubtful*, before the amendment of 1863 of § 167, subd. 7, whether or not the provision of the R. S. which authorized the joining in foreclosure actions of a surety, a demurrer

based on the supposition that it had been repealed, was held not to be frivolous (*Chauncey* v. *Lawrence*, 15 Abb. 106). And where the complaint alleged that the plaintiff was the owner and holder of the note in suit, the court refused to treat as frivolous an answer which denied that the plaintiff was owner and holder, and alleged that one V. G. was the real owner and holder of said note and the real party in interest (*Tamisier* v. *Cassard*, 17 Abb. 187; and see *Arrangois* v. *Frazer*, 2 Hilton, 244).

a. Where plaintiff sued in a representative capacity, and alleged in his complaint in general terms that defendant was indebted to *him* for, &c., an answer denying any knowledge or information sufficient to form a belief whether he (defendant) was indebted to plaintiff, was held not to be frivolous (*Morrow* v. *Gougan*, 3 Abb. 328). And where the complaint on a promissory note in an action against the maker and payee in order to show title in the plaintiff, averred an indorsement and delivery to plaintiff, and that plaintiff was the holder, an answer which denied the delivery to the plaintiff and alleged a delivery to a third person, named, was held not to be frivolous (*Metropolitan Bank* v. *Lord*, 1 Abb. 185).

b. **Frivolous demurrer.**—Where in an action by a corporation the complaint averred that the plaintiffs were a corporation duly incorporated by the laws of the State of New Jersey, with power to sue and be sued, and did business in the State of New York, held that a demurrer on the ground that it appeared on the face of the complaint that plaintiffs had not legal capacity to sue was frivolous (*Elizabethport Manufacturing Company* v. *Campbell*, 13 Abb. 86).

c. **Motion.**—The application under this section is a motion (*Roberts* v. *Clark*, 10 How. 415; *Gould* v. *Carpenter*, 7 How. 97; *Marquisee* v. *Brigham*, 12 *id.* 399; *Butchers' Bank* v. *Jackson*, 22 How. 470). It is a "summary demurrer," and the opposite party may, *after* the notice, if the time to amend has not expired, serve an amended pleading, and such pleading served before the hearing of the motion will be answer to it (*Burrall* v. *Moore*, 5 Duer, 654; *Currie* v. *Baldwin*, 4 Sand. 690). The motion must be on a notice of five days; in every case, it cannot be made on an order to show cause returnable in two days (*Lefferts* v. *Snediker*, 1 Abb. 41). There is no time limited within which it is to be made (*Darrow* v. *Miller*, 3 Code Rep. 241; 5 How. 247). The opposite party does not waive his right to move by obtaining time to answer (*Cutts* v. *Surridge*, 16 Law J. 193 Q. B.; 11 Jur. 585; 4 D. & L. 642; *Norton* v. *McIntosh*, 7 Dowl. 530); nor by answering the frivolous pleading (*Stokes* v. *Hagar*, 1 Code R. 84). The notice of motion must ask either for "judgment" or "relief;" and where a notice of motion, after asking for an order to strike out an answer as frivolous, concluded by asking for such other "order," &c., it was held, that under such a notice relief could not be given (*Rae* v. *Washington Mutual Insurance Co.*, 1 Code Rep. N. S. 185; *Darrow* v. *Miller*, 3 Code R. 241; 5 How. 247).

d. A plaintiff may, in a proper case, ask in one motion for judgment under this section and to have irrelevant and redundant matter struck out, and indefinite and uncertain allegations amended (*The People* v. *McCumber*, 15 How. 186; 18 N. Y. 315). And where the notice of motion is for judgment on the answer, containing several defences as frivolous, or for an order striking out some or all of the defences as sham and irrelevant, it need not necessarily specify which defences are claimed to be frivolous, and which sham or irrelevant (*Bailey* v. *Lane*, 13 Abb. 354).

e. On motion for judgment on an answer as frivolous, it is not competent to the defendant to attack the complaint, as not stating a cause of action (*Corn Exchange B'k.* v. *W'ern Transp. Co.*, 15 Abb. 319 *note*).

f. The motion is made on the copy pleading served, and no affidavit is necessary (*Stokes* v. *Hagar*, 1 Code R. 84; *Howorth* v. *Hubbersty*, 3 Dowl. Pr. Cas. 455). The judgment must be granted or refused on what appears upon the pleadings alone, and an affidavit, if served, could not be taken into account in deciding this question (*Caswell* v. *Bushnell*, 14 Barb. 393). By this it is merely intended that no affidavit need be served with the motion papers; for if the defendant

do not appear to oppose the motion, the plaintiff must give proof of the reception of the answer and of the service of the notice of motion (*Darrow* v. *Müller*, 3 Code R. 291; 5 How. 247).

a. Where an answer contained *two* defences, and plaintiff moved for *judgment* for frivolousness of answer, and one defence was held good and the other frivolous,—held that the latter defence might be *stricken* out under the notice that plaintiff would ask other and further relief, &c. (*Hecker* v. *Mitchell*, 5 Abb. 453).

b. A judge *at chambers* has power to make an absolute or *conditional* order for judgment, *precisely as at special term.* Therefore, where it appears that the answer is put in, in good faith, and *merits are properly sworn to, an amended answer* may be allowed upon terms (*Witherspoon* v. *Van Doler*, 15 How. 266; and see *Appleby* v. *Elkins*, 2 Sand. 673; *B'k. of Lowville* v. *Edwards*, 11 How. 218; *Shearman* v. *N. Y. Central Mills*, 1 Abb. 190; *Fales* v. *Hicks*, 12 How. 155; *Fleuret* v. *Roget*, 5 Sand. 646; *Brown* v. *Ward*, 3 Duer, 660; *Marquisee* v. *Brigham*, 12 How. 399; *Witherhead* v. *Allen*, 28 Barb. 661).

c. A frivolous pleading is not struck out but remains upon the record (*Briggs* v. *Bergen*, 23 N. Y. 162).

d. **Decision on motion.**—If judgment is ordered for the plaintiff on a frivolous answer or demurrer, and there is no other issue, the plaintiff takes judgment in same manner as though no answer or demurrer had been served (*King* v. *Stafford*, 5 How. 30; *Aymer* v. *Chase*, 1 Code Rep. N. S. 141; *Saltus* v. *Kip*, 2 Abb. 332; 12 How. 342; 5 Duer, 646); the defendant is entitled to notice of the application for judgment (*id.*)

e. The decision on a motion for judgment on the ground of frivolousness of a demurrer or answer, is a judgment on an issue of law and not an order from which an appeal can be taken (*Witherhead* v. *Allen*, 28 Barb. 661; *King* v. *Stafford*, 5 How. 30; *Roberts* v. *Morrison*, 7 How. 396; *Bruce* v. *Pinkney*, 8 How. 397; *Lewis* v. *Acker*, 8 How. 414; *Bauman* v. *N. Y. Cent. R. R. Co.*, 10 How. 218; *Harris* v. *Hammond*, 18 How. 123; *Lee* v. *Ainslee*, 1 Hilton, 277; see note to § 252 *post*); an appeal may be taken from such decision as an order if broughtbefore judgment entered. After judgment is entered the appeal must be from such judgment (*id.*) If the order direct judgment for more than the plaintiff is entitled to, it should be corrected on motion, not by appeal (*id.*)

f. **Costs.**—Where an application is made under this section and judgment is ordered with costs of the application upon all or any of the causes of action, those costs must be inserted in and be collected as part of the judgment—they cannot be collected as interlocutory costs (*Wesley* v. *Bennet*, 6 Abb. 12).

g. On granting or denying an application for judgment under this section, only the costs of a motion can be allowed (*Butchers' B'k.* v. *Jacobson*, 22 How. 470; contra, *Pratt* v. *Allen*, 19 How. 450; *Bell* v. *Noah*, 24 How. 478; and see *Lawrence* v. *Davis*, 7 How. 354; *Roberts* v. *Morrison*, 7 How. 396, in which cases costs of a trial were allowed).

h. **Appeal.**—On an appeal from an order rendering judgment on a demurrer as frivolous, the order will not be reversed unless the court are of opinion that the demurrer would be sustained on argument (*Wesley* v. *Bennett*, 5 Abb. 498; see *Manning* v. *Tyler*, 21 N. Y. 570; and 28 Barb. 668; 2 Abb. 327; 6 Duer, 688; *Laverty* v. *Griswold*, 12 N. Y. Leg. Obs. 316). And on an appeal from an order pronouncing an answer frivolous, if the answer does not establish a good defence the general term should sustain the order, although it may not regard the answer as frivolous (*Martin* v. *Kanouse*, 2 Abb. 328; *East River B'k.* v. *Rogers*, 7 Bosw. 494; see, however, *Aitken* v. *Clarke*, 15 Abb. 319). Where the court say it is not sufficient to sustain a judgment on an answer as frivolous, that such answer would *probably* be held bad on demurrer.

i. On appeal from a judgment for plaintiff on account of the frivolousness of a demurrer to the complaint, the frivolousness is the only question that can be reviewed. The extent of the defendant's liability cannot be considered (*Witherhead* v. *Allen*, 28 Barb. 661).

j. An appeal from a judgment for the plaintiff on account of the frivolousness of the demurrer to the complaint, is not entitled to any preference on the calendar (*Wilder* v. *Lane*, 34 Barb. 54).

CHAPTER II.

Issues and the mode of trial.

SECTION 248. The different kinds of issues.
249. Issue of law.
250. Issue of fact.
251. On issues of both law and fact, the issue of law to be first tried.
252. Trial defined.
253. Issues, how tried.
254. Issues triable by the court.
255. Issues, where to be tried.
256. Either party may give notice of trial. Note of issue. Stenographer.
257. Order of disposing of issues on the calendar.

§ 248. [203.] *The different kinds of issues.*

Issues arise upon the pleadings, when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds,—

1. Of law; and
2. Of fact.

§ 249. [204.] *Issue of law.*

An issue of law arises,

1. Upon a demurrer to the complaint, answer, or reply, or to some part thereof.

§ 250. [205.] (Am'd 1849.) *Issue of fact.*

An issue of fact arises,

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer controverted by the reply; or,
3. Upon new matter in the reply, except an issue of law is joined thereon.

§ 251. [206.] *On issues of both law and fact, the issue of law to be first tried.*

Issues both of law and of fact may arise upon different

parts of the pleadings in the same action. In such cases the issues of law must be first tried, unless the court otherwise direct.

a. On demurring to one of several defences in an answer, the plaintiff may put the cause on the calendar for trial on the issues of fact, without waiting for the determination of the issue of law (*Palmer* v. *Smedley*, 13 Abb. 185), and where in such a case the issues of fact have been tried first without objection, it will be deemed that the court directed them so to be tried (*Fry* v. *Bennett*, 9 Abb. 45; *Warner* v. *Wigers*, 2 Sand. 635). In the superior court, "whenever a cause is moved on the trial calendar in which there was an issue of law pending, the court will then determine whether the issue of fact shall be first tried or not, and it is not necessary to obtain a previous order on the subject." Where there is an issue of law and an issue of fact in a cause, no judgment for costs can be entered in favor of the party who prevails on the issue of law, until the issue of fact is disposed of (*Masters* v. *Barnard*, 6 How. 114).

§ 252. [207.] (Am'd 1851, 1852.) *Trial defined.*

A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

b. The taking a dismissal of the complaint under sec. 258, is a trial (*Dodd* v. *Curry*, 4 How. 123; 2 Code Rep. 69). Whether the hearing of a motion for judgment on a frivolous demurrer, under section 247, is a trial (*Gould* v. *Carpenter*, 7 How. 98; *Roberts* v. *Morrison*, ib. 396; *Lawrence* v. *Davis*, ib. 354; *Hull* v. *Smith*, 8 *ib.* 149; *Rochester City Bank* v. *Rapelje*, 12 How. 26; *Pratt* v. *Allen*, 19 How. 450; *Witherhead* v. *Allen*, 28 Barb. 661; *Butchers B'k* v. *Jacobson*, 22 How. 470; *Bell* v. *Noah*, 24 How. 478), and whether a motion to dismiss a complaint for not proceeding with the action, is a trial (*Tilspaugh* v. *Dick*, 8 *id.* 33); also whether an application for judgment under section 246 is a trial, —are questions important as regulating the amount of costs on such motions, and are considered with that view in the note to section 307, subd. 4.

c. The reason for confining the trial of an issue of fact to a particular locality does not apply to the trial of an issue of law; and therefore an issue of law may be brought on to argument at a special term held in a different county in the district, from that indicated as the place of trial in the complaint (*Ward* v. *Davis*, 6 How. 274).

§ 253. [208.] (Am'd 1849, 1852.) *Issues, how tried. Trial by jury.*

An issue of law must be tried by the court, unless it be referred, as provided in sections two hundred and seventy and two hundred and seventy-one. An issue of fact in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried by a jury, unless a jury trial be waived as provided in section two hundred and sixty-six, or a reference be ordered as provided in sections two hundred and seventy, and two hundred and seventy-one.

a. An action for damages for conversion of personal property must be tried by a jury, unless a jury trial be waived in the manner prescribed (*Lewis* v *Varnum*, 12 Abb. 305). And so of an action to recover damages or a statute penalty for creating or continuing a nuisance (*Fire Department* v. *Harrison*, 2 Hilton, 455; 9 Abb. 1; 17 How. 273; 18 How. 181).

b. Where the main object of an action is the recovery of damages on a cause of action which would formerly have been a common-law action, and equitable relief is sought merely in aid of such recovery, if necessary, the cause should be tried at the circuit, and not at a special term (*N. Y. Ice Co.* v. *Northwestern Ins. Co.*, 10 Abb. 35; 31 Barb. 72; 20 How. 424; see *Dunnell* v. *Keteltas*, 16 Abb. 205; *Greason* v. *Keteltas*, 17 N. Y. 496).

c. Where there is an agreement to insure and deliver a policy, and a loss occurs before the delivery of the policy, an action on the agreement and loss is one to be tried by a jury (*Rockwell* v. *Hartford Fire Ins. Co.*, 4 Abb. 179).

d. In an action for a divorce on the ground of adultery in which issues are raised by the pleadings, it is not necessary to frame issues, but the issues made by the pleadings may be tried (*Parker* v. *Parker*, 3 Abb. 478).

See Rule 33 and § 266, *post.*

§ 254. [209.] (Am'd 1849.) *Other issues to be tried by the court.*

Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury; or may refer it, as provided in sections 270 and 271.

e. All actions seeking equitable relief are to be tried by the court (*McCarty* v. *Edwards*, 24 How. 236; *McMahon* v. *Allen*, 10 How. 384; *Hill* v *McCarthy*, 3 Code R. 50; *Church* v. *Freeman*, 16 How. 297); as, to charge the estate of a married woman (*Cheesebrough* v. *House*, 5 Duer, 125), or to set aside an assignment for fraud (*Wilson* v. *Forsyth*, 16 How. 448; *Draper* v. *Day*, 11 How. 439); or they may be referred (*McCarty* v. *Edwards* and *Allen* v. *McMahon*, *supra*). The order must be made before or at the trial—not after (*O'Brien* v. *Bowes*, 4 Bosw. 658).

See Rule 33.

§ 255. [210.] (Am'd 1849, 1851, 1852.) *Issues, where to be tried.*

All issues of fact, triable by a jury or by the court, must be tried before a single judge. Issues of fact in the supreme court, must be tried at a circuit court when the trial is by jury; otherwise, at a circuit court or special term, as the court may by its rules prescribe. Issues of law must be tried at a circuit court or special term, and shall, unless the court otherwise direct, have preference on the calendar.

f. The parties may stipulate to have the trial out of the court-house, and out of the county (Laws 1847, ch. 470).

g. An issue of law may be brought on for trial at any special term in the dis-

trict within which is situated the county named in the complaint as the place of trial (*Ward* v. *Davis*, 6 How. 274).

See Supreme Court Rules in the First District, of Oct. 1851, and in the Second District, in Appendix; also Rule 28.

* § 256. [211.] (Am'd 1858, 1859, 1860, 1863.) *Either party may give notice of trial. Note of issue. Stenographer.*

At any time after issue, and at least fourteen days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk at least eight days before the court with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue.

In the first Judicial District there need be but one notice of trial and one note of issue from either party, and the action shall then remain on the calendar until disposed of, and when called may be brought to trial by the party giving the notice. In every action in which issue of fact is now joined, and the action is now placed upon the calendar of the supreme court of the first judicial district, or of the superior court of the city of New York, or of the court of common pleas for the city and county of New York, the party who shall have filed such note of issue, shall, as a condition precedent to such action being brought to trial, pay to the clerk of the court the sum of three dollars, and in every action in either of the said courts commenced after the passage of this act, the party who shall file therein a first note of issue of fact shall, as a condition precedent to such filing, pay to the clerk of the court the sum of three dollars; and the amounts so received shall be accounted for and paid over, monthly, by the clerk of each of said courts, to the comptroller of the city of New York, and by him deposited in the county treasury, to be used as a fund for the payment of the salaries of stenographers employed in said courts, as provided for in this section. If the fund thus created be inadequate to pay such salaries, the additional amount necessary for such payment shall be appropriated and paid from the fund of county contingencies, to which fund any surplus of the sums so paid over to the comptroller, as hereinbefore provided, shall be credited.

Each of the courts hereinbefore named shall appoint a stenographer for the circuit, trial term, or special term, which consti-

* *Amended—See Appendix.*

tutes a separate branch of such court, who shall be a sworn officer of the court, shall hold office during the pleasure of the court, and shall be paid a salary of fifteen hundred dollars per annum, in like manner as the salaries of other officers of the courts are now paid. It shall be the duty of every stenographer so appointed for any circuit, trial term, or special term, under the direction of the presiding judge thereof, to take full stenographic notes of all proceedings in every trial thereat; and in case the presiding judge shall require a transcript of said stenographic notes, he may order the expense thereof to paid equally by the parties to the action, at the rate of ten cents for every one hundred words so transcribed, and may enforce payment thereof, and the amount so paid, together with the sum paid as a condition precedent to the cause being brought to trial, or to the first note of issue being filed as hereinbefore provided, shall be deemed a necessary disbursement within the meaning of section three hundred and eleven of the code of procedure, and shall be allowed as such to the prevailing party in the action.

At any extra circuit, trial term, or special term of said courts, the presiding judge thereof shall appoint a stenographer for such extra circuit or term, who shall, in like manner as aforesaid, be a sworn officer, and who shall be paid a compensation at the rate and in the manner hereinbefore provided.

When a court of oyer and terminer shall be held in and for the city and county of New York, the presiding judge thereof shall designate one of the stenographers of the supreme court to act as stenographer of such court of oyer and terminer during its session, who shall, in like manner as aforesaid, be a sworn officer, but who shall receive no compensation in addition to his salary as hereinbefore provided, except that in case a transcript of his stenographic notes, taken on the trial of any criminal cause, be required for the use of the presiding judge or the district attorney, the expense thereof shall, on the order of such judge or district attorney, be paid as a county charge at the rate hereinbefore specified.

In other counties of this State, on trials of issues of fact, at any circuit court, or court of oyer and terminer, it shall be lawful for the presiding justice, in his discretion, to employ a stenographer, who shall be entitled to such compensation as shall be certified by such justice, not exceeding five dollars for

each day's attendance at such court at the request of such justice; which compensation shall be a charge upon the counties in which such courts shall be held respectively, and shall be audited, allowed and paid in like manner as other county charges are audited, allowed and paid. It shall be the duty of such stenographer to furnish to any party to such trials, upon request, a copy of the evidence and proceedings taken by him on such trials, or of such part thereof as may be required, on payment, on behalf of such party, of six cents for every one hundred words of the copy so furnished.

a. This section applies to actions existing when the code took effect (*Reynolds* v. *Davis*, 2 Abb. 168; 5 Duer, 611).

b. As to notice of trial in N. Y. common pleas and superior courts, see Rules in Appendix; as to notes of issue at general term, see Rule 41; as to notice of trial in supreme court, see Rule 29.

c. Notice of trial served by mail is sixteen days (§ 412, *post*), including the day of service. (*Id.*) In other cases the day of service is to be excluded, and the first day of the court included (*Dayton* v. *McIntyre*, 5 How. 117).

d. Where all the defendants appear, but only some of them put in an answer, notice of trial must be given to all the defendants, those who answer and those who do not answer (*Tracy* v. *N. Y. Steam Faucet Co.* 1 E. D. Smith, 349).

e. Where there are two actions depending between the same parties, and prosecuted and defended by the same attorney, and one action only is noticed for trial, the notice should specify the action intended to be tried, or it may be considered insufficient (*Lesher* v. *Parmelee*, 1 Wend. 22). And if, besides the issues to be tried, there are also damages to be assessed on a default entered in the same action, the notice of trial should also express the plaintiff's intention to have such damages assessed by the jury who try the issue (6 Cow. 599). [And where an answer is framed with a view to affirmative relief, if the defendant notice the cause, his notice should, it is thought, express his intention to take judgment for such relief.]

f. If no notice of trial be given, or the notice be irregular or insufficient, and the plaintiff proceeds to trial, and obtains a verdict, the court, on application of the defendant, will set the verdict aside (15 Johns. 399; 1 Caines' R. 154). But in determining the sufficiency of the notice, the court will inquire whether the attorney or party was misled by the defect (3 Caines' R. 86, 133; 4 Cowen, 60; 11 Wend. 178); and for this purpose they will look, not only to the face of the notice, but to other circumstances (4 Cowen, 60). Thus, where the name of one of the parties was written Jeunis, instead of Teunis, it was held sufficient (3 Caines' R. 133). So, a notice of trial for Tuesday the 18th, instead of Monday the 18th (3 *ib.* 87), or for the third Monday instead of the third Tuesday, the party not being misled (4 Cow. 60), was held sufficient. And where the notice of trial was for the third *Tuesday* instead of the third *Monday*, on the Wednesday following the third Tuesday the plaintiff took an inquest. A motion to set aside that inquest as irregular was denied, it appearing that the opposite attorney had retained the notice, and had not been misled by the mistake in the notice (*N. Y. Central Ins. Co.* v. *Kelsey*, 13 How. 535). If the opposite attorney thought the notice irregular or insufficient, he should have returned it immediately after its receipt. (*Ib.*)

g. A dismissal of the complaint founded upon service of the notice of trial or hearing is irregular if obtained without placing the cause on the calendar (*Browning* v. *Paige*, 7 How. 487).

h. Where one of several defences has by order been stricken from an answer

as irrelevant, and the defendant appeals to the general term from such order, the plaintiff cannot, pending such appeal, bring on the action for trial (*Trustees of Pen Yan* v. *Forbes*, 8 How. 285).

a. The note of issue should state the kind of issue (see 13 How. 345).

b. If a cause is put on the calendar as of a wrong date of issue, the error may be corrected by motion at the circuit. The court will not fix the date as of which the cause shall be placed on the calendar (*North* v. *Sargeant*, 14 Abb. 224; see Rule 41).

Date of issue on new trial in common pleas, see Rule 6, Common Pleas Rules, June, 1840.

§ 257. [212.] *Order of disposing of issues on the calendar.* The issues on the calendar shall be disposed of in the following order; unless, for the convenience of parties or the dispatch of business, the court shall otherwise direct:

1. Issues of fact to be tried by a jury;
2. Issues of fact to be tried by the court;
3. Issues of law.

a. Actions by the attorney-general have a preference on the calendar (see Laws 1850, ch. 128, p. 200; Laws 1848, p. 582; Laws 1858, ch. 37, s. 1); and so have issues of law (§ 255, *ante*); and cases on certiorari (Rule 47); and actions against corporations, on notes or other evidences of debt, for the absolute payment of money on demand (2 R. S. 459, § 11).

CHAPTER III.

Trial by Jury.

SECTION 258. Notice of trial. Separate trials.
259. Court to be furnished with a copy of the pleadings.
260. General and Special verdicts defined.
261. When jury may render either general or special verdict, and when the court may direct a special finding.
262. On special finding with a general verdict, the former to control.
263. Jury to assess defendant's damages in certain cases.
264 Entry of the verdict. Motion for new trial.
265. Motion for new trial, or for judgment on special verdict, where to be heard.

§ 258. [213.] (Am'd 1851.) *Notice of trial. Separate trials.*

Either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require. A separate trial between a plaintiff and any of the several defendants may be allowed by the court, whenever, in its opinion, justice will thereby be promoted.

a. **Affidavit to prevent inquest.**—An affidavit of merits is necessary to prevent an inquest (*Dickerson* v. *Kimball*, 1 Code R. 83; *Jones* v. *Russell*, 3 How. 324; 1 Code R. 113: *Sheldon* v. *Martin*, 1 Code Rep. 81; *Anderson* v. *Hough*, 1 Code Rep. 50; 1 Sand. 271; see Rule 27). Except only in the case of an answer setting up a counter-claim and nothing more, no reply being made (*Potter* v. *Smith*, 9 How. 262). The plaintiff is never required to file an affidavit of merits, *semble* (*Regan* v. *Priest*, 3 Denio, 163). One affidavit of merits to prevent an inquest is sufficient, though the cause be several times noticed for trial and inquest (6 Cowen, 45). And if filed, and served on a plaintiff's attorney, for a circuit in one county, it has been held sufficient, though the venue be afterwards changed to another county, and the cause be tried in the latter. (*Ib.*) But an affidavit of merits made and used for one purpose in a cause, cannot be used for another: *e. g.*, an affidavit to change the venue will not be received as the foundation of a motion to set aside a default for want of a plea (*Cutler* v. *Biggs*, 2 Hill, 409; and see *Belden* v. *Devoe*, 12 Wend. 223; *Robinson* v. *Sinclair*, 1 How. 106; *Popham* v. *Baker*, 1 How. 166; *Colgate* v. *Marsh*, 2 How. 186). And a verified answer was held not to be sufficient to prevent the taking of an inquest in the cause at the circuit, out of its order on the calendar. (*Ib.*; 1 Code Rep. 81, 113; 1 How. 166).

a. Where the cause is called in its order the defendant may appear and defend, although no affidavit of merits be filed (*Starkweather* v. *Carswell*, 1 Wend. 77).

b. In an action against the several parties to a bill or note, jointly under the act of April, 25, 1832, if the trial was put off by any of such parties [or if one of them filed an affidavit of merits, 19 Wend. 125], the plaintiff might proceed to trial or inquest against the others, in the same manner as if the suit had been commenced against such other parties only, and the action was thereby severed (Laws of 1835, p. 248, § 2). But unless the trial was so put off, the plaintiff was not at liberty to sever the action as between two defendants who had pleaded, and proceed to trial or inquest against one only (4 Hill, 568).

c. **Affidavit by whom to be made.**—The affidavit must in general be made by the defendant himself; in his absence, however, it may be made by his attorney or counsel (11 Johns. 82); or his agent or attorney in fact specially authorized to defend the action (*Johnson* v. *Lynch*, 15 How. 199). Where made by the attorney, counsel, or agent, it must state a sufficient excuse for not being made by the defendant personally (2 Cow. 581; 1 How. 62). Absence beyond seas or out of the State will usually be deemed sufficient (*Johnson* v. *Lynch*, supra). It is no valid objection to such an affidavit, that the knowledge of the defence is sworn to be derived from the statements of the defendant; for this is all the information that, as a general rule, the attorney can ever have. (*Id.*) It would be proper that the affidavit should state, not only that the deponent has been fully informed of the facts of the case, but his inquiries into the truth of those facts, and his better knowledge of them by means of such inquiries, &c. (*Id.* 202). In *Phillips* v. *Blagge*, (3 Johns. 141), the affidavit was made by the attorney, and stated that the defendant was absent beyond sea, and had represented to him that he had a good and substancial defence on the merits, and, from his representations and the papers produced, he verily believed there was a defence. This was held sufficient. In *Roosevelt* v. *Dale* (2 Cow. 581), the attorney made the affidavit, swearing to a good defence on the merits, that the defendant had left the city of New York for Columbia County, and did not return in time to make the affidavit. This was held insufficient. The plaintiff will be permitted to impeach the excuse for the affidavit being made by any one other than the defendant, by showing that it is false or frivolous, but cannot question the existence of a defence sworn to in due form (*Johnson* v. *Lynch*, 15 How. 202, overruling some dicta to the contrary).

d. Where a maker and endorser of a note are sued in one action, an affidavit of merits by the maker will not prevent an inquest against the endorser, unless it appear that the defence of both is identical (19 Wend. 125). And where several suits are brought against the maker and endorsers of the same note, an affidavit of merits to set aside an inquest in all the causes may be made by the maker, if he be acquainted with the facts, and the defence be the same in all the causes (6 Cowen, 395).

e. **Form of affidavit.**—The substance of the ordinary affidavit is, that the defendant has fully and fairly stated the case to his counsel, giving the name and residence of such counsel (Rule 21), and that he has a good and substantial defence on the merits thereof, as he is advised by his said counsel, after such statement made as aforesaid, and verily believes to be true (5 Johns. 335; 16 *ib.* 3). The language of the affidavit should strictly conform to the rules of the court; otherwise, it may be treated as a nullity at the circuit (2 Hill, 359). An affidavit that the party has fully and fairly stated "this case," or "his case," to counsel, fairly implies that he has stated the whole case, and is a sufficient compliance, in that particular, with the rule (*Jordan* v. *Garrison*, 6 How. 6). But an affidavit that he has stated his "defence," or "the facts of his defence," to counsel, only implies that he has stated one side of the case, and is, therefore, insufficient (22 Wend. 636; 2 Hill, 359; *Richards* v. *Swetzer*, 1 Code R. 117; *Tompkins* v. *Acer*, 10 How. 310; *Ellis* v. *Jones*, 6 *id.* 296). So, an affidavit that the defendant has fully and fairly stated "the facts of his

case," &c., is insufficient (1 Hill, 644). And an affidavit which alleged that the defendant had stated "*his case in this cause*," was held insufficient (*Ellis* v. *Jones*, 6 How. 296). Nor will it do to qualify the requisition of the rule, by adding, "so far as the facts have come to defendant's knowledge," unless a sufficient excuse be shown (19 Wend. 617). An affidavit that the defendant has a "defence, &c., to the plaintiff's declaration filed in the suit," &c. (1 How. 68), or "to the bond," &c., or "a defence in the action," without stating "on the merits" (4 Hill, 584; *McMurray* v. *Gifford*, 5 How. 14), has been held bad. So, where the person described as counsel in the affidavit, was not in fact, a counsellor, although an attorney, the affidavit was insufficient (1 How. 74). The courts are always strict as to the form of an affidavit of merits (see Finlayson's Common Law Procedure Acts, p. 91, *c*).

a. **Affidavit to be filed and copy served.**—The affidavit is to be filed, and a copy, endorsed with a notice of the original being on file, served on the plaintiff's attorney, before or on the first day of the circuit (15 Johns. 536); or an inquest actually taken (6 Hill, 368; 6 Abb. 512).

b. **Service of the affidavit.**—Under the former practice it was said that an affidavit to prevent an inquest sometimes might, and at other times should, be served in a different manner from what is required in relation to other papers. At the circuit, if the plaintiff's attorney was not present, it might be delivered to the counsel having the cause in charge. If not delivered at the circuit, it should be served in such a way that it will probably come to the knowledge of the attorney in season to enable him to communicate with the counsel before the inquest is taken. Accordingly, when the affidavit was served on the second day of the circuit, by leaving it at the office of the plaintiff's attorney, no one being in at the time, and he took the inquest a few moments afterwards, but without knowing that the affidavit had been served, his proceedings were held regular (*Brainard* v. *Hanford*, 6 Hill, 368). It would be otherwise if there is any one in the office at the time of the service (*Smith* v. *Aylesworth*, 24 How. 33).

c. **Inquest, when it may be taken.**—An inquest may be taken on any day after the first day of the circuit, immediately after the opening of the court (Rule 29) but not after the trial of a litigated cause has commenced (*Nichols* v. *Chapman*, 9 Wend. 451), or after the jury have been discharged (*Dickinson* v. *Kimball*, 1 Code Rep. 83; *Haines* v. *Davis*, 6 How. 118; 1 Code Rep. N. S. 407).

d. In the superior court an inquest cannot be regularly taken on the first day of a trial term, unless the action is regularly called on that day upon the calendar (*Smith* v. *Brown*, 1 Duer, 665).

e. The plaintiff cannot take an inquest at a circuit for which he has not served a notice of trial, although he has been called there by a notice of the defendant (*Potter* v. *Davison*, 8 Abb. 43).

f. An inquest out of the order of causes upon the calendar can regularly be taken at the opening of the court, and only at that time. Where, at the opening of the court, the plaintiff asks to take an inquest, and he by direction of the court waits till a cause then on trial is concluded, and then takes an inquest, —it is irregular, but will be set aside without costs. In such a case the proper course is to defer taking an inquest until it can be done at the opening of the court (*Anon.* MS. Superior Ct.; see 6 Abb. 512).

g. Where a motion to change the place of trial was made by the defendant, and after the motion had been heard, and while the question was under advisement, the cause was reached on the calendar, and the plaintiff took an inquest. There was no stay of proceedings. The motion was subsequently granted. Held, that the decision related back to the time of making the motion and made the inquest irregular; but the inquest would have been regular if the decision on the motion to change the place of trial had been denied (*Wilson* v. *Henderson*, 15 How. 90).

h. **Proceedings on inquest.**—Upon an inquest the defendant has a right to appear, and cross-examine the plaintiff's witnesses; but he cannot prove a defence by them, nor examine witnesses on his own behalf. He may, however, object to the plaintiff's evidence, and except to the judge's opinion, as in

ordinary cases. So, the plaintiff may be nonsuited if he fail to make out his case (*Wilkis* v. *Green*, 1 Wend. 78; *Hartness* v. *Boyd*, 5 *ib.* 563). (See in note to § 246).

a. Where there is a counter-claim, not denied, and the plaintiff takes an inquest, the amount of the counter-claim must be allowed the defendant (*Potter* v. *Smith*, 9 How. 262).

b. An action at issue upon issues of fact only, and noticed for trial, and placed upon the calendar, if the defendant fails to appear when it is reached in its order, must be tried by the court and jury, or by the court alone if the plaintiff elects to treat the failure of the defendant to appear as a waiver by him of a trial by jury. The plaintiff cannot in such a case take an order to have his damages assessed by a sheriff's jury (*Giberton* v. *Fleischel*, 5 Duer, 652; *Dolan* v. *Petty*, 4 Sand. 678).

c. Where the defendant has answered, denying all or any of the material allegations of the complaint, although he does not appear on the trial, it is incumbent on the plaintiff to prove the allegations so denied before he is entitled to judgment (*Patton* v. *Haswell*, 34 Barb. 421).

d. One of two defendants appearing by a separate attorney and having a separate and different defence, may bring the cause as to himself to trial, and in case no one attends for the plaintiff, may take a judgment of dismissal by default (*Gurnee* v. *Hoxie*, 29 Barb. 547).

e. **Waiving or setting aside inquest.**—A party who has taken an inquest regularly is not bound to waive it, he may put the adverse party to his motion (*Smith* v. *Howard*, 12 Wend. 128). Setting aside inquest is in the discretion of the court (*Leighton* v. *Wood*, 17 Abb. 177). But no inquest should be set aside unless the court is fully satisfied that defendant has no evidence which would materially reduce the amount of the recovery (*Leighton* v. *Wood*, 17 Abb. 177). The court refused to open an inquest on the excuses that the counsel was engaged before a referee and that a material witness was absent (*Ward* v. *Ruckman*, 23 How. 330). An inquest regularly taken will not be set aside, where it appears that the answer was insufficient or frivolous (*Hunt* v. *Mails*, 1 Code Rep. 118). On setting aside a regular inquest, defendant was put under terms of withdrawing a plea of the statute of limitations (*Fox* v. *Baker*, 2 Wend. 244); and the superior court refused to set aside an inquest regularly taken, where the only defence was usury (*Morris* v. *Slatery*, 6 Abb. 74). So, the court refused to set aside an inquest because the action was improperly brought in the name of husband and wife, or for a variance between the complaint and judgment, and the proof, nor because the judge allowed an amendment by which the amount of plaintiff's recovery was increased (*Burger* v. *Baker*, 4 Abb. 11).

f. When the cause is reached and called, and an inquest taken in the absence of the defendant's counsel, *semble* his actual engagement at the time at another court, is not a ground for opening the default (*Morris* v. *Slatery*, 6 Abb. 74). After a default regularly taken, the same will not be opened, upon a mere general affidavit of merits. The party must disclose the nature of his defence so that the court may judge whether it is meritorious (*McGaffigan* v. *Jenkins*, 1 Barb. 31; *Ferrusac* v. *Thorn*, ib. 42). If a married woman is sued as a *feme sole*, and she allows judgment to pass by default, and it appears she obtained the credit by representing herself as a widow—the court will not on motion relieve her from the judgment, but leave her to an appeal (*Genet* v. *Dusenbury*, 2 Duer, 679).

g. An order opening an inquest may be appealed to the general term (*Leighton* v. *Wood*, 17 Abb. 177; but see 7 Bosw. 678; 17 Abb. 319, note).

h. **The action must be ready for trial as to all the defendants.**—An action cannot regularly be brought to trial until it is in such a situation that a *final judgment* can be rendered between *all the parties*. It cannot be tried in *sections* without leave of the court. Thus, if all the defendants have not been served with the summons, nor have appeared, a defendant who has been served and answered cannot bring the action to trial (*Morris* v. *Crawford*, 16 Abb. 124). One of two defendants appearing by a separate attorney, and having a separate and different defence, may bring the cause as to himself to

trial, and in case no one attends for the plaintiff may take a judgment of dismissal by default (*Gurnee* v. *Hoxie*, 29 Barb. 547). Nor where an action is at issue as against all of several defendants, can any one of them give notice of trial, and upon the failure of the plaintiff to appear, take a judgment against him by default. The cause must not only be in readiness for trial as between all the parties to the action, but it must also have been noticed for trial by all the defendants who have a right to appear on the trial and move for judgment against the plaintiff. Where the cause has not been noticed for trial by the plaintiff, and but one of several defendants who has appeared and answered has noticed it, no effectual trial can be had. Of course, the plaintiff cannot be forced to trial in such a case (*Ward* v. *Dewey*, 12 How. 193; and see *Tracy* v. *N. Y. Steam Faucet Co.*, 1 E. D. Smith, 349; *ante*, p. 459, *d*; *Burnham* v. *De Bevoise*, 8 How. 159; *Powell* v. *Finch*, 5 Duer, 666). But it has been held that one of several defendants, who defends separately, may bring the cause as to himself to trial, and in case no one attends for the plaintiff may take a dismissal of the complaint as to himself by default (*Gurnee* v. *Hoxie*, 29 Barb. 547).

a. **Jury.**—One not a freeholder nor assessed in respect of personal estate is not qualified to act as juror (*Valton* v. *Nat. Loan Fund Ins. Co.*, 17 Abb. 268). Where a juror is challenged for favor, the triers must find that he stands impartial and indifferent, or they should reject him (*Smith* v. *Floyd*, 18 Barb. 522). Where a judge acts as trier upon the challenge of a juror to the favor, his rejection, as immaterial, of evidence offered in support of the challenge cannot be reviewed (*Costigan* v. *Cuyler*, 21 N. Y. 134).

b. Where parties proceed to trial before a jury without objection to the manner in which such jury was empannelled or sworn, it is too late after verdict to make such objection (*Dayharsh* v. *Enos*, 1 Selden, 531; *Mayor of N. Y.* v. *Mason*, 1 Abb. 352; *Hardenburgh* v. *Crary*, 15 How. 307).

c. **Struck jury.**—As to when the court will order a struck jury, see *Walsh* v. *Sun Mut. Ins. Co.*, 17 Abb. 356. A special jury will not be ordered in New York city (*Nesmith* v. *Atlantic Ins. Co.*, 8 Abb. 423).

See Laws 1857, ch. 530.

d. **Right to begin.**—Where the plaintiff must or may give any evidence to make out his case he has the right to begin (see *Ayrault* v. *Chamberlain*, 33 Barb. 229, 233; *Hecker* v. *Hopkins*, 16 Abb. 301 *n*; *Littlejohn* v. *Greeley*, 13 Abb. 41; *Huntington* v. *Conkey*, 33 Barb. 218; *Hollister* v. *Bender*, 1 Hill, 150; *Lexington* v. *Paver*, 16 Ohio, 324; *Richards* v. *Nixon*, 20 Penn. 19; *Thurston* v. *Kennett*, 2 Foster, 151; *Vance* v. *Vance*, 2 Metc. (Ky.) 581; *Woller* v. *Morgan*, 18 B. Monr. 136; *Jackson* v. *Pittsford*, 8 Blackf. 194; *Latham* v. *Selkirk*, 11 Texas, 314; *Davis* v. *Brigham*, 29 Maine, 391; *Gross* v. *Turner*, 21 Verm. 437; *Leete* v. *Gresham Ins. Co.*, 7 Eng. Law & Eq. R. 578; *Sutton* v. *Saddler*, 3 C. B. N. S. 87; *Amos* v. *Hughes*. 1 Moo. & R. 464; *Carter* v. *Jones*, 6 C. & P. 64; 1 Moo. & R. 281; *Cooper* v. *Wakeley*, 3 C. & P. 474, 480; see also, 3 Camp. 366; 2 Stark. 518; 6 C. & P. 687, 773, 666; 1 Moo. & R. 304, 386, 476, 441, 578; 15 B. Monr. 27; Hardin, 182).

e. **Counsel addressing jury.**—Whether counsel shall be permitted to address the jury is in the discretion of the court (*The People* v. *Cook*, 4 Selden, 67); and the court will restrain the observations of counsel to the points in issue (*Mitchell* v. *Borden*, 8 Wend. 570; and see *Bullock* v. *Smith*, 15 Geo. 395; *Mitchum* v. *The State*, 11 Geo. 615; *Fry* v. *Bennett*, 3 Bosw. 202).

f. In opening each party should be confined to a legitimate opening of his *own* case (*Ayrault* v. *Chamberlain*, 33 Barb. 229). Evidence cannot be rejected because not within the opening (*Nearing* v. *Bell*, 5 Hill, 291).

g. **Objecting to pleadings.**—The only objections that can be taken to the complaint at the trial are that it does not show a cause of action, or that the court has not jurisdiction (*Winterson* v. *Eighth Av. R. R. Co.* 2 Hilton, 389; *Luddington* v. *Taft*, 10 Barb. 447).

h. A defendant cannot move for a non-suit on the ground of the insufficiency of the complaint (*Kelly* v. *Kelly*, 3 Barb. 419).

a. Where the defendant set up matter as a counter-claim, to which there was no demurrer or reply, but which the presiding judge held did not, in effect, constitute a counter-claim,—held that he might disregard such alleged counter-claim (*Van Valen* v. *Lapham*, 13 How. 246).

b. **Postponement on payment of costs of circuit.**—Where a cause was reached at the circuit, and called on for trial by the defendants; whereupon the plaintiff applied for a postponement, which was denied. He then gave notice of discontinuance, and made a tender of costs; ten days afterwards, but during the same circuit, the judge at the circuit made an order, dismissing the complaint with costs and directing an extra allowance,—held that the judge had jurisdiction to make such order (*Moffat* v. *Ford*, 14 Barb. 577).

c. Where a defendant has been offered his costs of the circuit and it does not appear that they have ever been made out or adjusted in any way, or he prepared to receive them, he is not entitled to a dismissal of the complaint for not bringing the cause to trial at the circuit (*Hawley* v. *Seymour*, 8 How. 96). Defendant should have had his costs adjusted and given plaintiff notice of the amount. (*Id.*)

d. **Examination of Witnesses.**—The court may in its discretion allow leading questions to a witness (*Cheney* v. *Arnold*, 18 Barb. 434; *Budlong* v. *Van Nostrand*, 24 id. 25); and decide whether or not the question is leading (*Walker* v. *Dunspaugh*, 20 N. Y. 170); may allow further testimony after a party has closed his case (*Chancel* v. *Barclay*, 1 E. D. Smith, 384; 20 N. Y. 60; *Sheldon* v. *Wood*, 2 Bosw. 285); and may control the cross-examination (*Peck* v. *Richmond*, 2 E. D. Smith, 380). After a witness has been once examined, unless requested to remain he may leave the court (*Sheffield* v. *Rochester R. R. Co.* 21 Barb. 339). If the opposite party desire to cross-examine him, it should be done while he is on the stand. (*Id.*) As to the time and manner of examining a witness as to his competency (see *Seely* v. *Engell*, 17 Barb. 530). The party putting a witness on the stand may be required by his adversary to state in advance what he proposes to prove by him (*Beal* v. *Finch*, 1 Ker. 128); and whether a witness shall be put on his *voir dire* or not is in the discretion of the judge (*Seeley* v. *Engell*, 17 Barb. 530). The court may in its discretion interfere and protect a witness from irrelevant questions (*Varona* v. *Socarras*, 8 Abb. 302); and the order of proof is in the discretion of the judge (*Bedell* v. *Powell*, 13 Barb. 183; *Seeley* v. *Chittenden*, 4 How. 265).

e. Counsel objecting to a question put to a witness may be required to state the grounds of his objection (*Harris* v. *Panama R. R. Co.* 5 Bosw. 312; *Elwood* v. *Diefendorf*, 5 Barb. 398). Where a conversation between persons is offered in evidence, the party offering it must disclose how it is material (*Trustees of Baptist Church* v. *Brooklyn Fire Ins. Co.* 23 How. 448).

f. A party must except to a question put to a witness before the question is answered; he cannot except after the question is answered (*Cheesebrough* v. *Taylor*, 12 Abb. 227).

g. Each party should put in all his proof before resting his case (*Seeley* v. *Chittenden*, 4 How. 265; *Ayrault* v. *Chamberlain*, 33 Barb. 234; but the number of witnesses and whether or not a witness should be recalled is in the discretion of the presiding judge (*Treadwell* v. *Stebbins*, 6 Bosw. 538; *Anthony* v. *Smith*, 4 Bosw. 503; *Burger* v. *White*, 2 Bosw. 92; see *Lewis* v. *Ryder*, 13 Abb. 1; *Stacey* v. *Graham*, 3 Duer, 444; *Pearson* v. *Fiske*, 2 Hilton, 146; *Meakim* v. *Anderson*, 11 Barb. 216; *Dunckle* v. *Kocker*, 11 Barb. 387; *Williams* v. *Hayes*, 20 N. Y. 60; *Green* v. *Brown*, 3 Barb. 120; *Keeler* v. *Delavan*, 4 Barb. 317). This discretion may be reviewed on a motion for a new trial, but not on appeal (*Nolton* v. *Moses*, 3 Barb. 31).

h. The court may limit the number of witnesses to any point (*Anthony* v. *Smith*, 4 Bosw. 503; *Ward* v. *Wash. Ins. Co.* 6 Bosw. 229).

i. Allowing or refusing to allow the plaintiff to re-open the case after the defendant has rested, is in the discretion of the court (*Henry* v. *Lowell*, 16 Barb. 268).

a. The credibility of witnesses is a question for the jury (*Merritt* v. *Lyon*, 8 Barb. 110). It is in the discretion of the court to determine when testimony as to the character of a witness shall cease, when it may be resumed and which party shall close the examination, and the decision is not reviewable (*Spear* v. *Myers*, 6 Barb. 445). A witness cannot be impeached as to credibility by proof of any single act of bad conduct (*Varona* v. *Socarras*, 8 Abb. 302).

b. Under a general objection to the competency of a witness, objection to the competency of individual answers given by him cannot be raised (*Anon.* 8 Abb. 102).

c. The right of counsel on cross-examination to enquire into collateral facts with a view to discredit the witness, is in the discretion of the court, and is not reviewable, as a general rule, either on exception or motion for a new trial (*Allen* v. *Bodine*, 6 Barb. 383).

c. Where a witness testifies to facts not within his knowledge, the testimony cannot be struck out, the only remedy is to show by cross-examination that the witness had not sufficient knowledge of what he had testified to (*Rushmore* v. *Hall*, 12 Abb. 421; see *Hall* v. *Ernest*, 36 Barb. 585).

e. A witness may, on cross-examination be interrogated as to his religious belief, to show that he does not believe in the existence of a God who will punish false swearing, it goes to the credibility of the witness (*Stanbro* v. *Hopkins*, 28 Barb. 265).

f. Evidence once given cannot be withdrawn (*Decker* v. *Bryant*, 7 Barb. 183) and after evidence bearing upon the issues has been duly taken, without objection, the judge at the circuit has no power to strike it out, or to exclude it from the consideration of the jury (*Hall* v. *Ernest*, 36 Barb. 585).

g. A party cannot impeach his own witness, that is to say he cannot insist that he is unworthy of belief, but he may show by other witnesses that the facts are not as he has stated them, in other words he may be contradicted (*Hunt* v. *Fish*, 4 Barb. 324).

h. An adverse witness cannot be contradicted unless his attention has been directed to the subject on which the contradiction is proposed (*Trustees of Baptist Church* v. *Brooklyn Fire Ins. Co.*, 23 How. 448).

i. As to the right of a party to contradict testimony brought out by himself (*Trustees of Baptist Church* v. *Brooklyn Fire Ins Co.*, 23 How. 448).

j. Where testimony is offered which is relevant as to one of two defendants but is irrelevant as to the other, it must be objected to by the latter on that ground. If an exception is taken by both defendants it is not erroneous to overrule it (*Black* v. *Foster*, 28 Barb. 387).

k Where evidence is offered as a defence and excluded on the ground that it is not warranted by the pleadings, if the party desires to avail himself of it in mitigation, he should offer it again for that purpose (*Travis* v. *Barger*, 24 Barb. 615).

l. If an offer of evidence contain any matter not admissable, the whole may be rejected (*Hosley* v. *Black*, 26 How. 97).

m. A juror may be examined as a witness in the cause (*Manley* v. *Shaw*, 1 Carr. & M. 361).

n. **Nonsuit.**—A nonsuit may be ordered at any stage of the trial (*Ernst* v. *Hudson River R. R. Co.*, 24 How. 97). After plaintiff has closed his case (*Winfield* v. *Potter*, 24 How. 446) On a defendant moving for a nonsuit he must specify the grounds for his motion (*Castle* v. *Duryea*, 32 Barb. 480) A motion for nonsuit, on the ground that plaintiff has shown no right to recover, *or* that the evidence does not entitle the plaintiff to recover, is too indefinite (*Trustees of St. Mary's Church* v. *Cagger*, 6 Barb. 577). A defendant moving at the close of the evidence for a nonsuit, which is denied, if he desires that questions of fact be submitted to the jury, must distinctly request it and cannot upon appeal, make the point under a general exception to the judge's direction of a verdict, that there are questions of fact which should have been submitted (*Winchell* v. *Hicks*, 18 N. Y. 558; and see *Bidwell* v. *Lament*, 17 How. 357).

a. Where testimony is conflicting, the case must be submitted to the jury (*Smith* v. *Tiffany*, 36 Barb. 23; *Bernhard* v. *Brunner*, 4 Bosw. 528; *Bidwell* v. *Lament*, 17 How. 357).

b. A nonsuit cannot be directed by the judge on the assumption, by him, that a witness for the plaintiff is not worthy of belief (*Merritt* v. *Lyon*, 3 Barb. 110). That the jury may choose to discredit evidence not impeached and not incredible upon its face, is no reason for submitting it to them (*Lomer* v. *Meeker*, 25 N. Y. 361). It is error to refuse a nonsuit where the uncontradicted evidence establishes a defence (*id*).

c. When the court may nonsuit, see *Smith* v. *Sanger*, 3 Barb. 360; *Kelly* v. *Kelly*, 3 Barb. 419; *Carpenter* v. *Smith*, 10 Barb. 668; *Thompson* v. *Dickerson*, 12 Barb. 108; *Dascomb* v. *Buffalo and State Line R. R.*, 27 Barb. 222; *Ernst* v. *Hudson River R. R. Co.*, 24 How. 97; *Bidwell* v. *Lament*, 17 How. 357; *Fales* v. *McKeon*, 2 Hilton, 53.

d. Where a nonsuit depends on important questions, and disposes of the whole of plaintiff's rights, it is a proper case for suspending judgment and directing that the plaintiff's exception to the nonsuit be heard in the first instance at the general term (*Molony* v. *Dows*, 9 Abb. 86).

e. **Effect of nonsuit or dismissal of complaint.**—Upon a motion for nonsuit a dismissal of the complaint may be taken (*Casson* v. *Whalon*, 1 Code Rep. N. S. 27; 5 How. 325). A dismissal of the complaint being equivalent to a nonsuit (*Holmes* v. *Slocum*, 6 How. 218; *Harrison* v. *Wood*, 2 Duer, 50; see *Robbins* v. *Wells*, 26 How. 15), is not a bar to a second action for the same cause (*Dexter* v. *Clarke*, 22 How. 289; *Seaman* v. *Ward*, 1 Hilton, 52; *Tattersall* v. *Hass*, id. 56; *Coit* v. *Beard*, 33 Barb. 357; *Coit* v. *Bland*, 12 Abb. 462; 22 How. 2); unless it be an action for equitable relief (see *De Witt* v. *Chandler*, 11 Abb. 472; and note to *Coit* v. *Bland*, 12 Abb. 462). In actions for equitable relief a dismissal of the complaint on the merits is a bar to a second action for the same cause, and this effect cannot be prevented by directing that the dismissal be without prejudice to a second action (*Bostwick* v. *Abbott*, 16 Abb. 417). In an action on contract where the dismissal of the complaint in a previous action is set up as a bar, the plaintiff may show to obviate such defence that the dismissal was not on the merits (*Wilcox* v. *Lee*, 26 How. 418).

f. On dismissing a complaint on the merits, the court cannot, by giving leave to bring a new action, destroy the bar occasioned by the dismissal (*Bostwick* v. *Abbott*, 40 Barb. 331).

g. **Rulings at the trial.**—On an exception to all the rulings the exception cannot avail if any of the rulings are right (*Cronk* v. *Canfield*, 31 Barb. 191; and see *Dows* v. *Rush*, 21 Barb. 156).

h. Counsel may submit their propositions separately, and require the judge to pass upon them separately (*Vallance* v. *King*, 3 Barb. 548).

i. An erroneous decision of the judge on the trial, can be corrected only on a case or exceptions, it cannot be reviewed on a special motion (*Craig* v. *Fanning*, 6 How. 336).

j. Where a party offers to prove two connected facts, one of which is inadmissible, it is not error for the court to reject the offer as a whole (*Harger* v. *Edmonds*, 4 Barb. 256).

k. **Production of documents or chattels.**—Where a witness on his examination admits the possession, in court, of a document material to the matter in issue, but refuses to produce it, the court may compel the production of such document or punish the witness for contempt (*Boynton* v. *Boynton*, 16 Abb. 87; 25 How. 490; see however, *Grim* v. *Hamel*, 2 Hilton, 434).

l. On a trial for breach of warranty of a chattel, neither a party nor a witness can be compelled to produce the chattel in court (*Hunter* v. *Allen*, 35 Barb. 42).

m. **Changing ground of action or defence.**—Where in an action for trespass on lands, the defendants in their answer, set up a title to the premises in a third person, and justify under a license from him, they cannot change their

ground on the trial and show title in one of the defendants (*Coan* v. *Osgood*, 15 Barb. 583).

a. Where in an action against a railroad company to recover damages for an injury to the plaintiff's property, the complaint merely alleges that the injury was occasioned by the neglect to construct *cattle guards*, a recovery cannot be had for an omission to build *fences* (*Parker* v. *Rens. & Saratoga R. R. Co.* 16 Barb. 315).

b Where a complaint set forth a contract by defendants to transport plaintiff in a particular vessel, and alleged a breach in not conveying in that vessel, without either alleging an obligation on defendants to provide a substitute in the event of the loss of the first named vessel, or claiming any damage for defendant's neglecting to forward him in some other vessel held that plaintiff must be confined to the breach specially alleged and could not recover on any other grounds (*Briggs* v. *Vanderbilt*, 19 Barb. 222).

c. In an action for a false warranty and for a breach of warranty, the plaintiff on the trial elected to go for the false warranty, held that he could not at the close of the trial change his ground and have the jury charged that if they found a breach of a warranty only without proof of fraud, the plaintiff was entitled to recover (*Springstead* v. *Lawson*, 23 How. 302).

See *ante*. page 351 *e*.

d. **Charging jury.**—A judge is not bound to give any instructions to the jury as to the law (*Haupt* v. *Pohlmann*, 16 Abb. 307); nor to express an opinion on a question of fact (*Moore* v. *Meacham*, 10 N. Y. 208); but he may do so (*Cheesebrough* v. *Taylor*, 12 Abb. 227). The court may instruct the jury to presume a fact in certain cases (*Hoyt* v. *Carter*, 16 Barb. 220); and as to the effect of the verdict on the question of costs (*Nolton* v. *Moses*, 3 Barb. 31). If a party supposes the jury to be misled by any instruction from the judge he should suggest that fact to the judge, he cannot remedy it by excepting to the instruction (*Stroud* v. *Frith*, 11 Barb. 300; and see *Nolton* v. *Moses*, 3 Barb. 31; *Crawford* v. *Wilson*, 4 Barb. 505; *Lansing* v. *Russell*, 13 Barb. 510). The facts being undisputed the judge may direct the jury how they shall find their verdict (*Porter* v. *Havens*, 37 Barb. 343; *The People* v. *Cook*, 4 Selden, 67; *Holbrook* v. *Wilson*, 4 Bosw. 65).

e. If a party desires the attention of the jury called to any particular fact or aspect of the case, he should [before the judge commences to charge the jury] request to have it done (*Parsons* v. *Brown*, 15 Barb. 590; *Gracer* v. *Stellwagen*, 25 N. Y. 316). The request should be in such form that the court may properly charge in the very terms of the request without qualification (*Carpenter* v. *Stilwell*, 1 Kernan, 61; *Booth* v. *Sweezey*, 4 Selden, 276; *Snell* v. *Snell*, 3 Abb. 426; *Vallance* v. *King*, 3 Barb. 548; *McBurney* v. *Cutter*, 18 Barb. 204; *Elton* v. *Markham*, 20 Barb. 343; *Robinson* v. *N. Y. & Erie R. R. Co*, 27 Barb. 512). And if the charge is in *substance* such as requested, although not in the exact words, it is sufficient (*Sherman* v. *Wakeman*, 11 Barb. 255; *First Bapt. Church* v. *Brooklyn Fire Ins. Co.*, 23 How. 448; *Williams* v. *Birch*, 6 Bosw. 300; see *Gale* v. *Wells*, 12 Barb. 85).

f. It is not error to refuse to charge a proposition correct in law, where the evidence does not warrant a finding of facts to support such a proposition (*Kiernan* v. *Rochelean*, 6 Bosw. 148; and see *Gurney* v. *Smithson*, 7 *id.* 396; *Lyon* v. *Marshall*,, 11 Barb. 244; *Gardner* v. *Clark*, 17 Barb. 538; *Rushmore* v. *Hall*, 12 Abb. 421; and see *Walrod* v. *Ball*, 9 Barb. 271), nor is it error that the judge in his charge stated as law what had nothing to do with the case (*Lyon* v. *Marshall*, 11 Barb. 241; *Horner* v. *Wood*, 16 Barb. 386).

g. An exception to the whole charge and to each and every part thereof, raises but a single exception and is unavailing if any part of the charge is correct (*Dows* v. *Rush*, 28 Barb. 127; *Vankirk* v. *Wilds*, 11 Barb. 520). Whether it would be sufficient to except the charge "and to each part thereof separately and distinctly" (*Dows* v. *Rush*, 28 Barb. 157; and see *Crook* v. *Canfield*, 31 Barb. 171).

a. A defendant's request to charge was refused on the ground that the previous charge covered the whole ground occupied by the evidence. To this refusal the defendant excepted but did not except to the judge's remark that the matter had been already charged and without asking that it should be submitted to the jury whether the charge had covered the whole case embraced by the evidence, held that the proper exception had not been taken and the defendant was remediless (*Hotchkins* v. *Hodge*, 38 Barb. 118).

b. A statement of the evidence, or a comment upon it or its effect, an assumption of a fact in a cause, or a mere reference to what is established by the evidence, by a judge in a charge to the jury, are not grounds of exception to the charge (*Dows* v. *Rush*, 28 Barb. 156).

c. A party dissatisfied with the expression of an opinion by a judge upon a question of fact, or the conclusion at which he arrives in regard to it, must express that dissatisfaction, not by excepting to the charge of the judge on that point, but by asking to have the question of fact submitted to the jury for their determination. (*Id.*)

c. An exception to the charge, on the ground that a particular question should have been submitted to the jury as a question of fact is not a compliance with this rule; where the judge has made no charge to the contrary, nor been requested to submit the question to the jury, and has not refused to do so. (*Id.*)

d. An exception to the charge in such a case is not equivalent to a request to the judge to submit the question and a refusal to do so. (*Id.*)

e. In an action for assault, the judge charged the jury as to the effect of their verdict on the question of costs, in case they should find for the plaintiff, and refused to charge them that in arriving at the amount of the verdict they would give plaintiff, they had nothing to do with the question of costs, or whether or not their verdict would entitle him to full costs, held correct (*Waffle* v. *Dillenbeck*, 39 Barb. 123).

f. **Deliberation of jury.**—The jury in retiring to deliberate may take with them any papers read in evidence on the trial (*Howland* v. *Willetts*, 5 Seld. 170.) The judge may keep the jury together as long as in his judgment there is any reasonable prospect of their being able to agree (*Green* v. *Telfair*, 11 How. 260). But he has no right to threaten or intimidate a jury, who are unable to agree upon a verdict in order to affect their deliberations (*Green* v. *Telfair*, 11 How. 260).

h. **Separation of jury** without leave, is not *per se* a ground for a new trial (*Anthony* v. *Smith*, 4 Bosw. 503).

i. **Interference with jury.**—Any improper interference with the jury by either of the parties, will vitiate the verdict (*Reynolds* v. *Champlain Transp. Co.* 9 How. 7; *Dorlon* v. *Lewis*, 9 How. 1; *Nesmith* v. *Clinton Fire Ins. Co.* 8 Abb. 141). A motion for a new trial on the ground of the misbehavior of the jury, should be made before the judge who presided at the trial; or if before another judge it should be made upon a case (*Nesmith* v. *Clinton Fire Ins. Co.* 8 Abb. 141).

j. Affidavits of jurors are not receivable to impeach their verdict, for mistake or error as to the merits, or for any misconduct of a juror (*Green* v. *Bliss*, 12 How. 428); but the affidavit of a juror is receivable to show an interference with the jury by either party to the action (*Reynolds* v. *Champlain Transp. Co.* 9 How. 7).

k. **Sealed verdict.**—Judge may order jury to bring in a sealed verdict without the consent of the parties (*Green* v. *Bliss*, 12 How. 428). A sealed verdict should properly be signed by all the jurors, but the omission of any juror to sign does not render the verdict void, but only irregular, and the irregularity is waived if not insisted on at the time the verdict is rendered. (*Id.*)

l. **Polling jury.**—The jury may be polled at the instance of either party, and then any of them may dissent from it (7 Johns. 32; 3 Cow. 23); in which case the jury may be again sent out (2 Wend. 352; 3 Johns. 255). A party, against whom a verdict is declared, has an absolute right to poll the jury at any time before the verdict is entered. In polling the jury the inquiry is, "Is this your verdict?" and the court cannot be required to have the question

put, "Is this your verdict against each and both of the defendants?"—(*Labar* v. *Koplin*, 4 Coms. 547). If each juror does not say the verdict is his, it is the duty of counsel then and there to call the attention of the court to the fact, or he loses the right afterwards to object, as where one juror answered "I consented to it," and another, "I agreed to it" (*Green* v. *Bliss*, 12 How. 428).

a. **Irregularities at the circuit.**—The remedy of a party aggrieved by proceedings at the circuit, such as motions to put a cause over the circuit, to put off a cause to a later day in the same circuit, to correct the calendar, or for attachment against an absent witness, is not by appeal but by motion at special term to set aside the proceedings for irregularity (*Miller* v. *Porter*, 17 How. 526). Thus where the judge at the circuit refused the defendant's motion to postpone a trial and the plaintiff proceeded substantially *ex parte* and took a verdict, the special term, on defendant's motion, set aside the verdict and allowed defendant to defend on terms, and the general term affirmed the action of the special term. (*Id.*)

b. **Exceptions.**—To review errors upon the trial or to raise a question of law, an exception must be taken and set forth in a case (*Ingersoll* v. *Bostwick*, 22 N. Y. 425; *Otis* v. *Spencer*, 6 Abb. 127). An exception must be specific (see *Caldwell* v. *Murphy*, 1 Kernan, 416; *Hart* v. *Rens. R. R. Co.* 4 Selden, 37; *Acker* v. *Ledyard*, id. 62; *Mabbett* v. *White*, 2 Kern. 442; *French* v. *White*, 5 Duer, 254; *Requa* v. *Holmes*, 16 N. Y. 193; *Meakim* v. *Anderson*, 11 Barb. 216); and not cover more than is actually erroneous (*Fowler* v. *Dorlon*, 24 Barb. 384).

c. If after an exception the ground of objection is removed, the exception is not available (*Bronson* v. *Wiman*, 10 Barb. 406).

d. Exception should be on some point of law, either in admitting or rejecting evidence, or upon a challenge, or some matter of law, arising upon a fact not denied, in which either party is overruled by the court (*Kelly* v. *Kelly*, 3 Barb. 419). There can be no exception to matters within the discretion of the court, as the allowance or disallowance of an amendment (*Ford* v. *David*, 1 Bosw. 570; *Roth* v. *Schloss*, 6 Barb. 308; see *Greggs* v. *Howe*, 31 Barb. 100); or of an adjournment (*Holbrook* v. *Wilson*, 4 Bosw. 65); or to the refusal of the judge to receive a demurrer to evidence (*Colegrove* v. *N. Y. & N. Haven R. R. Co.* 20 N. Y. 492); or to commentaries of the judge, at the circuit, upon the evidence (*Nolton* v. *Moses*, 3 Barb. 31; *Crawford* v. *Wilson*, 4 Barb. 505; *Lansing* v. *Russell*, 13 Barb. 510; and see *Walrod* v. *Ball*, 9 Barb. 271).

e. Where no exception is noted on the judge's minutes, it seems evidence will be received that an exception was in fact taken (*Sanger* v. *Vail*, 4 Abb. 217).

f. **Ordering exceptions to be heard at general term, in first instance**—A judge of circuit cannot order a case to be heard at general term, he can only order the exceptions to be so heard (*Cronk* v. *Canfield*, 31 Barb. 171).

g. An exception to a dismissal of the complaint (a nonsuit), cannot be ordered to be heard in the first instance at general term, and if such an order is made, the general term will order a new trial (*Hoagland* v. *Miller*, 16 Abb. 103).

§ 259. [214.] (Am'd 1851.) *Court to be furnished with copy pleadings, &c.*

When the issue shall be brought to trial by the plaintiff, he shall furnish the court with a copy of the summons and pleadings, with the offer of defendant, if any shall have been made. When the issue shall be brought to trial by the defendant, and the plaintiff shall neglect or refuse to furnish the court with a copy of the summons and pleadings and the offer of the defendant, the same may be furnished by the defendant.

§ 260. [215.] (Am'd 1849.) *General and special verdicts defined.*

A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

a. A special verdict must state the facts proved, not the evidence given to prove the facts (5 Hill, 634; 4 *ib.* 171. And see *Sisson* v. *Barrett*, 2 Coms. 406; *Hill* v. *Covell*, 1 Coms. 522; *Langley* v. *Warner*, 3 Coms. 329). It is an established rule that in deciding on special verdicts, the court cannot pass on any fact not stated or derivable from the facts appearing by such verdict (*Williams* v. *Jackson*, 5 Johns. 502), except such as are admitted by the pleadings (*Barto* v. *Himrod*, 4 Selden, 483). The requisites of a special verdict are the same now that they were before the code (*Williams* v. *Willis*, 7 Abb. 90). Certain facts in issue were admitted on the trial, and only one issue submitted upon which the jury found "for the plaintiff." Held not a special verdict. (*Id.*)

b. It is a mistrial where no general verdict being rendered, the answers of the jury to specific questions, not covering the whole case like a special verdict, are taken and referred to the general term for judgment upon the answers and the questions of law arising in the case (*Manning* v. *Monaghan*, 23 N. Y. 539). A special verdict must find all the facts (*Eisemann* v. *Swan*, 6 Bosw. 669); or a new trial will be ordered. (*Id.*)

c. Where there are defences in *abatement* and in *bar* and the case goes to the jury on both defences, the judge should require a separate verdict on each defence (*Gardner* v. *Clark*, 21 N. Y. 399).

§ 261. [216.] (Am'd 1849.) *When jury may render either general or special verdict, and when court may direct special finding.*

In an action for the recovery of specific personal property, if the property have not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property, if their verdict be in favor of the plaintiff, or if they find in favor of the defendant, and that he is entitled to a return thereof; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention, or taking and withholding such property.

In every action for the recovery of money only, or specific real property, the jury in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered upon the minutes.

a. **In actions to recover personal property.**—In actions to recover the possession of personal property, and damages for its detention, a general verdict is proper. 1*st.* Where there has not been a delivery of the property to the plaintiff, and the answer does not deny the value of the property claimed to be as stated in the complaint; 2*d.* Where the property has been delivered to the plaintiff, and the answer does not claim a re-delivery (*Archer* v. *Boudinet*, 1 Code Rep. N. S. 372). Where the property has been delivered to the plaintiff he cannot elect to take judgment for the value; but where it has not been delivered to him, the judgment should be in the alternative (*Rockwell* v. *Saunders*, 19 Barb. 474). In an action against several defendants, to recover possession of personal property, the court may adjudge a return of the goods in favor of such of the defendants as shall appear to be entitled to a return, and to refuse it as to the others (*Woodburn* v. *Chamberlin*, 17 Barb. 446). Although the jury find the exclusive possession of the goods to be in one of the defendants, they are not bound to render a general verdict in favor of all the defendants. (*Ib.*) And where in such an action a portion of the defendants claim the entire possession, by virtue of a chattel mortgage, in hostility both to their co-defendant (the sheriff) and the plaintiff, and the proof shows that the sheriff levied upon the property, and held it in subserviency to the mortgage, it is not necessary that the jury should determine by their verdict the value of the property admitted by the mortgagees to be in their possession. A general assessment of the whole value is all that is necessary. (*Ib.*) Where the property has been delivered to the plaintiff, and the defendant in his answer claims a return thereof, if the verdict is for the defendant the plaintiff has a right to return the property, instead of paying the value of it; which can only be required of him in case a return cannot be had. It is plaintiff's right to have the damages for the taking and detention assessed. The judgment should be accordingly. The defendant has not the right to a judgment for the value of the property or the return thereof as he shall elect. The jury should be instructed to find for the defendant generally and to assess the value of the property, together with the damages for the taking and detention (*Glann* v. *Younglove*, 27 Barb. 480). Where the jury find a verdict for the plaintiff, but award no damages for the detention, the court may supply the omission by inserting nominal damages (*Von Schoening* v. *Buchanan*, 14 Abb. 185).

b. That the judgment in an action for the return of personal property, is for the value absolutely, instead of in the alternative for the property or its value, and does not conform to the report of the referee, is an irregularity, to be corrected by the court of original jurisdiction, but not reviewable on appeal (*Ingersoll* v. *Bostwick*, 22 N. Y. 425; *Johnson* v. *Carnley*, 10 id. 570).

c. **Actions on contract.**—In an action to recover a money demand on contract where the amount of principal and interest is admitted, and by a special verdict the defendant's liability is established, an assessment by the jury of the amount of the recovery is unnecessary (*Bulkley* v. *Marks*, 15 Abb. 454).

d. **Mandamus.**—The jury may render a general verdict on the trial of the issues on a plea to the return to a mandamus (*The People* v. *The Board of Police*, 14 Abb. 158; *id.* 151).

e. **Part for plaintiff, and part for defendant.**—In case of several issues, the jury may find some for the plaintiff and some for the defendant (1 Arch. Pr. 218). So in an action in form *ex delicto* against several defendants, the jury may find one guilty and acquit another (1 Cow. 322; 14 Johns. 166; 2 *ib.* 382). As to a separate acquittal of one defendant in order to make him a witness for his co-defendant, see 3 Hill, 104; 4 *ib.* 549; 6 *ib.* 583; 6 Ohio R. 144.

f. **Damages exceeding amount claimed.**—The jury can in no case give damages for an amount exceeding the amount claimed by the complaint; and it is the duty of the clerk, if the jury find a verdict for greater damages, to enter it for the amount claimed merely. If, however, entered for more, the plaintiff may remit the excess (5 Hill, 76; 4 M. & S. 94). Or the plaintiff may have leave to amend his complaint by increasing the amount of damages; but such an amendment will only be allowed on condition that the

plaintiff submit to a new trial (*Bowman* v. *Earle*, 3 Duer, 691) if the defendant desires it (*Corning* v. *Corning*, 1 Code Rep. N. S. 351; 2 Selden, 98). Where the jury gave a verdict of an amount exceeding the amount claimed by the complaint, and the judge on the trial allowed an amendment of the complaint by increasing the amount of damages claimed, and without imposing any terms, and judgment was entered for the amount of the verdict; and the general term afterwards vacated the order allowing the amendment, and gave leave to the plaintiff to remit the damages so far as they exceeded the amount originally demanded, and, that being done, affirmed the judgment for that amount, with costs, reversing as to the excess,—on appeal to the court of appeals that judgment was affirmed. (*Id.*)

a. It is no objection to the recovery of single damages that the complaint goes upon the statute of wilful trespass (*Dubois* v. *Beaver*, 25 N. Y. 123).

b. **Interest.**—In actions of assumpsit, it is usual to calculate interest, and have it assessed by the jury as part of the plaintiff's damages; and interest is always allowed on promissory notes, bills of exchange, and goods sold at a specified credit; and generally, it is allowable by way of damages, in assessing damages for breach of a contract (3 Wend. 356; 15 Johns. 24, 38; 1 *ib.* 315; *Dana* v. *Fielder*, 2 Kernan, 40). It is recoverable on contracts for the payment of money, from the time the principal ought to have been paid (7 Wend. 109; 20 *ib.* 58; *Purdy* v. *Phillips*, 1 Kernan, 406), and is always properly chargeable where there is either an express or implied agreement to pay it (7 Wend. 318). But interest is not recoverable on uncertain and unliquidated demands (1 Johns. 315; 6 *ib.* 45; *McKnight* v. *Dunlop*, 4 Barb. 36), and, therefore, it is not allowable on an unliquidated account for board (17 Barb. 454), or for medical attendance, no date being proved (*Rawson* v. *Grou*, 4 E. D. Smith, 18), or for work and labor (7 Wend. 178; 3 Cow. 393; 4 *Ib.* 496) or goods sold and delivered (*Ib.* 6; *Ib.* 193), where no time is fixed for payment (*Ib.*), unless there be an express agreement to allow interest, or unless there are circumstances from which such agreement can be inferred (*Ib.*; 3 *Ib.* 496; 3 *Ib.* 393; 5 *Ib.* 587; 6 Johns. 45). In actions on policies of insurance, where there is no doubt as to the amount of the loss, interest is allowed from the time of payment specified in the policy (23 Wend. 545; 1 Johns. 315; 2 Hill, 589; 1 *Ib.* 261). In an action for debt on judgment, interest is recoverable from the time of its rendition (3 Wend. 496; 22 Wend. 157; 3 Hill, 426). In debt on bond, interest is not recoverable beyond the amount of the penalty, where the judgment has not been delayed on the part of the defendant (1 Johns. 343; 3 Caines R. 48; *Lyon* v. *Clarke*, 4 Selden, 148). In covenant for a certain sum due for rent, and payable in money, interest is allowable (4 Johns. 183; and see *Livingston* v. *Miller*, 1 Kernan, 80). And so it is in an action for use and occupation (*Ten Eyck* v. *Houghtaling*, 12 How. 523). In an action on a premium note for non-payment of assessments (*Hyatt* v. *Wait*, 37 Barb. 30). In an action for attorney's costs (*Adams* v. *Fort Plain B'k.*, 23 How. 45). In an action against a stockholder in manufacturing company (*Burr* v. *Wilcox*, 22 N. Y. 551). In trespass for taking goods (8 Johns. 446), and in trover (*ib.* 2; *ib.* 280; 4 Cow. 53; 7 Wend. 354; 8 *ib.* 505), interest may be allowed on the value of the chattels, from the time of the trespass or conversion, by way of damages. An allowance of interest in tort may be submitted to jury (*Walrath* v. *Redfield*, 18 N. Y. 458). As to allowing interest in addition to penalty of bond (*Brainard* v. *Jones*, 18 N. Y. 35). Interest on legacies (*Bradley* v. *Faulkner*, 2 Kernan, 472). As to interest in action against sheriff for an escape (*Renick* v. *Orser*, 4 Bosw. 384). Interest on an account usually commences from the time it is rendered (*Beers* v. *Reynolds*, 12 Barb. 288). Interest in action to recover bank deposits (*Pelham* v. *Adams*, 17 Barb. 384). Interest allowed on recovery of money deposited on an illegal wager (*Ruckman* v. *Pitcher*, 20 N. Y. 9; 13 Barb. 556). Interest upon interest when recoverable (*Townsend* v. *Corning*, 1 Barb. 627; *Tylee* v. *Yates* 3 *id.* 223; *Ackerman* v. *Emott*, 4 *id.* 626). An exception to the allowance of interest must be specific (*McMahon* v. *N. Y. & Erie R. R. Co.*, 20 N. Y. 469). Where interest is improperly allowed, the verdict will not for that cause be set aside, but the plaintiff will be allowed to remit (3 Wend. 525).

c. **Compound interest.**—There is no authority for the recovery of com-

pound interest in an action at law unless there has been a promise in writing to pay it after interest has become due, or without proof of peculiar facts taking it out of an ordinary claim (*Forman* v. *Forman*, 17 How. 255).

a. **Double and treble damages.**—At common law the damages are always single; but double and treble damages are, in some cases, given by statute. The jury may, in such cases, double and treble the damages themselves, and the court will intend that they have done so, unless the verdict be in terms for single damages (1 Cow. 175). The proper course, however, is for the jury to find single damages only, and the court then, on motion, will double or treble them as the case may require (1 Gallison, 26, 479; 25 Wend. 420). To entitle the plaintiff to double or treble damages, the declaration must distinctly refer to the statute (1 Cow. 175). A plaintiff may recover single damages although he claims double damages (*Dubois* v. *Beaver*, 25 N. Y. 123).

b. **Severance of damages.**—Where the defendants in trespass join in pleading, the jury, if they find them jointly guilty, cannot sever the damages (5 Burr, 2790; 6 T. R. 189; *O'Shea* v. *Kirker*, 8 Abb. 69; 4 Bosw. 120). So though they sever in pleading, or one suffer judgment by default, if there be but one trespass, and both are found guilty of the whole trespass (6 Cow. 313). But they may find one of them guilty of the trespass at one time, and another at another (11 Co. 5 b.), or one of them guilty of one part of the trespass, and another of another (Cro. Car. 54), or some guilty of the whole trespass, and others guilty of a part only (Cro. El. 860); in all which cases the jury may assess several damages (1 Arch. Pr. 218). Also, where the defendants plead severally, if they be found guilty of the same act of trespass the jury cannot sever the damages (Cro. El. 680; 11 Co. 6 a, 7 a; 1 Arch. Pr. 219). Where the jury sever the damages by mistake, the plaintiff may cure the defect by taking judgment *de melioribus damnis* against one, and entering a *nolle prosequi* as to the other (6 T. R. 199; 1 Wils. 306; *O'Shea* v. *Kirker*, 8 Abb. 69; *Turner* v. *McCarthy*, 4 E. D. Smith, 247), or by entering a remittitur as to the lesser damages, he may have judgment for the greater damages against both (Cro. Car. 192; 1 Wils. 30; Arch. Pr. 219).

c. Where there are separate suits against several joint trespassers, and the plaintiff recovers, he can have but one satisfaction. But he may assess the damages separately, and then elect *de melioribus damnis*, and recover costs against each (8 Cow. 111; *Beal* v. *Finch*, 1 Kernan, 128).

d. Where default and interlocutory judgment have been previously entered, in the action, as to one or more of several defendants, or as to one or more of several counts, and the jury find a verdict on the issue for the plaintiff, they must assess the damages for the whole, or against all the defendants (6 Cow. 599; 11 Co. 5; 2 Bos. & Pul. 163). But where some of several defendants suffer a default, and those who plead to issue are acquitted at the trial, the jury shall, in some instances, assess damages against those who have let judgment go by default, and in others not; the rule in such cases being, that where the plea of one of the defendants is such as shows that the plaintiff could have no cause of action against any of them (as payment of the plaintiff's demand), such plea shall operate or enure to the benefit of all; otherwise where the plea merely operates in discharge of the party pleading it (10 Pick. 291; 2 Ld. Raym. 1372; 2 Stra. 1108, 1222; 2 Chitt. R. 135).

e. Where there are several counts, the jury may give entire damages, or they may sever them, and give damages on each count or each class of counts (Arch. N. P. 233). If they give entire damages, and one count turns out to be bad, the the defendant might move in arrest of judgment (2 Dougl. 730; 6 T. R. 691; 5 Johns. 435; 11 *ib.* 985), or bring error (Arch. N. P. 283; 9 Wend. 650), unless the error could be remedied by amendment (1 Dougl. 376; 1 Bos. & Pul. 329; 1 Arch. Pr. 219).

f. **Contingent damages.**—Where there is an issue of law remaining to be argued in the action, the jury, where they find for the plaintiff, usually assess contingent (*i. e.*, conditional) damages, to become absolute in case the demurrer shall be decided for the plaintiff (2 Tidd's Pr. 778, 717). But where the issue in fact goes to the whole declaration, there is no necessity for an assessment of contingent damages (19 Wend. 630).

a. **Altering verdict.**—After the jury have pronounced their verdict, they may alter and correct it, before it is received and recorded. And the court may also send them out again to reconsider their verdict, if it appears to be a mistaken one before it is received (7 Johns. 32). See note to § 262.

§ 262. [217.] *On special finding with general verdict, former to control.*

Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

b. The judge at the circuit cannot order a verdict for one party to be changed to a verdict in favor of the other party on the ground that the general verdict is inconsistent with special findings of the jury (*U. S. Trust Co.* v. *Harris*, 2 Bosw. 75).

c. When on a general verdict the judge may permit the verdict to be entered on some of the counts only (*Baker* v. *Rand*, 18 Barb. 153).

d. Proceedings of court at general term where there is a general and special verdict, and they are not consistent (*U. S. Trust Co.* v. *Harris*, 2 Bosw. 75).

§ 263. [218.] (Am'd 1851.) *Jury to assess defendant's damages in certain cases.*

When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a set-off for the recovery of money is established, beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court give judgment for the plaintiff on the answer. If a set-off, established at the trial, exceed the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly.

§ 264. [219.] (Am'd 1851, 1852.) *Entry of the verdict. Motion for new trial on judge's minutes.*

(1) Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict. (2) If an exception be taken, it may be reduced to writing at the time, or entered in

the judge's minutes, and afterwards settled as provided by the rules of the court, and then stated in writing in a case, or separately, with so much of the evidence as may be material to the questions to be raised, but need not be sealed or signed, nor need a bill of exceptions be made. (3) If the exceptions be in the first instance stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the court, or a judge thereof. (4) The judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion in actions hereafter tried, if heard upon the minutes, can only be heard at the same term or circuit at which the trial is had. When such motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had.

a. **Part 1.**—Judgment *must* be entered on the direction of the judge at the circuit (§ 264), except *only* in *two* instances. These are:—*First:* Where a party takes an exception on the trial, on which he desires to move for a new trial, the judge may order the exception to be heard, in the first instance, at the general term, and judgment to be there given; *Second:* Where upon the trial an uncontroverted state of facts is presented, involving only a question of law, in that case the judge may direct a verdict subject to the opinion of the court (*Cobb* v. *Cornish*, 16 N. Y. 602; 6 Abb. 129; 15 How. 407).

b. **Part 3.**—This implies it may become necessary to separate exceptions when inserted in a case (*Gilchrist* v. *Stevenson*, 7 How. 275); where the exceptions are in the first instance stated in a case containing matter not necessary to present the legal questions arising upon them, the party desiring a review in the court of appeals should procure the exceptions to be separated from the case by or under the direction of the court below, or a justice thereof. If it does not appear from the return that the exceptions were in the first instance stated separately, or that they were separated from the case in which they were originally stated under the direction of the court below, or a judge thereof, the appeal to the court of appeals will be dismissed (*Zabriskie* v. *Smith*, 1 Kernan, 480).

c. **Part 4.**—A motion for a new trial on the judge's minutes can be only (1) upon exceptions; (2) for insufficient evidence; (3) for excessive damages (*Moore* v. *Wood*, 19 How. 409); (4) on the ground that the verdict is against the evidence (*Allgro* v. *Duncan*, 24 How. 210).

§ 265. [220.] (Am'd 1851, 1852, 1857.) *Motion for new trial on a case, &c. Verdict subject to the opinion of the court.*

(1.) A motion for a new trial, on a case or exceptions, or otherwise, and an application for judgment on a special ver-

dict or case reserved for argument or further consideration, must in the first instance be heard and decided at the circuit or special term, except that when exceptions are taken, the judge trying the cause may at the trial direct them to be heard in the first instance, at the general term, and the judgment in the mean time suspended; and in that case they must be there heard in the first instance, and judgment there given. (2.) And when upon a trial the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at the general term; and in that case, the application for judgment must be made at the general term. (3.) Every judgment rendered upon a verdict taken, subject to the opinion of the court at a general term, may be reviewed by the court of appeals in the same manner, and with the like effect, as if exceptions had been duly taken at the proper time; provided it shall appear by the return, that questions of law were involved in the rendition of the judgment.

a. **Motion for new trial.**—A motion for a new trial is a proceeding entirely distinct from an appeal from the judgment. A party may pursue both at the same time (*Benedict* v. *Caffee*, 3 Duer, 669). A motion for new trial on a case or exceptions is restricted to a trial by jury (*Jackson* v. *Fussitt*, 33 Barb. 645; 12 Abb. 281; *Burnett* v. *Phalon*, 4 Bosw. 662); and the case on which the motion is made should show that the trial was by jury (*Cronk* v. *Canfield*, 31 Barb. 171). The motion must be made before the entry of judgment (*Jackson* v. *Fussitt*, 33 Barb. 645; 12 Abb. 281; 9 Abb. 137; *Gurnee* v. *Smithson*, 7 Bosw. 396; *Anderson* v. *Dickie*, 17 Abb. 83; 26 How. 199; *Barnes* v. *Roberts*, 5 Bosw. 73; see, however, contra, *Tucker* v. *White*, 27 How. 97); except where the judgment is allowed to be entered up as security (*id. Morgan* v. *Morris*, 12 Abb. 164; *Benedict* v. *Caffee*, 3 Duer, 669). Where there are no exceptions or where the new trial is sought on a question of fact, the motion must be heard in the first instance at special term (*id.*, *Lusk* v. *Smith*, 8 Barb. 570). Where there are exceptions, and the new trial is sought on questions of law only, then, *unless* there is an order that the exceptions be heard in the first instance at general term, the motion must be at special term (*Morgan* v. *Morris*, 12 Abb. 164; *Taylor* v. *Harlow*, 11 How. 285; *Watson* v. *Scriven*, 7 id. 10; *Potter* v. *Chadsey*, 16 Abb. 146). Where there is a question of fact the motion cannot be ordered to be heard in the first instance at general term (*id. ante*, p. 471, *a;* but see *Morris* v. *Brower*, 4 Sand. 701; *Ryle* v. *Harrington*, 14 How. 59). An exception to an order dismissing the complaint on the trial at the close of the plaintiff's case, cannot be heard at the general term in the first instance (*Lake* v. *Artisans' Bank*, 17 Abb. 232).

b. A motion for a new trial *at special term* can only be made before the judge who presided at the trial (*Jackson* v. *Fussitt*, 9 Abb. 137; *Ryle* v. *Harrington*, 4 Abb. 421; *Morris* v. *Brower*, 4 Sand. 701; *Mead* v. *Keyes*, 4 E. D. Smith, 510; but query, and see *Molony* v. *Dows*, 9 Abb. 86; 18 How. 27).

c. On the hearing of exceptions in the first instance at general term, no question of fact can be discussed, nor the point that the decision of the jury is against the weight of evidence (*Hotchkins* v. *Hodge*, 38 Barb. 118; *Clark* v. *Ward*, 4 Duer, 206; *Seeley* v. *Chittenden*, 10 Barb. 303). And the point that the verdict is contrary to evidence can only be raised on a motion for a new trial, it cannot be raised on an appeal from the judgment (*Anthony* v. *Smith*, 4 Bosw. 503).

a. On a motion for new trial the party is confined to the objections raised on the trial (*Waterville Manuf. Co.* v. *Brown*, 9 How. 27; *Smith* v. *Floyd*, 18 Barb. 523; *Staring* v. *Bowen*, 6 Barb. 109; see, however, *Keyes* v. *Devlin*, 3 E. D. Smith, 518).

b. Where on the trial only questions of law arise which are ruled against the defendant, and the judge charges that plaintiff has a right to recover, without any exception taken, defendant cannot on motion for new trial insist that a question of fact should have been left to the jury (*Hunter* v. *Asterhoudt*, 11 Barb. 33).

c. On a motion for a new trial, the refusal of the judge to permit an amendment of the pleadings at the trial cannot be reviewed (*Hendricks* v. *Decker*, 35 Barb. 298).

d. New trial for verdict against weight of evidence, surprise, or newly discovered evidence, or accident by deprivation of evidence are in the discretion of the court, and the discretion is exercised liberally (*Platt* v. *Munroe*, 34 Barb. 291; see *Housee* v. *Hammond*, 39 Barb. 96).

e. On a motion for a new trial on a case before the judge who heard the case, he may, of his own motion, correct the case to make it conform to the facts (*Toplitz* v. *Raymond*, 10 Abb. 60).

f. In an action for a tort there may be a new trial as to one defendant (*Seeley* v. *Chittenden*, 4 How. 265).

g. On the argument of a motion for a new trial on a case, the case may be amended to make it agree with the judge's minutes (*Toplitz* v. *Raymond*, 10 Abb. 60).

h. Where a new trial is granted on the application of the defendant, a copy of the order must be served before the defendant can move for a dismissal of the complaint for not proceeding to trial. It is otherwise where the new trial is ordered on the application of the plaintiff (*Robb* v. *Jewell*, 6 How. 276).

i. On the denial of a motion for a new trial at special term, if no appeal be taken from the order, the moving party will be deemed to acquiesce in the propriety of such denial, and to have waived all grounds for a new trial, except such questions of law as under exceptions taken at the trial may be reviewed on an appeal from the judgment itself, and on appeal from the judgment, such exceptions will alone be considered (*Rider* v. *Union India Rubber Co.*, 4 Bosw. 169).

j. A party cannot move to set aside a verdict in his own favor, on the ground that the evidence was insufficient to sustain it. His remedy is a motion for a new trial upon a case (*Moore* v. *Wood*, 19 How. 405).

k. **Feigned issue.**—Reviewing the trial of a feigned issue on a case (*Lansing* v. *Russell*, 13 Barb. 510; *Snell* v. *Loucks*, 12 Barb. 385).

l. **New trial for verdict against evidence,** (see *Dolsen* v. *Arnold*, 10 How. 528; *Stettiner* v. *Granite Ins. Co.*, 5 Duer, 594; *Wheeler* v. *Calkins*, 17 How. 451; *Fry* v. *Bennett*, 9 Abb. 45; *Heritage* v. *Hall*, 33 Barb. 347; *Smith* v. *Tiffany*, 36 Barb. 23; *Housee* v. *Hammond*, 39 Barb. 96). An order for a new trial on the ground that the verdict was against evidence is always on the condition of payment of costs of the first trial (*East River Bank* v. *Hoyt*, 22 How. 478; *North* v. *Sergeant*, 33 Barb. 350).

m. **Newly discovered evidence.**—(See *The People* v. *Marks*, 10 How. 261; *Simmons* v. *Fay*, 1 E. D. Smith, 107; *Leary* v. *Roberts*, 8 Abb. 310). A motion for a new trial on the ground of newly-discovered evidence cannot be heard in the first instance at general term. It must be made at special term. If denied, an appeal from the order denying it may be taken to the general term. Such an appeal will be heard at the same time as the appeal from the judgment (*Clarke* v. *Ward*, 4 Duer, 206).

n. **Excluding evidence.**—(See *Robinson* v. *Lyle*, 10 Barb. 513; *Snell* v *Loucks*, 12 Barb. 385).

o. **Want of evidence.**—(See *Rathbone* v. *Stanton*, 6 Barb. 141; *Smith* v. *Tiffany*, 36 Barb. 23; *Moore* v. *Wood*, 19 How. 405).

a. **Misdirection.**—(See *Alston* v. *Jones*, 17 Barb. 276; *Storey* v. *Brennan*, 15 N. Y. 524; *Gardner* v. *Clark*, 17 Barb. 538). The motion must be on a case (*Brush* v. *Kohn*, 14 Abb. 51.)

b. **Improper evidence.**—(See *Hahn* v. *Van Doren*, 1 E. D. Smith, 411; *Anderson* v. *Busteed*, 5 Duer, 485; *Travis* v. *Barger*, 24 Barb. 614; *Weeks* v. *Lowere*, 8 Barb. 530; *Clarke* v. *Crandall*, 3 Barb. 612; *Dresser* v. *Ainsworth*, 9 Barb. 619; *Boyle* v. *Coleman*, 13 Barb. 42; *Underhill* v. *Harlem R. R. Co.*, 21 Barb. 489; *Vallance* v. *King*, 3 Barb. 548.)

c. **Surprise.**—(See *Beach* v. *Tooker*, 10 How. 297; 1 Abb. 297; *The People* v. *Marks*, 10 How. 261; *Taylor* v. *Harlow*, 11 *id.* 285; *De Leyer* v. *Michaels*, 5 Abb. 203; *Meakim* v. *Anderson*, 11 Barb. 216; *Mercereau* v. *Pearsall*, 6 How. 293; *Fellows* v. *Emperor*, 13 Barb. 92; *Peck* v. *Hiler*, 30 Barb. 655.)

d. **Charge of jury.**—(See *Gale* v. *Wells*, 12 Barb. 85; *Hunter* v. *Osterhoudt*, 11 Barb. 33.)

e. **Excessive damages.**—(See *Scherpf* v. *Szadecsky*, 1 Abb. 366; *Knight* v. *Wilcox*, 18 Barb. 212; *Blum* v. *Higgins*, 3 Abb. 104; *Fry* v. *Bennett*, 9 Abb. 45; *Krom* v. *Schoonmaker*, 3 Barb. 647; *Clapp* v. *Hudson R. R. Co.*, 19 Barb. 461; *Rogers* v. *Beard*, 20 How. 98.)

f. **Inadequate damages.**—(See *Richards* v. *Sandford*, 2 E. D. Smith, 349.) A motion for a new trial on the ground of inadequate damages cannot be made on the judge's minutes (*Moore* v. *Wood*, 19 How. 409).

g. **Perverse verdict.**—(See *Clarke* v. *Richards*, 3 E. D. Smith, 89.)

h. **Penal action.**—(See *East River Bank* v. *Hoyt*, 23 How. 478.)

i. **Equity cases.**—(See *Clayton* v. *Yarrington*, 33 Barb. 144.)

j. Where on exceptions the court cannot clearly see that injustice has not been done by the application of an improper rule of damages, they will order a new trial (*Rogers* v. *Beard*, 20 How. 98). But a new trial will not be granted merely because the court would have come to a different conclusion on the evidence (*Mackey* v. *N. Y. Central R. R. Co.*, 27 Barb. 529).

New trial refused in the following cases:

k. Where the decision was right, but the reasons for it were not the true ones (*Munroe* v. *Potter*, 22 How. 49).

l. To impeach a witness (*Beach* v. *Tooker*, 10 How. 297; 1 Abb. 297).

m. Where the plaintiff could in no event recover more than nominal damages (*Hopkins* v. *Grinnell*, 28 Barb. 533; *McConihe* v. *N. Y. and Erie R. R. Co.*, 20 N. Y. 495).

n. For an erroneous decision in favor of admitting evidence, but under which no evidence is shown to have been given (*Vallance* v. *King*, 3 Barb. 548).

o. Where evidence was erroneously rejected, but afterwards admitted (*Morgan* v. *Reid*, 7 Abb. 215).

p. Where the party was not in fact prejudiced (*id.*, *Cook* v. *Litchfield*, 2 Bosw. 183; *Hunt* v. *Fish*, 4 Barb. 324).

q. For refusal to nonsuit, where the defect was afterwards supplied (*Barrick* v. *Austin*, 21 Barb. 241).

r. Because a question which ought to have been submittted to a jury, was passed upon by the court without objection (*Clark* v. *Mayor of N. Y.*, 24 How. 333).

s. **Evidence on new trial.**—Evidence taken orally in an action in a county court before a county judge, who has gone out of office, cannot be ordered to stand as evidence on a new trial before his successor (*Putnam* v. *Crombie*, 34 Barb. 232).

t. **Costs on motion for new trial.**—The costs on a motion for a new trial on a case or exceptions at special term are $10 (*Jackett* v. *Judd*, 18 How. 385).

u. **Appeal from order denying new trial.**—An appeal by a defendant from an order denying his motion for a new trial, does not *per se* stay the entry of judgment (*Valton* v. *Nat. Loan Fund Soc.* 19 How. 515). To stay the entry of judgment an order is necessary (*id.*); and if the appeal is to the court of ap-

peals, the order must be obtained before the appeal is perfected. (*Id.*) The entry of judgment does not affect the appeal from the order (*id.*) either to the general term or to the court of appeals. (*Id.*)

a. On appeal from an order granting a new trial the judgment cannot be reversed unless the case negatives any inference that the court below granted a new trial because it came to a different conclusion upon the facts from that found on the original trial. The defeated party must go down to a new trial unless he can show by a statement of the facts considered as established at general term, that the judgment was founded upon an errroneous conclusion of law (*Miller* v. *Schuyler*, 20 N. Y. 522).

b. On an appeal to the general term from a judgment, the court will not review an order denying a motion for a new trial. Such an order can only be reviewed on an appeal from it (*Marquart* v. *La Farge*, 5 Duer, 559; *Ogden* v. *Coddington*, 2 E. D. Smith, 317; *Brown* v. *Richardson*, 1 Bosw. 402).

c. The order upon affirmance at general term, after judgment, of an order denying a motion for a new trial on a case, should not include a direction that the judgment be affirmed (*Miller* v. *Eagle Life Ins. Co.* 3 E. D. Smith, 184).

d. When a party moving for a new trial is not entitled to it as a matter of right, he cannot on an appeal by him from an order granting it *on terms* procure its reversal by reason of such terms. The terms are discretionary and not reviewable on appeal (*Burger* v. *White*, 2 Bosw. 92).

g. **Costs on appeal from order granting or refusing a new trial.**—The prevailing party on appeal to the general term from an order granting or refusing a new trial, is entitled to $15 before argument, and for argument $30 (*Jackett* v. *Judd*, 18 How. 385).

e. **Evidence on motion for new trial.**—On motion for a new trial on a case, the court will receive documentary evidence which could not have been controverted on the trial (*Hart* v. *Coltrain*, 24 Wend. 14). Thus where a record improperly attested was admitted on the trial, and on a motion for a new trial a properly-attested record was produced, the motion for a new trial was denied (*Markoe* v. *Aldrich*, 1 Abb. 55; see 2 Sand. 718); where a nonsuit for defect of proof is improperly refused, and exception taken, if either party afterwards supply the proof the want of which would have justified a nonsuit, the exception is of no avail, and a new trial will be refused (*Schenectady Plank Road Co.* v. *Thatcher*, 1 Kern. 102; *Mayor of N. Y.* v. *Mason*, 1 Abb. 344; *Briedert* v. *Vincent*, 1 E. D. Smith, 542; *Morgan* v. *Reid*, 7 Abb. 215).

f. After a complaint had been dismissed on the trial, the plaintiff obtained an order to amend it, and on the amended complaint moved for a new trial. The city court of Brooklyn granted it (*Bigelow* v. *Law*, 5 Abb. 455).

g. **Verdict subject to the opinion of the court.**—There can be no decision subject to the opinion of the court at general term on a trial by the court without a jury (*Molloy* v. *Wood*, 3 Abb. 369). And a verdict subject to the opinion of the court is only proper where the facts are undisputed (*Porter* v. *Schepeler*, 2 Bosw. 188; *Cobb* v. *Cornish*, 16 N. Y. 602; 6 Abb. 129; 15 How. 407; *Gilbert* v. *Beach*, 16 N. Y. 608; *Chambers* v. *Grantzon*, 7 Bosw. 414; *Brown* v. *Orser*, 2 Bosw. 365; *Bell* v. *Shibley*, 33 Barb. 610; *Havemeyer* v. *Cunningham*, 8 Abb. 1; *Beebe* v. *Ayres*, 28 Barb. 283; *Whittaker* v. *Merrill*, id. 526). Thus where there is a question as to the credibility of witnesses and there is conflicting testimony, which ought to be submitted to a jury, and where there are exceptions in the case in regard to the admissibility of testimony, it is improper for the judge at the circuit to take the case from the jury and direct a verdict for the plaintiff subject to the opinion of the court at general term (*Sackett* v. *Spencer*, 29 Barb. 180; *Purchase* v. *Matteson*, 25 N. Y. 211; 15 Abb. 402). And where upon the trial, evidence was offered for the plaintiff, which on the defendant's objection, was excluded, and the plaintiff excepted, the testimony being closed, the court directed the jury to assess the value of the property in question. The defendant asked for certain rulings as to the effect of the evidence upon the question of value. The court refused to rule as required, and the defendant excepted. The jury rendered a verdict for the plaintiff. Thereupon the court ordered that the motion for judg-

ment should be heard in the first instance at general term. At general term judgment was ordered for the defendant; the court of appeals reversed the judgment and ordered a new trial, and held that it was not a case in which the judge at the trial could send it direct to the general term (*Cobb* v. *Cornish*, 16 N. Y. 602; 6 Abb. 129; 15 How. 407; and see *Bangs* v. *Palmer*, 16 How. 542). And where, upon the trial, there was a disputed question of fact, the judge submitted certain questions to the jury, who answered them specially, and found a verdict for the plaintiff, subject to the opinion of the court, the general term ordered a dismissal of the complaint. The court of appeals reversed that judgment, and ordered a new trial (*Gilbert* v. *Beach*, 16 N. Y. 606; see *Clark* v. *McConnin*, 6 Duer, 309; *Beebe* v. *Ayres*, 28 Barb. 276; *Suckett* v. *Spencer*, 29 Barb. 180; *Whittaker* v. *Merrill*, 28 Barb. 526). Where the judge on the trial ordered judgment for the plaintiff for $750, subject to the opinion of the general term, and, in case the general term sustained the plaintiff's right of action, then there should be a reference to ascertain plaintiff's damages, the judgment was held to be irregular (*Buchanan* v. *Cheeseborough*, 5 Duer, 238). These decisions were not made on the ground that the general term could not render a judgment at variance with the verdict, but because the cases were not such as allowed a verdict to be taken subject to the opinion of the court at general term (see *ante*, p. 447, *a*). It seems quite immaterial for which party a verdict subject to the general term is taken (*Cobb* v. *Cornish*, 16 N. Y. 604; 6 Abb. 129; 15 How. 407). Such a verdict suspends the entry of judgment until the decision at the general term (*Gilbert* v. *Beach*, 16 N. Y. 608; *Roosa* v. *Snyder* 12 How. 286). The party in whose favor the verdict is taken must make a case containing the pleadings and proceedings at the trial, and on such case move at general term for judgment (*Cobb* v. *Cornish*, *supra*). If the party in whose favor the verdict is taken fails to make a case according to the rules and practice of the court the opposite party may give notice of motion at the next term for judgment, and if no sufficient excuse is then shown for not making the case, the court will order judgment to be entered for the opposite party (*Jackson* v. *Case*, 12 Johns. 431). Where a verdict subject to the opinion of the court is improperly taken a new trial is to be ordered (*Chambers* v. *Grantzon*, 7 Bosw. 414); but the court may *by consent* hear and determine the motion (*Porter* v. *Schepeler*, 2 Bosw. 188; *Whittaker* v. *Merrill*, 28 Barb. 526; see however *Purchase* v. *Matteson*, 25 N. Y. 211; 15 Abb. 402); in what case they will disregard the objection that a particular and material fact is unproved, when such objection was not taken at the trial, and some evidence in support of it was given, and the whole proceedings tend to show that it was understood at the trial that no such objection was relied on (*Porter* v. *Lobach*, 2 Bosw. 188); and on the application for judgment the general term will not entertain objections which if suggested at the trial, might have been obviated (*McKennie* v. *Furrell*, 4 Bosw. 193); where a verdict is properly taken subject to the opinion of the court at general term, judgment may be rendered at general term, either for a dismissal of the complaint or for the plaintiff (*Chittenden* v. *Empire Stone Dressing Co.* 3 Abb, 71; 6 Duer, 30; *Kelly* v. *Upton*, 12 How. 140). A general verdict for plaintiff taken by consent on a concession that "there could be no controversy as to what facts the evidence established, and that the case presented only questions of law," must be deemed at least as favorable to the plaintiff upon the facts in issue as it would be if such verdict had been found by the jury upon a submission of the issues to them upon the evidence. In such case, for the purposes of a hearing upon the questions of law arising on the trial, the plaintiff is entitled to regard the issues of fact as found in his favor (*Sharp* v. *Whipple*, 3 Bosw. 474). And where in such case the parties agreed upon the form of a verdict and consented thereto, and in addition to a general verdict for the plaintiff they agreed to a special finding of certain facts upon which questions of law arose, such general verdict must stand unless such special finding is inconsistent therewith; and though the whole verdict is taken subject to the opinion of the court, the defendant is not at liberty to claim on the hearing that the issues of fact were not established by the evidence in favor of the plaintiff, except so far as such special finding may control them. In the case last stated, the special finding agreed upon is to be taken as establishing the facts therein stated, and the general verdict as estab-

lishing all other facts in issue, in favor of the plaintiff. (*Id.*) When a verdict is taken subject to the opinion of the court, the court will draw in support of the verdict, every inference from the evidence which a jury would be justified in drawing (*Williams* v. *Ins. Co. of N. A.* 1 Hilton, 345). The question is, who is entitled to judgment upon the facts established, and the verdict may be supported upon any theory consistent with the facts, though not suggested by the pleadings (*Oneida Bank* v. *Ontario Bank*, 21 N. Y. 490).

a. If on a verdict subject to the opinion of the court at general term, a new trial is granted, on the suggestion that further evidence can be supplied, the court will impose on the party desiring the new trial the payment of the costs of the trial, and all subsequent proceedings, as a condition of such new trial (*Kelly* v. *Upton*, 12 How. 140).

b. A verdict having been found for the plaintiff subject to the opinion of the court at general term, the court ordered a new trial unless the parties would consent to a reference to reassess the damages in accordance with the decision at the general term, the parties by consenting to such reference waived their right to a new trial before a jury (*Woodruff* v. *Commercial Mut. Ins. Co.*, 2 Hilton, 130).

c. Where the facts have been specially found by the jury, and a verdict directed subject to the opinion of the court at general term, a motion cannot be entertained at general term to set aside the finding of the jury as against evidence (*Purvis* v. *Coleman*, 1 Bosw. 321). Such a motion must be made, in the first instance, at the special term, and it is only upon an appeal from the order there that such a motion can be considered at general term. (*Id.*)

d. **Motion in arrest of judgment.**—It is doubtful if any such proceeding as a motion in arrest of judgment exists (*Snell* v. *Snell*, 3 Abb. 426; 7 How. 316; *Duel* v. *Agan*, 1 Code Rep. 134).

e. **Judgment non obstante.**—A motion for judgment *non obstante veredicto* is not known in the present practice (*Van Valen* v. *Lapham*, 13 How. 240).

See notes to §§ 264, 268.

CHAPTER IV.

Trial by the Court.

SECTION 266. Trial by jury, how waived.
267. On trial by the court, judgment how given.
268. Exceptions, how and when taken. Judgment at general term.
269. Proceedings upon judgment on issue of law.

§ 266. [221.] (Am'd 1849.) *Trial by jury, how waived.*

Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court, in other actions, in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

a. A trial by jury can be waived only in the manner prescribed by law (*Fire Department* v. *Harrison*, 2 Hilton, 455; *Lewis* v. *Varnum*, 12 Abb. 305), but entering upon the trial of an action by the court without objection, or objecting by way of motion to dismiss the complaint only, is a waiver of a jury trial (*Greason* v. *Keteltas*, 17 N. Y. 498; *Moffat* v. *Mount*, 17 Abb. 4).
See Rule 28.

* § 267. [222.] (Am'd 1849, 1860.) *On trial by the court, judgment how to be given.*

Upon the trial of a question of fact by the Court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the Clerk within twenty days after the Court at which the trial took place. Judgment upon the decision shall be entered accordingly.

b. A judge before whom an action at law is tried without a jury, acts in the double capacity of court and jury, and when instead of rendering a judgment in express terms for the defendant, he orders that the complaint should be dismissed, it is to be presumed he thereby *non-suits* the plaintiff (*Coit* v. *Bland*, 12 Abb. 463).

c. One judge cannot try a portion of an action and another judge finally determine it (*Chamberlain* v. *Dempsey*, 15 Abb. 1.) Thus where an action has been tried before a judge without a jury, and a judgment rendered for plaintiff, with a direction for a reference to compute the amount of the recovery,

* *Amended—See Appendix.*

no other judge than the one who tried the cause has power, on the coming in of the report of the referee to render final judgment in the action. (*Id.*)

a. On a trial by the court, it may and should decide the whole case (1 Bosw. 281; 13 How. 246).

b. Thus where the complaint prays a specific performance of a contract to convey land or for damages, but shows the defendant incapable of conveying and the parties go to trial, the court is not to dismiss the complaint, but to retain the case to award damages (*Barlow* v. *Scott*, 24 N. Y. 40); and so where the action was to reform a policy of insurance and to recover for a loss covered by said policy (*N. Y. Ice Co.* v. *N. Western Ins. Co.*, 23 N. Y. 357; reversing 10 Abb. 84; 13 How. 240; and as it seems overruling *Von Beck* v. *Village of Rondout*, 15 Abb. 48; *Stevenson* v. *Buxton*, 37 Barb. 13).

c. The requirement that the decision should be filed within twenty days, is merely directory (*Burger* v. *Baker*, 4 Abb. 11; *The People* v. *Dodge*, 5 How. 47; *Stewart* v. *Slater*, 6 Abb. 84; *Lewis* v. *Jones*, 13 Abb. 427; *O'Brien* v. *Bowes*, 4 Bosw. 663); but the judge having heard the cause must decide it; he cannot after the hearing order it to be tried by a jury (*O'Brien* v. *Bowes*, 4 Bosw. 663).

d. The decision need not do more than find generally in favor of the plaintiff or defendant (*Johnson* v. *Whitlock*, 3 Kernan, 334; *Otis* v. *Spencer*, 16 N. Y. 610; 6 Abb. 127; 15 How. 425); a finding of facts or statement of a conclusion of law is only necessary in the case made for the purpose of an appeal. (*Id.*) It is to be treated as the verdict of a jury (*Osborn* v. *Marquand*, 1 Sand. 457; *Hoppe* v. *Robbe*, 1 Cal. 373; *Breeze* v *Doyle*, 19 Cal. 101; *Mann* v. *Witbeck*, 17 Barb. 388; *Gilbert* v. *Luce*, 11 *id.* 92.) [These decisions were prior to the amendment of 1860.]

e. If the judge omit to find any question of fact involved, the remedy of the party aggrieved is not an exception but a motion before the judge to have the finding corrected; the omission cannot be supplied nor considered on an appeal from the judgment (*Sharp* v. *Wright*, 35 Barb. 236; *The People* v. *Albright*, 14 Abb. 305; *Niles* v. *Price*, 23 How. 473). But if the judge fail to specify the relief granted or the determination of the action, it is an irregularity which may be taken advantage of even on appeal (*Chamberlain* v. *Dempsey*, 14 Abb. 241). For the statement of facts must support the conclusions of law, or the judgment will be reversed. No fact can be implied from the conclusions of law (*Tomlinson* v. *Mayor of N. Y.* 23 How. 452; and see *Rogers* v. *Beard*, 20 How. 98; as to how the statement of facts should be made. In that case the court refused to review the judgment because of the insufficiency of the statement of facts; and see *Sinclair* v *Talmadge*, 35 Barb. 602).

f. On a motion to set aside a judgment for irregularity, in failing to file the decision in writing, it should clearly appear on the moving papers that no decision has in fact been filed (*Lewis* v. *Jones*, 13 Abb. 427).

g. The omission to file the decision in writing may be disregarded under § 176 where there is no pretence of merits, or that the action was not correctly decided (*Lewis* v. *Jones*, 13 Abb. 427); or the finding of facts may be filed after judgment (*Vermule* v. *Shaw*, 4 Cal. 214).

h. Unless there is a finding of facts by the justice who tried the cause, incorporated in the case, the general term will not hear an appeal from the judgment, and will dismiss the appeal for the omission of such a finding, unless before the cause is submitted the parties consent that it be sent back for correction (*Matthews* v. *Mayor of N. Y.*, 14 Abb. 214), and in the court of appeals it is held that where a judgment after a trial by the court comes up for review without any finding of facts nothing can be presumed against the correctness of the decision, the presumption must be in favor of the decision (*Viele* v. *Troy & Boston R. R. Co.* 20 N. Y. 184).

i. The refusal of a court trying an issue without a jury, to consider the testimony as conflicting, or to pass upon the credibility of witnesses, raises no question reviewable in the court of appeals (*Terry* v. *Wheeler*, 25 N. Y. 520).

j. A general exception to a finding mixed of law and fact does not raise the question whether the fact found is sustained by the evidence (*The People* v. *Albright*, 14 Abb. 305).

a. Upon the trial of an issue of fact by the court, the prevailing party, on filing the decision of the judge, may enter his judgment *immediately* (*Lynde* v. *Cowenhoven*, 4 How. 327; *Renouil* v. *Harris*, 2 Code Rep. 71; 2 Sand. 641.) The judge's decision is the only authority for entering judgment (*Chamberlain* v. *Dempsey*, 14 Abb. 241). But on a finding in favor of a plaintiff subject to an accounting, no judgment can be entered until the accounting has been had (*McMahon* v. *Allen*, 27 Barb. 335). The cause cannot be referred to the general term for its decision primarily upon matter of fact or matter of law.

b. **Review.**—The only mode of obtaining a review of any decision on such a trial, whether during its progress or at its close, is by an appeal under section 348 (*Mallory* v. *Wood*, 14 How. 67; 3 Abb. 371; *Wright* v. *Delafield*, 11 How. 465; *Watson* v. *Scriven*, 7 How. 9; *Hunt* v. *Bloomer*, 3 Kernan, 341; 12 How. 567).

* § 268. [223.] (Am'd 1851, 1852, 1860.) *Exceptions, how and when taken. Judgment at general term.*

(1) For the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial, within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury. (2) And either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge in settling the case must briefly specify the facts found by him, and his conclusions of law. (3) But the questions, whether of fact or of law, arising upon the trial, can only be reviewed in the manner prescribed by this section, the questions of law in every stage of the appeal, and the questions of fact upon the appeal to the general term of the same court, as prescribed in section three hundred and forty-eight.

No finding of facts by the General Term shall be required for the purpose of review in the Court of Appeals, and if the judgment be reversed at the General Term, it shall not be deemed to have been reversed on questions of fact unless so stated in the judgment of reversal; and in that case the question whether the judgment should have been reversed either upon questions of fact or of law, shall be open to review in the Court of Appeals.

The provisions of this section, and also of section two hundred and seventy-two, as they are hereby amended, shall apply to appeals now pending as well as to those hereafter brought

**Amended—See Appendix.*

a. **Exceptions.**—"The exceptions which may be and must be made within ten days after notice of the judgment, are those, and only those, which under the former system of practice were made to the ruling of the court after the evidence was closed and before the jury retired. This clause of the section does not authorize exceptions to be taken after judgment to matters arising during the trial, and where there is an opportunity to except at the time the adverse decision is made. Where a party can except on a point ruled against him as the trial is proceeding, but omits to do so," he cannot afterwards except (*Hunt* v. *Bloomer*, 3 Kernan, 341; 12 How. 567; *Johnson* v. *Whitlock*, 3 Kernan, 344; 12 How. 571).

b. Unless exceptions are taken to the conclusions of law, the court on appeal cannot review such conclusions (*Mayor of N. Y.* v. *Erben*, 24 How. 358). Thus in an action to foreclose a mortgage. The trial was by the court without a jury. On the trial the plaintiff moved the cause on the pleadings and on the bond and mortgage, the subject-matter of the action. He waived proof of the matters set up in the answer, claiming that they constituted no defence. The judge so decided, and judgment accordingly. The record did not disclose any exception to the decision. On appeal to the general term, the judgment was affirmed. The defendant appealed to the court of appeals. On motion the appeal was dismissed; on the ground that as no exception had been taken, there was no question raised for review (*Hunt* v. *Bloomer*, *supra*).

c. No exception to a finding of fact is necessary (*Mayor of N. Y.* v. *Erben*, 24 How. 358). An exception to a finding mixed of law and fact does not raise the question whether the fact found is sustained by the evidence (*The People* v. *Albright*, 14 Abb. 305). Where the trial is by the court, an exception to the final decision of the judge, as well upon the facts as the law of the case, that the plaintiff was entitled to recover * * only raises the question whether, upon the facts *as found*, the law has been properly decided (*Belknap* v. *Sealey*, 4 Kernan, 148. See Rule 36).

As to notice of the judgment see in note to § 332, *post*.

d. The court have the power to allow exceptions to be filed, *nunc pro tunc*, after the ten days allowed therefor have expired (*Sheldon* v. *Wood*, 14 How. 18; *Coe* v. *Coe*, 14 Abb. 87; *Bortle* v. *Mellen*, id. 228). But leave given to make a case, does not extend the right to take exceptions beyond the ten days (*Beach* v. *Gregory*, 3 Abb. 78, affirming 2 id. 203; see *Salls* v. *Butler*, 27 How. 133; and the case or exceptions will not usually be resettled so as to allow exceptions to be inserted which were not taken within that time, and especially not if an argument on the case or exceptions has been had (*Beach* v. *Raymond*, 1 Hilton, 201). After the decision of an appeal by the court in *banc*, the unsuccessful party cannot be allowed, for the purpose of an appeal to the court of appeals, to insert exceptions not appearing in the case upon which the appeal to the general term has been decided. (*Id.*)

e. **Review of Judgment.**—"In order to review the judgment after trial by the court, a case must always be made. In settling this, the code imperatively requires a statement of the facts found by the judge and his conclusions of law. The party who prepares the case should insert this statement, which, like any other part of the case, will be subject to amendment by the other party, and settlement by the judge. If it be desired to review any conclusion of fact, the case will contain the evidence bearing upon that conclusion. It will also contain the exceptions taken during the trial, and those taken after the judgment, to the final conclusions of law. The case, if served within the ten days, will be of itself a compliance with the first clause of the section, and no other exceptions will be required to satisfy that clause. If not served within ten days, then a formal exception must have been made and served within that time, as the authority for inserting it in the case afterwards prepared; and any exception which appears in the case as settled, will be assumed to have been made in due time" (*Hunt* v. *Bloomer*, 3 Kernan, 341; 12 How. 567; *Johnson* v. *Whitlock*, 3 Kernan, 344; 12 How. 571).

f. In settling the case the facts found and the conclusions of law must be separately stated (*id.*, and see *Gilchrist* v. *Stevenson*, 7 How. 273).

See *Appeal from judgment on report of referee*, *post*.

a. **Findings of fact at General Term.**—Where the court, at general term, establish findings of fact different from the facts found by the court or referee who tried the cause, such finding of facts should be made part of the record (*Smith* v. *Grant*, 17 How. 381). Where such a case is sent back to the general term from the court of appeals for re-settlement, the general term has no power to send it to the special term or referee for re-settlement and re-statement of the facts found by the judge or referee. The court of appeals should be furnished with the same facts as those on which the general term based its judgment. (*Id.*) Where the facts as found at the general term have not been stated in the record in pursuance of rule 38, the general term in its discretion has the right and will allow such settlement upon terms. (*Id.*)

§ 269. [224.] (Am'd 1849, 1851.) *Proceedings upon judgment on issue of law.*

On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the manner prescribed by the first two subdivisions of section two hundred and forty-six, upon the failure of the defendant to answer, where the summons was personally served. If judgment be for the defendant, upon an issue of law, and if taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as in that section provided.

See note to § 246, *ante*.

CHAPTER V.

Trial by Referees.

SECTION 270. All issues referable by consent.
271. When a reference may be compulsorily ordered.
272. Mode of trial. Effect of report. Review.
273. Referees, how chosen.

§ 270. [225.] *All issues referable by consent.*

All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties.

§ 271. [226.] (Am'd 1849.) *When reference may be compulsorily ordered.*

Where the parties do not consent, the court may upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference in the following cases:

1. Where the trial of an issue of fact shall require the examination of a long account on either side; in which case, the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or,

2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect; or,

3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

§ 272. [227.] (Am'd 1851, 1852, 1857, 1859, 1860.) *Mode of trial. Effect of report. Review.*

The trial by referees shall be conducted in the same manner, and on similar notice, as a trial by the court. They shall have the same power to grant adjournments and to allow amendments to any pleadings and to the summons, as the court upon such trial, upon the same terms and with the like effect. They

shall have the same power to preserve order, and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment, and to punish them as for a contempt for non-attendance or refusal to be sworn or testify, as is possessed by the court. They must state the facts found and the conclusions of law separately; and their decision must be given and may be excepted to and reviewed in like manner, and with like effect in all respects, as in cases of appeal under § 268; and they may in like manner settle a case or exceptions. The report of the referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict.

When the case on appeal shall have been heard and decided at the General Term, upon the report of the referee and exceptions without a case containing the evidence, the decision may be reviewed in like manner on appeal to the Court of Appeals. If the judgment be reversed at the General Term and a new trial ordered, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and in that case the question whether the judgment should have been reversed either upon questions of fact or of law, shall be open to review in the court of appeals.

* § 273. [228.] (Am'd 1849, 1851, 1862, 1863.) *Referees, how chosen—who may be referees—time for making report.*

In all cases of reference, the parties as to whom issues are formed in the action, (except when the defendant is an infant or an absentee,) may agree in writing upon a person or persons not exceeding three, and a reference shall be ordered to him or them, and to no other persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who shall be free from exception. And no person shall be appointed referee to whom all parties in the action shall object, except in actions for divorce. And no justice or judge of any court shall sit as referee in any action pending in the court of which he is judge, and not already referred. Unless the court shall otherwise order, or the parties otherwise

* *Amended—See Appendix.*

stipulate, the referee or referees shall make and deliver a report within sixty days from the time the action shall be finally submitted, and in default thereof, said referee or referees shall not be entitled to receive any fees, and the action shall proceed as if no reference had been ordered.

a. **Referee defined.**– A referee is "a person to whom a cause pending in a court is referred by the court, to take testimony, to hear the parties, and report thereon to the court, and upon whose report, if confirmed, judgment is entered." (Burrell's Law Dict., tit. Referee.) When a specific question is referred to him, his office resembles that of a master; when the whole issue is referred to him, he takes the place of the court (*Graves* v. *Blanchard*, 3 Code Rep. 27; 4 How. 308).

b. **Reference defined.**—A reference is a legislative substitute for a trial by jury (12 Johns. 218). Where a rule of court was entered by consent of the parties, referring the cause to three referees "to hear and determine the matters in controversy, on legal and equitable principles," it was held that such reference took the cause out of court, was in fact an arbitration, and that the report of the referees was an award (*Blunt* v. *Whitney*, 3 Sand. 4).

c. **Consent to refer.**—An attorney retained to defend an action has an implied authority to consent to a reference (*Smith* v. *Troup*, 18 Law Jour. Rep. 290, C. P.). The consent should be "*written*." It may be written by the parties or their attorneys, or by the clerk entering their consent in the minutes, or by the referees in their minutes, such consent being made before them (*Leaycroft* v. *Fowler*, 7 How. 259). But the necessity of a written consent to refer may be waived, and such waiver may be by parol, or by the parties proceeding with the reference (*Keator* v. *Ulster Plank Road Co.*, 7 How. 41; see note to 3 Abb. 171).

d. By a rule of the supreme court in the first district, adopted November, 1856, it is ordered:—"A referee can in no case be nominated by a party unless all the parties agree upon a suitable person. No such agreement can be made where an infant or an absentee is a party, nor where a divorce is sought by or against a married woman. The agreement when alleged must be evidenced by writing signed by the parties or their attorneys. No referee's name should be inserted in any proposed order unless accompanied by such agreement. If inserted otherwise, the court will not strike it out, nor in any manner act on the proposed draft order" (13 How. 346).

e. In an action referrable only by consent, a stipulation was signed by the attorneys of both parties, referring the cause to M, and an order was made on defendant's motion, and on filing the stipulation, referring it to I,—held that the plaintiff had a right to disregard the order entirely, and proceed as if no consent to any reference had been given (*Haner* v. *Bliss*, 7 How. 246).

f. **Reference by compulsion—In what cases.**—§ 271, subd. 1. The revised statutes provided that whenever a cause should be at issue, and it should appear that the trial of the same would require the examination of a long account on either side, the court might, on the application of either party or without such application, order such cause to be referred to three impartial and competent persons (2 R. S. 384, § 39). Under this provision, it was held, that a reference was strictly proper only in the cases of accounts existing between the parties; and that where there was no account, in the ordinary acceptation of the term, the cause could not be referred, although there might be many items of damage (6 Hill, 373). It was always regarded as a proceeding applicable only to what were formerly known as actions of assumpsit, or debt on simple contract, although it was held possible that a reference might be ordered in what was formerly known as an action of covenant (19 Wend. 108; 9 *id.* 480; 6 *id.* 503). An action upon a policy of insurance against fire was allowed to be referred, where the controversy between the parties related solely to items of injury, and the amount of loss sustained by the assured

(1 Hall, 560). But a reference was refused in such an action, where the defence charged a fraud on the part of the insured (*Levy* v. *Brooklyn Fire Ins. Co.*, 25 Wend. 687; *Freeman* v. *Atlantic Mut. Ins. Co.*, 13 Abb. 124; but see *contra*, *Lewis* v. *Irving Fire Ins. Co.*, 15 Abb. 303, note), and where an action was brought to recover back money alleged to have been fraudulently charged in an account between the parties, the issues involving a long account a reference was ordered (*Sheldon* v. *Wood*, 1 Code Rep. N. S. 118; 3 Sand. 739). And the fact that an order of arrest has been obtained in the action will not prevent the court ordering a reference (*Atocha* v. *Garcia*, 15 Abb. 303). Nor would every matter of account be allowed to be referred, as where there there but four items of account (10 Wend. 577; and see *Harris* v. *Mead*, 16 Abb. 257 and infra). Actions of tort were not referable (19 Wend 108). The class of actions in which the court can order the whole action to be tried by the referee, without the consent of either party, is enlarged by the code, but the fact which warrants the exercise of the power is the same now as when the revised statutes alone gave the authority to refer (*McCullough* v. *Brodie*, 13 How. 346; 6 Duer. 659; *Cameron* v. *Freeman*, 10 Abb. 332; 18 How. 310). In an action against a sheriff for a false return and for not satisfying an execution out of the property in his hands under an attachment, an order to refer was denied because the action sounded in tort and did not require the examination of an account in the ordinary acceptation of the term *account* (*Dewey* v. *Field*, 13 How. 438).

a. An action based on carelessness or negligence cannot be referred, although it may become necessary, in the course of the trial, to examine into a large number of items constituting the plaintiff's claim for damges (*M'Master* v. *Booth*, 3 Code Rep. 111; 4 How. 427). The action was for an injury to the property of the plaintiff, by reason of the alleged negligence of the defendant's servant, and the plaintiff, upon an affidavit that the trial would involve a long account, moved for a reference. The motion was denied. (*Id.*)

b. Although in an action for an account between partners, the question of partnership or no partnership when in issue, is a proper one to be decided by a jury, yet where it is so connected with the accounts of the firm that a full statement of the accounts will require an examination, there the cause should be referred (*Mills* v. *Thursby*, 11 How. 113; and see *Palmer* v. *Palmer*, 13 *id.* 363; *Jackson* v. *De Forest*, 14 *id.* 81; see however *Cameron* v. *Freeman*, 18 How. 310; *Graham* v. *Golding*, 7 How. 260).

c. A reference can only be compelled where the court can see from the pleadings and proceedings that the trial must *necessarily* involve the examination of a long account on either side (*Keeler* v. *Poughkeepsie Plank Road Co.*, 10 How. 11; *Sharp* v. *Mayor of N. Y.*, 18 How. 213; *Cameron* v. *Freeman*, 18 How. 310; 10 Abb. 332; *Kennedy* v. *Shilton*, 9 Abb. 157, note; 1 Hilton, 546). It is not enough that the examination of such an account may become important collaterally, for the purpose of establishing some other issue. (*Id.*)

d. An action to recover compensation for endorsing notes for defendant's accommodation, is properly referable, as requiring the examination of a long account, the case not involving any difficult question of law (*Masterton* v. *Howell*, 10 Abb. 118).

e. One bill of goods, containing fifty items, delivered at one time, is in fact, but one item (*Swift* v. *Wells*, 2 How. 79; *Miller* v. *Hooker*, id. 171; *Stewart* v. *Elwell*, 3 Code R. 119; *Harris* v. *Mead*, 16 Abb. 257). Where the alleged long account consisted of the examination of items of damage sustained by the plaintiff by reason of the false representations of the defendants, which induced the plaintiff to make certain outlays for establishing a soap factory, the motion was denied (*McCullough* v. *Brodie*, 13 How. 346; 6 Duer, 659).

f. Where a cause involves the examination of a long account, it is no sufficient objection to granting a motion for a reference that the cause has once been tried by a jury (*Brown* v. *Bradshaw*, 8 How. 176; 1 Duer, 635). Where the necessity of examining a long account depends upon the decision of another issue in the action, as whether a partnership existed a reference will not be ordered until that issue has been first tried (*Graham* v. *Golding*, 7 How. 260). But where the question whether there was a partnership or not

could only be answered by first going into the accounts,—the plaintiff being entitled to be a partner on his bringing into the business a certain amount of capital, and he insisted that he had done so, and that the books show it,—there the reference was ordered (*Ib.*; see *Smith* v. *Dodd*, 3 E. D. Smith, 348; *Cameron* v. *Freeman*, 18 How. 310).

a. **Cases within Subd. 2 of § 271.**—It seems there may be a reference of any specific question in any action where the taking of a long account is necessary (*Bowman* v. *Sheldon*, 1 Duer, 607). Thus in an action by an attorney to recover compensation for services, there was on plaintiff's motion a reference to adjust the bills of costs sued upon. (*Id.*) A reference will not be compelled in such a case (see *Fox* v. *Fox*, 24 How. 409). And where on a cause being submitted to the court, it appears that the plaintiff is entitled to have an account taken, but there are questions of fact material to the taking of the final account that must be settled by testimony, the cause will be referred to a referee, to find the facts upon the issues, and upon such finding to state the account between the parties (*Van Zant* v. *Cobb*, 10 How. 348). A reference was ordered at general term after a verdict subject to the opinion of the court to ascertain the amount of damages in an action on a policy of insurance (*Woodruff* v *Commercial Mut. Ins. Co.*, 2 Hilton, 130; and see *Ehlen* v. *Rutger Fire Ins. Co.*, 6 Abb. 68).

b. Where at the trial after certain evidence was given it was stated by the plaintiff's counsel that the plaintiff's account amounted to between $500 and $600, but no proof was given, the court ordered judgment for the plaintiff for $750 subject to the opinion of the general term, and in case the general term sustained the plaintiff's right of action, then a reference was ordered to ascertain their damages, held that the course pursued at the trial was irregular. That a cause cannot be tried before a jury in part and partly before a referee afterwards to be appointed. In a case where the propriety of a reference is disclosed on the trial the cause may properly be withdrawn from the jury, but should be so altogether (*Buchanan* v. *Cheesebrough*, 5 Duer, 238).

c. **Cases within Subd. 3 of § 271.**—This subdivision is intended to provide for references in cases where questions of fact should arise, upon collateral matters in the cause, in any any stage of it, and not to those questions or issues of fact which are made by the pleadings. * * As, for instance, whether an injunction has been violated, or the party is in contempt, for any cause alleged, the numerous questions which arise on motion, and in relation to the execution of the orders, decrees, and process of the court, and also upon petitions during the progress of a cause (*Flagg* v. *Munger*, 3 Barb. 9; 2 Code R. 17). A reference was ordered on a motion to discharge from arrest (*Barron* v. *Sandford*, 14 How. 443; 6 Abb. 320, *note*; *Stelle* v. *Palmer*, 7 Abb. 181). On a motion to satisfy a judgment (*Meyer* v. *Lent*, 7 Abb. 225; 16 Barb. 539; *Pendleton* v. *Weed*, 17 N.Y. 72), or to cancel a judgment entered on confession (*Dwight* v. *St. John*, 25 N. Y. 203). On a motion against an attorney for not paying moneys collected (*Barber* v. *Case*, 12 How. 351). On a motion to enter a docket secured on appeal (*Munn* v. *Barnum*, 2 Abb. 411); and on a motion to set aside a judgment against a lunatic (*Demelt* v. *Leonard*, 19 How. 140).

d. It is the duty of a referee appointed to take evidence, to take all that is offered and leave it to the court on the hearing of the matter, to determine what is or is not competent (*Scott* v. *Williams*, 23 How. 393; 14 Abb. 70).

e. Where there has been a reference under this subdivision, every question depending not on the facts found, but on error in the proceedings on the trial or in the determination of the facts, must be raised by exception, and there can be no review in the court of appeals of the correctness of the determination of the facts (*Marshall* v. *Smith*, 20 N. Y. 251).

Reference in special proceedings:

f. In a proceeding under the act to facilitate the closing up of insolvent and dissolved mutual insurance companies (*Sands* v. *Tillinghast*, 24 How. 435).

g. To settle claims against executors (*Coe* v. *Coe*, 37 Barb. 232).

a. To determine appeals from Commissioners of Highways (*The People* v. *Albright*, 14 Abb. 305; *The People* v. *Van Alstyne*, 32 Barb. 131).

b. To take an account or on dissolution of joint stock company (see *Ketchum* v. *Clark*, 22 Barb. 319).

c. **Equity causes.**—On the practice of referring causes equitable in their nature, (see *Elmore* v. *Thomas*, 7 Abb. 70; *McMahon* v. *Allen*, 10 How. 384; *Draper* v. *Day*, 11 How. 439; *Stevenson* v. *Buxton*, 15 Abb. 352).

d. **Order for reference necessary.**—A reference cannot be had without an order of the court; and although the parties may agree upon a suitable person to act as referee, the court must be satisfied that the selection made is a proper one. A referee who proceeds in a cause by virtue of an appointment by stipulation of the parties merely, acts without authority (*Litchfield* v. *Burwell*, 5 How. 341). But where on a written stipulation to refer to a referee named, upon which no order was entered, the cause was tried before such referee, referee, a report was made, and judgment entered thereon, it was held that neither party could attack the judgment for defects in the appointment of the referee (*Whalen* v. *Superv. of Albany*, 6 How. 278; and *Luddington* v. *Taft*, 10 Barb. 448; 3 Abb. 168). [An order on the stipulation might in such a case be entered *nunc pro tunc*.]

e. **At what stage of the cause order for reference to be applied for.**—The order for reference cannot be applied for until after issue (3 Cow. 339), nor until the cause is ready for trial as to all the defendants (*Hawkins* v. *Avery*, 32 Barb. 551). Issue is joined immediately on the service of an answer not constituting a counter-claim, or on the service of a reply to a counter-claim. The making the motion need not be delayed to ascertain if either party intends to amend (*Cusson* v. *Whalon*, 1 Code Rep., N. S. 27; *Enos* v. *Thomas*, 2 Code Rep., 128). But it should be made before notice of trial, or the moving party may be subjebted to costs of his opponent in preparing for trial (5 Cow. 269).

f. The neglect of the parties to move for a reference does not deprive the court of the power to order a reference (*Church* v. *Freeman*, 16 How. 297; *O'Brien* v. *Bowes*, 4 Bosw. 661).

g. **Motion for order of reference, Papers on.**—Where parties do not consent, the reference is to be obtained by motion at special term. The motion is non-enumerated. (Rule 40). It must be founded on affidavit. The affidavit need not state the place of trial named in the complaint (2 Cow. 448; 7 *ib.* 478). But must state that issue has been joined (2 Cow. 34); and that the trial of the action will require the examination of a long account, and not involve the examination of difficult questions of law; or that the reference is necessary to carry a judgment or order into effect. The affidavit must be made by the party himself, and not by the attorney, unless a sufficient excuse for the omission is shown (*Mesick* v. *Smith*, 2 How. 7; *Ross* v. *Beecher*, ib. 157; *Little* v. *Bigelow*, ib. 164; *Colton* v. *McCullough*, ib. 165; 4 Hill, 548). The affidavit need not state that the investigation will *not* require the decision of difficult questions of law; that will be presumed, unless and until it is made to appear otherwise by the opposing affidavits (*Barber* v. *Cromwell*, 10 How. 351). The moving papers should name the person or persons proposed as referee or referees (1 Caines' R. 7, 149). It is usual to name three, but the court may appoint one or more refees, not exceeding three. On a motion to refer to "A. B.," naming only one referee, it was held that the motion should have been to refer to three persons, naming them in the notice, and the notice was denied (*Gott* v. *Owen*, 7 Hill, 155).

h. **Cross-motions for an order for reference. Joint reference.**—Where both parties move for a reference, the motion of the party giving notice is entitled to a preference (1 Wend. 15). And in cross-actions, where cross-applications are made for a reference, a joint reference will be ordered, and the referees authorized to hold their meetings so as to accommodate both parties (4 Wend. 198).

i. **Opposing motion for order of reference.**—In opposition to the motion, it may be shown, by affidavit, that difficult questions of law will arise (2 Johns.

Cas. 402; 2 Caines' R. 251; 2 Johns. 374), as the party is advised by counsel, and verily believes (1 Caines' R. 149). And if it clearly appear, that difficult questions of law will arise, the motion will be denied (1 How. 168). But it is not enough to state, generally, that questions of law will arise; it must be made to appear to the court what the points of law are, so that it can judge whether they are material and difficult, and will necessarily arise. And the court must be satisfied that they will be questions of real difficulty (5 Cow. 423), otherwise the motion will be granted (*Dewey* v. *Field*, 13 How. 439). If the cause is not in readiness for trial as to all the defendants it is not referable, and the objection should be taken on the motion to refer, it cannot be taken afterwards (*Hawkins* v. *Avery*, 32 Barb. 551).

a. It is no sufficient objection to an order of reference, that the case has been tried by a jury (*Brown* v. *Bradshaw*, 8 How. 176; 1 Duer, 635).

b. **No appeal from order for reference.**—In an action in which the court has power to order a reference, no appeal lies from an order ordering a reference (*Gray* v. *Fox*, 1 Code Rep. N. S. 334; *Ubsdell* v. *Root*, 3 Abb. 142; 1 Hilton, 173; *Bryan* v. *Brennon*, 7 How. 359; *Smith* v. *Dodd*, 3 E. D. Smith, 348; *Kennedy* v *Shilton*, 9 Abb. 157 *note*; 1 Hilton, 546; *The People* v. *Haws*, 12 Abb. 204; *Dean* v. *Empire State Mut. Ins. Co.*, 9 How. 69; see, however, *Cram* v. *Bradford*, 4 Abb. 201; *Whitaker* v. *Desfosse*, 7 Bosw. 678; *Harris* v. *Mead*, 16 Abb. 257). And in no case can a party appeal from the order after proceeding to trial under it (*Ubsdell* v. *Root*, supra).

c. **Amendment after an order for reference, effect of.**—Where, after an order made to refer, the defendant obtained leave to amend by setting up a counter-claim, Harris, J., on making an order allowing the amendment, observed, "It would have been proper had either party desired it, to vacate the order of reference" (*Beardsley* v. *Stover*, 7 How. 295). See *Changing referee, infra.*

d. **Divorce cases.**—Where in an action for a divorce there was a written stipulation to waive a jury trial, and consenting to a trial by a referee, and an order of reference reciting the filing of such stipulation had been entered referring it to a referee to take the evidence and report same to the court. The parties both appeared before the referee—a motion to confirm the referee's report was denied on the ground that the the cause had been irregularly referred: the reference should have been of the issues (*Diddell* v. *Diddell*, 3 Abb. 167).

e. **Reference to take an account.**—Where a reference is made to a referee simply to take and state an account, he is a mere substitute for a matser in chancery, and must conform to that practice, as the supreme court has not made any rules in respect to the taking and stating of accounts in equity cases (*Palmer* v. *Palmer*, 13 How. 363; *Ketchum* v. *Clark*, 22 Barb. 319; see 7 Abb. 70). The decision of the referee, when confirmed by the courts is *res adjudicata* (*Demarest* v. *Daig*, 11 Abb. 9).

f. **Who will be named as referees. Referees to be residents of the county.**—If no objection is made to the referees named in the notice (where there are three), they, or one or two of them, will be appointed. But if the parties disagree, probably each party will be allowed to name one, and the court will name a third. The referees should, in all cases, be taken from the county named in the complaint as the place of trial (11 Johns. 406; 7 Wend. 483).

g. **Changing referee.**—The reversal of a judgment on a report of a a referee, on a question of law, is no ground for sending the case to a new referee; otherwise if the reversal be on a question of fact (*Billings* v. *Vanderbrek*, 15 How. 295; 6 Abb. 218; *Schermerhorn* v. *Van Alen*, 13 How. 82). Where, pending a reference, the court allowed an amendment, it ordered the hearing to continue before the same referee, and that the testimony taken might apply to the amended pleadings (*Turner* v. *Hillerline*, 14 How. 231; see *Beardsley* v. *Stover*, 7 How. 295; and see *Brittingham* v. *Stevens*, 1 Hall, 379). In *Perry* v. *Moore* (2 E. D. Smith, 32), the court set aside the report, with a direction to the referee to take further testimony and report specially. The referee being unimpeached, the court would not remove him, on the defendant's motion, for the reason that he and the plaintiff's attorney were occupants of the same office; this ground of objection having been known to the defendant when he consented to the appointment.

a. Where after a trial before a referee a new trial is ordered, it is not usual to send the case back to the same referee. The general practice is to vacate the order of reference, and either refer the cause to a new referee or retain it in court (*Sharp* v. *Mayor of N. Y.*, 31 Barb. 579; and see *Murphy* v. *Winchester*, 35 Barb. on page 620). But whether or not the cause shall be sent back to the same referee is in the discretion of the court, and the decision on this point is not reviewable (*id.*). If the cause is one referable only by consent, the court cannot send it to a new referee unless by consent (*id.*).

b. On reversing a judgment on a trial before a referee the superior court of New York always vacate the order of reference.—[*Ed.*]

c. **Death of referee.**—On the death pending a reference of two out of three referees, it is a matter of course to vacate the order of reference (*Emmet* v. *Bowers*, 23 How. 300).

d. **Effect of order of reference.**—The order does not involve the merits. It merely determines the *mode* of trial (*Bryan* v. *Brennon*, 7 How. 359). It does not preclude the defendant from objecting at the hearing that the complaint does not state facts sufficient to constitute a cause of action. (*Ib.*) The action and the parties remain in court for every purpose except the trial, notwithstanding the order of reference (*Holmes* v. *Slocum*, 6 id. 218; 1 Code Rep. N. S. 380; *Matthews* v. *Jones*, 1 E. D. Smith, 429).

e. **Waiver of irregularity in the appointment of referee.**—All irregularities in the appointment of a referee are waived by proceeding on the reference without objection (*Combs* v. *Wyckoff*, 1 Cai. R. 147; *Renouil* v. *Harris*, 1 Code Rep. 125; see cases collected, note to 3 Abb. 171); except that if the court has no jurisdiction that cannot be waived (*Garcie* v. *Sheldon*, 3 Barb. 232). After waiver of an irregularity in the order appointing the referee, by proceeding on the reference without objection, no appeal can be taken from the order (*Ubsdell* v. *Root*, 3 Abb. 142; 1 Hilton, 173; *Claflin* v. *Farmer's & Citizen's Bank*, 25 N. Y. 296); nor will a motion to change the referee for any cause existing at the time of the making the order be entertained (*Billings* v. *Vanderbrek*, 15 How. 295; 6 Abb. 213).

f. **Construction of order of reference.**—Where an order is made referring the cause, without any limitation, all the issues, whether of law or fact, are necessarily embraced in the reference, and the referees have power to report upon the whole issue (*Renouil* v. *Harris*, 1 Code Rep. 125; *Graves* v. *Blanchard*, 3 ib. 25; 4 How. 303).

g. **Service of order for reference.**—A certified copy of the order should be served on the referee, and a copy on the opposite attorney, although it has been held that service on the opposite attorney is unnecessary (1 How. 193). The order is the referee's authority to act, and he should not proceed until satisfied that the order has been duly entered (*Bonner* v. *McPhail*, 31 Barb. 106).

h. **Time and place of meeting of referees.**—The referees, after notice of their appointment, by service of a certified copy of the order appointing them, should, without delay, appoint a time and place for the hearing (2 R. S. 384, § 43). The place of meeting need not be in the county named in the complaint as the place of trial (2 Johns. 188; *Wheeler* v. *Maitland*, 12 How. 35). The appointment of the time and place of hearing may be by parol (*Stevens* v. *Strong*, 8 id. 339). If the attorney of a party receives notice of trial before a referee, he is bound to attend to it, and attend at the time and place of hearing mentioned in the notice. Mistaken intelligence received from the referee as to the time of hearing, may furnish a good ground for adjourning the hearing, but not for neglecting to attend (*Sage* v. *Mosher*, 17 How. 367).

i. The better practice is for the referee to appoint in writing a time and place for the trial, a copy of which appointment should be served with or before the notice of trial. (*Id.*)

j. A referee appointed by the city court of Brooklyn has no power to try the action in the city of New York (*Bonner* v. *McPhail*, 31 Barb. 107).

k. It is no objection to proceeding on the reference, that parties who are

necessary parties defendant, have not been served with process (*Hawkins* v. *Avery*, 32 Barb. 551).

a. **Witnesses—compelling attendance of, &c.**—Witnesses may be compelled to attend before such referees, by subpœnas issuing out of the court in which such cause is pending, in the same manner and with like effect as in cases of trials in such court (2 R. S. 384, § 45), and referees may compel the attendance of witnesses by attachment and punish them as for a contempt for non-attendance, or refusing to be sworn or testify. (Code, § 272). *Semble*, a habeas corpus ad test. may issue to procure the attendance as a witness before referees, of a person who is in prison (2 R. S. 559; *Marsden* v. *Overbury*, 36 Eng. Law and Eq. R. 276).

b. **Referee to be sworn before proceeding.**—Before proceeding to to hear any testimony in the cause, the referees shall be severally sworn faithfully and fairly to hear and examine the cause, and to make just and true report according to the best of their understanding; which oath may be administered by any person authorized to take affidavits, to be read in the court in which the suit is pending, or by any justice of the peace (2 R. S. 384, § 44). If the referees are not sworn, the parties by proceeding in the reference without objection waive the irregularity (*Keator* v. *Ulster Plank Road Co.* 7 How. 41). It seems that it is not necessary it should appear by the record that the referees were sworn (*Reed* v. *Talford*, 10 Verm. 509; *Putnam* v. *Dutton*, 8 *ib.* 396).

c. **Notice of Trial.**—The notice of hearing before a referee should be the same as on a trial by jury or by the court, but the notice may be waived by the parties proceeding without objection (*Wetter* v. *Schlieper*, 7 Abb. 92).

d. **Adjournment.**—To adjourn, all the referees must meet (7 Wend. 534; 22 *ib.* 637); they may require the payment of costs as a condition to the postponement (§ 314). If the party obtaining the adjournment refuse to pay the costs, the court will not award a precept against him, nor compel payment (5 Hill, 375). And it seems that the only remedy of the opposite party in this case is to proceed at once to a hearing. (*Ib.*) The referees, however, may require the party applying for the adjournment to stipulate in writing that in default of payment, the collection of the costs may be enforced by an order in the cause. (*Id.*) The court will not entertain a motion to postpone a trial before referees on the ground of the absence of a witness; the referees must decide on the question; if they commit any error, the court will correct it on motion to set aside the report (*Langley* v. *Hickman*, 1 Sand. 681).

e. The fact that, on a trial before a referee, adjournments were not formally made from one hearing to the other does not render the proceedings irregular, if both parties gave all the testimony they desired, and submitted the cause on such testimony (*Acces. Transit Co.* v. *Garrison*, 9 Abb. 141; 18 How. 1).

f. **Trial.**—All the referees must meet together and hear all the proofs and allegations of the parties (2 R. S. 384, § 46). The trial is to be conducted in the same manner as a trial by the court (§ 272). And a referee has power to preserve order on the trial and punish any violation thereof (*Re Seeley* and *Jobson*, 6 Abb. 217 *note*). The authority of a referee over the interlocutory questions presented in the progress of the trial, cease with his decision of them, or at least, with the trial itself (*Allan* v. *Way*, 3 Code R. 243). The plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited, or his complaint be dismissed, at any time before the cause has been finally submitted to the referees for their decision. In which case, the referees report according to the fact, and judgment may thereupon be perfected by the defendant (Rule 32). If after being duly notified by the plaintiff, the defendant neglect to appear, the referee may proceed with the hearing in his absence (11 Johns. 402; *Stephens* v. *Strong*, 8 How. 339).

g. **Witnesses, swearing, examination of, credibility of, &c.**—Any one of the referees may administer the necessary oath to the witnesses produced before them for examination (2 R. S. 384, § 46). On the hearing the same rules of evidence are to be observed as on a trial before a jury (6 Cow. 364); the court may require referees to report their decision in admitting or reject-

ing any witness, in allowing or overruling any question to a witness or the answer thereto (2 R. S. 384, § 47). The credibility of a witness is a question solely for the referees (*Leach* v. *Kelsey*, 7 Barb. 466). An objection to the competency of a witness not taken on the trial is waived. (*Id.*)

a. Semble, one of three referees before whom a cause is tried cannot be examined as a witness on such trial (*Morse* v. *Morse*, 1 Code Rep. N. S. 374; 11 Barb. 510). See Kelyngs R. 12; see *ante*, p. 79.

b. The order of admitting proof is in the discretion of a referee (*Gibson* v. *Pearsall*, 1 E. D. Smith, 90); as is, to some extent, the permitting leading questions (*Beach* v. *Raymond*, 2 E. D. Smith, 497; *Pearson* v. *Fiske*, 2 Hilton, 146). and the number of witnesses to be examined as to the character of a witness (*Green* v. *Brown*, 3 Barb. 119).

c. The taking or refusing testimony at any time while the cause is before him is a matter wholly in the sound discretion of the referee (*Schermerhorn* v. *Develin*, 1 Code Rep. 28). After the cause has been submitted, and the referees have retired, they may, in their discretion, open the hearing, and adjourn to receive further testimony (1 Wend. 104; *Duguid* v. *Ogilvie*, 3 E. D. Smith, 527; 1 Abb. 145; 20 N. Y. 60; *Ayrault* v. *Sackett*, 9 Abb. 154, *note*; *Kissam* v. *Hamilton*, 20 How. 376; *Litch* v. *Brotherson*, 25 How. 407; 16 Abb. 384). And unless the contrary be shown, it will be presumed that such discretion has been properly exercised (1 Wend. 104). Where a referee, after a final submission of the cause, refused an application by the plaintiff to postpone to produce further testimony, and certified that his refusal was upon the sole ground of his supposed want of authority to grant the plaintiff's application, the court opened the hearing on terms (*Packer* v. *French*, Lalor's Supp. to Hill and Denio, 103). But the referee may refuse to hear further testimony after the case is closed (*Trimble* v. *Stillwell*, 4 E. D. Smith, 513; *Pearson* v. *Fiske*, 2 Hilton, 146).

d. As to the course to be pursued by a referee, where a witness refuses to answer a pertinent question, see *Burnett* v. *Phalon*, (19 How. 530); and where he refuses to answer on the ground that the answer would criminate him (*Fellows* v. *Wilson*, 31 Barb. 162).

e. Where a referee admits evidence of a defence not set up in the answer, the error is not cured by a subsequent order to amend the answer by inserting such defence (*Johnson* v. *McIntosh*, 31 Barb. 267).

f. A referee cannot receive evidence against the objection of a party, and reserve the right to himself of rejecting it at the conclusion of the proceedings (*Chusman* v. *Merkel*, 3 Bosw. 402).

g. Where competent evidence is received subject to exception and to future decision as to its admissibility, an exception to this conditional admission becomes unavailable, in case the final decision is in favor of retaining the evidence (*Bihin* v. *Bihin*, 17 Abb. 9).

h. A referee cannot, while professing to admit evidence absolutely, admit it, in fact, *de bene esse*, and then reject it upon making up his report upon the whole case (*Allen* v. *Way*, 3 Code Rep. 243). But on the trial the referee received evidence of the declarations of a third party, but with a proviso that such evidence should be struck out if the defendant did not supply other proposed evidence bringing such declarations home to the plaintiff, by showing his assent thereto, or adoption thereof, and afterwards the referee for want of such supplemental evidence struck out such declarations and so reported, the court would not interfere with the report, unless the defendant excepted to such provisional reception of the evidence, or at the close of the case obtained a specific ruling thereon and then excepted (*Brooks* v. *Christopher*, 5 Duer, 216).

i. **Amendments.**—The power of referees to allow amendments, extends only to such amendments as the court may order on a trial (see *Woodruff* v. *Hurson*, 32 Barb. 557, and *note* to § 173, *ante*), or as may be made under §§ 169 and 170. The granting or refusing an amendment, within the limits of the power of a referee to grant, is a matter within the discretion of the referee, and his decision is not reviewable (*Woodruff* v. *Hurson*, 32 Barb. 557).

a. **Costs.**—Referees to whom the whole cause is referred may pass on the question of costs, where costs are discretionary (*Renouil* v. *Harris*, 1 Code Rep. 125; *Graves* v. *Blanchard*, 3 *id.* 25; 4 How. 303; *Luddington* v. *Taft*, 10 Barb. 448; *Pratt* v. *Stiles*, 9 Abb. 150; 17 How. 211). They cannot award costs against an executor or administrator personally, or against the estate he represents (*Mersereau* v. *Ryerss*, 12 How. 300).

b. **Production of books, &c.**—A referee has not authority to order the production of books, &c., where there is no provision to that effect in the order of reference (*Frazer* v. *Phelps*, 1 Code Rep. N. S. 214; 3 Sand. 741). Where a referee is ordered to take accounts, the referee's certificate that the production of books and papers is necessary, will be regarded as presumptively sufficient to warrant an order for such production. The burden of showing that the order ought not to be made, would be upon the adverse party. (*Ib.*) Nor has a referee the power to strike out a complaint for any default of the plaintiff in producing papers, &c. (*Bonesteel* v. *Lynde*, 8 How. 226).

c. **Review of proceedings before referee pending the reference.**—The court will not interfere on motion in a matter within the discretion of a referee before the referee has reported. The party must wait until the referee has made his report and then move to set aside the report (*Schermerhorn* v. *Develin*, 1 Code Rep. 28; see *Langley* v. *Hickman*, 1 Sand. 681), or appeal from the judgment thereon. But where pending a trial before a referee he decides to allow an amendment of the complaint, the defendant may immediately, and pending the reference, move the court appointing the referee, at special term, to review such decision of the referee (*Union Bank* v. *Mott*, 19 How. 114; *Billings* v. *Baker*, 6 Abb. 213); and in *Cooley* v. *Huntington*, 16 Abb. 384 *note*, the court pending a reference, entertained a motion to adjourn the proceedings before the referee.

d. **Report of referees.**—A report of any two of the referees is valid (2 R. S. 384, § 46). The report must state the facts found, and the conclusions of law separately (Code, § 272, rule 32; 2 R. S. 384, § 47; *Roberts* v. *Carter*, 28 Barb. 462). If it does not, the court will order a further report to be made, on the application of either party, or of its own motion (*Snook* v. *Fries*, 19 Barb. 313; *Parsons* v. *Suydam*, 3 E. D. Smith, 276; see *Church* v. *Erben*, 4 Sand. 691; *Van Steenburg* v. *Hoffman*, 6 How. 492; *Lakins* v. *Erie R. R. Co.* 11 *id.* 41; *Hulce* v. *Sherman*, 13 *id.* 411); and if, for any reason, effect cannot be given to such order, then the court will set aside the report (*Peek* v. *Yorks*, 14 How. 416). An opinion referring argumentatively, and in a general way, to the conclusions of fact and law at which the referees arrived, is not such a statement of the facts found by them, and their conclusions of law thereon, as is contemplated (*Mills* v. *Thursby*, 12 How. 418; and see *Doke* v. *Peek*, 1 Code 54; *Deming* v. *Post*, *id.* 121; *Sisson* v. *Barrett*, 2 Coms. 406). If there are issues upon which no evidence is given, he need not notice them in his report (*Ingraham* v. *Gilbert*, 20 Barb. 152; and to the like effect is *Patterson* v. *Graves*, 11 How. 91; *Marston* v. *Johnston*, 13 *id.* 93).

e. In order to found an objection upon the omission of the referee to find, one way or the other, upon a particular issue of fact, he should be specifically requested to do so, and an exception taken to his refusal (*Grant* v. *Morse*, 22 N. Y. 323).

f. A referee to whom the issues are referred is not, unless so ordered, to report the *evidence*, but the *facts* (*Patterson* v. *Graves*, 11 How. 91; *Dorr* v. *Noxon*, 5 How. 29). He need not report negatively what facts are not found. (*Id.*)

g. Until the report of a referee is signed by him and delivered, he may alter it as he pleases. He should not advise either party of his decision until his report is signed and ready for delivery (*Ayrault* v. *Sacket*, 17 How. 461; S. C. id. 507; 9 Abb. 154, *note*; and see *Kissam* v. *Hamilton*, 20 How. 376).

h. After a referee has signed and delivered his report, he has no power to alter it (*Shearman* v. *Justice*, 22 How. 241; *Niles* v. *Price*, 23 How. 473).

i. Where after a referee had delivered his report, in which he dismissed the complaint as to one defendant, and afterwards added "with costs to said defendant," such addition was on motion stricken out with costs. (*Id.*)

a. **Time for making report.**—The time for the referee to make his report may be extended by order of the court or a judge, or by consent of the parties. An oral consent on the hearing to extend the time will be sufficient (*Livingston* v. *Gidney*, 25 How. 1). If sixty days elapse, without any extension of the time to file the report, and without any report being filed, either party may, before any report is filed, notify the other and the referee of his intention to proceed as though no reference had been ordered. If neither party takes any such action before the referee has made and delivered his report, the right to disregard the reference is waived (*Mantles* v. *Myle*, 26 How. 409; see however *Litch* v. *Brotherson*, 25 How. 407; 16 Abb. 384). Notice of trial at the circuit is a notification of an intention to disregard the reference (*Livingston* v. *Gidney*, 25 How. 1). If after such a notification a report is made and filed, it will be irregular, and may be set aside on motion. (*Id.*) After a report is made, although not within the time prescribed, it cannot be disregarded, nor can the parties proceed as if no reference had been ordered. A report made after the time for making it has elapsed is irregular, but it is not a nullity, and can only be got rid of by a motion to set it aside as irregular and for leave to proceed as if no reference had been ordered (*id.*); and see *Foster* v. *Bryan*, 16 Abb. 396; 26 How. 164. A referee's report was reluctantly set aside, for not having been made and delivered within sixty days from the time the action was finally submitted (*Litch* v. *Brotherson*, 25 How. 407; 16 Abb. 384).

b. The delay of a referee in making and delivering his report cannot be considered the delay of the court (*Kissam* v. *Hamilton*, 20 How. 369).

c. The provision requiring referees to report within sixty days does not apply to the case of a reference of a claim against an executor or administrator (*Godding* v. *Porter*, 17 Abb. 374).

d. A report of a referee is not made until it is signed by the referee (*Kissam* v. *Hamilton*, 20 How. 369).

e. **Who entitled to the report.**—The report should be delivered to the successful party; and the other party has no right to the possession of it. If the referee deliver the report to the unsuccessful party, and he refuses to file it, the court on motion will order him to file it within a certain time; and if he does not, then, that the referee make a new report, and deliver same to the successful party (*Richards* v. *Allen*, 11 N. Y. Leg. Obs. 159).

f. **Amending report.**—A referee cannot without an order of the court amend his report after it has been signed and delivered to the prevailing party (see *ante*, page 499, *h*). The referees may themselves move to have their report sent back to them for correction (*Brittingham* v. *Stevens*, 1 Hall, 379) When a report is sent back for correction, if the referees go beyond correcting the errors complained of on the motion to set aside the report, and open the case as to other items, they are bound to hear additional testimony if offered (*Goulard* v. *Castillon*, 12 Barb. 126). See, *Changing referee.*

g. The court may order a referee to make a further report; and an order for a further report is not irregular for want of a specification of the points upon which a report is desired (*Union Bank* v. *Mott*, 13 Abb. 247).

h. After the referee has made his report his authority ceases; and when after the referee had made his report an order was obtained for him to make a supplemental report upon a matter omitted on the trial, such order was held to be irregular (*Pratt* v. *Stiles*, 17 How. 211; 9 Abb. 150).

i. Where the report does not pass on all the issues referred, the court at special term may send back the report for completion, but it will not do so where there are exceptions to the report, but leave the appellate court to dispose of the case upon the exception (*Brown* v. *N. Y. Cent. R. R. Co.* 26 How. 32).

j. **Death of defendant pending reference.**—The report of a referee is void if made after the action has abated by the death of the defendant (*Kissam* v. *Hamilton*, 20 How. 369; see *ante*, p. 136).

k. **Death of plaintiff.**—Where, after the report of a referee in favor of the defendant, and before judgment is entered thereon, the plaintiff in the action

dies, judgment may be entered thereon without making the plaintiff's representatives parties to the suit (*Scranton* v. *Baxter*, 1 Code Rep. N. S. 88; see *ante*, p. 134).

i. **Referees' fees.**—A referee may maintain an action for his fees without any express promise to pay; and where there are several referees, each may maintain a separate action for his fees (*Hinman* v. *Hapgood*, 1 Denio, 188). The referee has a lien on the report for the amount of his fees (*Howell* v. *Kenny*, 1 How. 105). And is not bound to deliver his report until his fees are paid (*Ott* v. *Schroeppel*, 3 Barb. 57).

b. The attorney in the action is not liable to the referee for his fees (*Judson* v. *Gray*, 1 Kern. 408; unless he has promised to pay them (*Judson* v. *Gray*, 17 How. 289); or he has received them from the client to pay the referee (*Lamoreaux* v. *Morris*, 4 How. 245). Even in the latter case the attorney cannot be attached for not paying over the money so received. (*Id.*)

c. Where the plaintiff's attorney requested the plaintiff to give him his note for the referee's fees, promising to advance to the referee such fees, and the note was given accordingly, held that the referee could sustain an action against the attorney for such fees on such his promise (*Judson* v. *Gray*, 17 How. 289).

d. Where the length of time spent by referees is disputed on the adjustment of the costs, it must be shown affirmatively by affidavit. It is immaterial what number of days were appointed for the reference, it must be shown the referee was personally present conducting the reference on each day charged (*Shults* v. *Whitney*, 17 How. 471; 9 Abb. 71). If by consent the testimony is taken before a clerk of the referee, no fees to the referee can be allowed for the time employed in taking such testimony. (*Id.*)

e. An oral agreement made by the parties to the action, in the presence of the referee as to his allowance for fees, and entered by him on his minutes, is an agreement in writing within the meaning of § 313 (*Philbin* v. *Patrick*, 22 How. 1).

f. The referee's fees are $3 a day (§ 313). Unless by the agreement in writing of the parties, the referees cannot charge anything additional for office-rent or for any other matter (*Harris* v. *Bennett*, not reported). Any dispute as to the amount of the referees' fees may be settled by requiring the referee to have the same taxed (*Richmond* v. *Hamilton*, 9 Abb. 71). Where a referee failed to deliver his report within sixty days after the case was finally submitted, but swore that both parties had consented that he might take his time to report, held that he was entitled to his fees (*Foster* v. *Bryan*, 16 Abb. 396; 26 How. 164; see *Time for making report*).

g. **Setting aside report of referees.**—Where the referee fails to pass on all the issues in the action, or when he has not separately found the facts necessary to a disposition of all the issues, the proper remedy is a motion to set aside the report; such errors cannot be reached by an appeal from the judgment (*Hulce* v. *Sherman*, 13 How. 411).

h. A motion to set aside the report of a referee is like a motion to set aside a verdict, and may probably be made in like cases as a motion for a new trial, and is governed by the like rules (see *Morgan* v. *Bruce*, 1 Code Rep. N. S. 364). The court will set aside the report if it appears to have been, even in the slightest degree, affected by any influence exercised by the successful party (*Yale* v. *Gwinits*, 4 How. 253; *Dorlon* v. *Lewis*, 9 *id.* 1; and see *Roosa* v. *Saugerties Turnpike Road Co.* 12 *id.* 297; *Van Steenburg* v. *Hoffman*, 15 Barb. 28; *Acces. Transit Co.* v. *Garrison*, 18 How. 1). The court *may* also set aside the report as against evidence (*Smith* v. *Schank*, 18 Barb. 346); but a report of referees, like the verdict of a jury, is, as a general rule, conclusive in a case of conflict of evidence (*Watkins* v. *Stevens*, 4 Barb. 168; *Camp* v. *Pulver*, 5 *id.* 91; *Spencer* v. *Utica R. R. Co. id.* 337; *Hayes* v. *Symonds*, 9 *ib.* 260; *Cady* v. *Allen*, 22 *id.* 388; *Baker* v. *Martin*, 3 *id.* 634; and see 12 Johns. 219; 1 Cai. R. 160; 24 Wend. 15; 1 Cal. R. 362; *Foster* v. *Coleman*, 1 E. D. Smith, 85; *Davis* v. *McCready*, 4 *id.* 565; *Mazette* v. *Harlem R. R. Co.* 3 *id.* 98; *Stuart* v. *Taylor*, 7 How. 251; *Van Ness* v. *Brush*, 22 How. 481; *Niles* v. *Price*, 23 How. 473;

Monell v. *Marshall*, 25 How. 425; *Train* v. *Brown*, 21 How. 93; *Van Alstyne* v. *Indianapolis R. R. Co. id.* 175; *Quackenbush* v. *Ehle*, 5 Barb. 469; *Davis* v. *Allen*, 3 Coms. 168; *Bearss* v. *Copley*, 10 N. Y. 93; *Watson* v. *Campbell*, 28 Barb. 421; *Sinclair* v. *Tallmadge*, 35 Barb. 602; *Hoogland* v. *Wight*, 7 Bosw. 394; — it is, therefore, like such verdict, only to be set aside where the finding is clearly against the weight of evidence, or where, upon the trial, some rule of evidence or principle of law has been violated (*Green* v. *Brown*, 3 Barb. 119; *Doyle's Adm'rs* v. *St. James' Church*, 7 Wend. 178; *Foster* v. *Coleman*, 1 E. D. Smith, 85; *Stuart* v. *Taylor*, 8 How. 251; *Eschbaugh* v. *Syracuse Distillery Co.*, 27 How. 125; *Bearss* v. *Copley*, 10 N. Y. 93; *Woodin* v. *Foster*, 16 Barb. 146; *Brooks* v. *Christopher*, 5 Duer, 216; *Roberts* v. *Carter*, 28 Barb. 462). The report may be set aside where an improper measure of damages was adopted (5 Duer, 535; *Dean* v. *Roesler*, 1 Hilton, 420); or for an unreasonable refusal to adjourn (*Forbes* v. *Frary*, 2 Johns. Cas. 224; but see *Carpenter* v. *Haynes*, 1 Code Rep. N. S. 414; or for excessive damages (*Krom* v. *Schoonmaker*, 3 Barb. 647); or for admitting improper evidence (*Clark* v. *Crandall*, 3 Barb. 612; see, however, *Allen* v. *Way*, 3 Code R. 243; *Vallance* v. *King*, 3 Barb. 548; *Belmont* v. *Coleman*, 1 Bosw. 188; *Brown* v. *Colie*, 1 E. D. Smith, 265; *Kennys* v. *Richards*, 11 Barb. 312); but query, if the court will set aside a report because the amount found for the plaintiff exceeds that stated in his bill of particulars? (12 Wend. 334, 504; *Bowman* v. *Earle*, 3 Duer, 691). The court will not interfere with the finding of a referee on a question of fact, as to which there is conflicting testimony, unless the clear weight of evidence shows that he has erred (*Watson* v. *Campbell*, 28 Barb. 421), although the court differs from the referee in the result at which he arrived (*Thompson* v. *Wood*, 1 Hilton, 93).

a. **Motion to set aside report of referees.**—The motion is non-enumerated (*Belmont* v. *Smith*, 1 Duer, 675). It should be to the court who appointed the referees (*Goulard* v. *Castillon*, 12 Barb. 126); should be based on a certificate or special report of the referee, not on affidavits (*Belmont* v. *Smith*, 1 Duer, 675); should be made promptly (*Patterson* v. *Graves*, 11 How. 91), before judgment (*Comstock* v. *Rathbone*, 1 Johns. 138).

b. **Costs on setting aside report.**—On setting aside the report of a referee and ordering a new trial, the costs are in the discretion of the court, and may be ordered to abide the event. The rule that a new trial on the ground that the verdict is against the weight of evidence can only be set aside on payment of costs, does not apply to reports of referees (*Wentworth* v. *Candee*, 17 How. 405).

c. **Confirmation of report.**—A report on the whole issue need not be confirmed (*Renouil* v. *Harris*, 1 Code R. 125); but all other reports should be confirmed (*Griffing* v. *Slate*, 5 How. 205; *Belmont* v. *Smith*, 1 Duer, 675; Rules 32, 33; and see *Bantes* v. *Brady*, 8 How. 216; *Swarthout* v. *Curtis*, 5 *id.* 198; *McMahon* v. *Allen*, 27 Barb. 335; 7 Abb. 1).

d. **Judgment on referees' report.**—Where a referee reports against a plaintiff on account of neglecting to appear, the judgment should be a dismissal of the complaint, not a judgment for the defendant as on the merits (*Salter* v. *Malcolm*, 1 Duer, 596).

e. Where the referee reports in favor of the plaintiff, but states that before a final judgment can be entered an accounting must be had, whereupon the cause is ordered back to the referee to take such accounting, judgment cannot be entered until such accounting is had (*McMahon* v. *Allen*, 27 Barb. 335).

f. Judgment upon the report of a referee is to be entered in form, as if pronounced by the court, before one of its justices, at special term (*Hancock* v. *Hancock*, 22 N. Y. 568).

g. If the successful party neglects or refuses to enter judgment, the other party, after requiring him to do so, may obtain an order directing him to file the report, and enter up judgment thereon; and in default thereof, giving the plaintiff leave so to do without costs (*Richmond* v. *Hamilton*, 9 Abb. 71).

h. **Notice of the judgment.**—Notice *in writing* of the entry of the judgment and a copy of the report should be served on the judgment debtor (§ 268; *Staring* v. *Jones*, 13 How. 423; Rule 32, and note to § 332, *post*).

a. **Appeal to general term from judgment on report of referees.**—The court cannot on motion set aside as erroneous a judgment entered on the report of a referee (*Dana* v. *Howe*, 3 Kern. 308). The only mode of reviewing the rulings of the referee (*Cronk* v. *Canfield*, 31 Barb. 171 except as *ante*, pp. 499, *c*, 501, *g*, or his report is by an appeal from the judgment entered thereon (*Haight* v. *Prince*, 2 Code Rep. 94; *Leggett* v. *Mott*, 3 *ib.* 5; *Nones* v. *Hope Mut. Ins. Co. ib.* 192; *Pepper* v. *Goulding*, *ib.* 29; *Crist* v. *Dry Dock Bank*, *ib.* 118, 142; *Enos* v. *Thomas*, 5 How. 164; *Watson* v. *Scriven*, 7 *ib.* 11; *Enos* v. *Thomas*, 1 Code Rep. N. S. 67; *Donohue* v. *Chapman*, *id.* 138); whether the finding be on a question of fact or law (*Cheesebrough* v. *Agate*, 7 Abb. 32; 26 Barb. 603; see *Conolly* v. *Conolly*, 16 How. 224). For the purposes of an appeal, exceptions must be served and a case made (*Johnson* v. *Whitlock*, 3 Kern. 350; see note to § 268, and Rules 34, 35, 36, 37). The appeal must be taken within thirty days after notice of the judgment (§ 332; *Staring* v. *Jones*, 13 How. 423); and the time to appeal cannot be extended directly (§ 405); nor should it be indirectly extended, as by setting aside a regular judgment for the purpose (*Humphrey* v. *Chamberlain*, 1 Kern. 274; *Marston* v. *Johnson*, 13 How. 93). See in note to § 332, *post*.

b. **Stay of proceedings on appeal.**—The appeal from the judgment does not stay the proceedings on the judgment. To stay the proceedings on the judgment, security must be given. But no security need be given unless a stay of proceedings is required (see § 348, and note thereto).

c. **Referees' findings.**—A referee is required only to find such facts as enter into and form the basis of his decision. Facts not found are negatived by implication (*Nelson* v. *Ingersoll*, 27 How. 1). An appellant cannot claim as error the omission of a referee or a judge trying an issue without a jury, to pass upon a material fact, he must show affirmatively that such referee or judge decided erroneously on such fact (*Heroy* v. *Kerr*, 21 How. 409; *The People* v. *Albright*, 14 Abb. 305). The remedy for such an omission is by motion to have the finding referred back for correction. (*Id.*)

d. A referee cannot make new findings either of law or fact after he has delivered his report (*Nelson* v. *Ingersoll*, 27 How. 1).

See, *Case on appeal to general term.*

e. **Case on appeal to general term, what to contain.**—On an appeal from a judgment for plaintiff rendered by the court without a jury [or by a referee] the case must show not only the facts on which the grounds of defendant's liability are based but also the facts on which the amount for which judgment was entered depends (*Watson* v. *Barker*, 16 Abb. 203).

f. On appeals from judgments in actions tried by the court or a referee, if the case contain no findings of fact it is the practice of the general term of the first district to dismiss the appeal, unless the parties consent, before the appeal is submitted, to have the case sent back for correction (*Matthews* v. *The Mayor of N. Y.*, 14 Abb. 209).

g. Where the case omitted the referee's findings, the general term suspended the argument that they might be supplied (*Watson* v. *Barker*, 16 Abb. 203); for such a defect the court of appeals dismissed an appeal (see *Bissel* v. *Hamlin*, 13 Abb. 23; 20 N. Y. 519).

h. On appeal from a judgment on the report of a referee, where it appeared that the referee wrote an opinion which was not inserted in the case, the argument of the appeal was postponed to have the opinion brought before the court (*Warren* v. *Warren*, 22 How. 142).

i. On an appeal from a judgment entered on the report of a referee, the appellant may be heard on exceptions taken to the referee's conclusions of law upon the facts found, although the printed case does not contain any of the evidence. But in such case he cannot be heard upon his exceptions to the findings of fact. It must be assumed that they were found upon competent and sufficient evidence (*Frost* v. *Smith*, 7 Bosw. 108); and whenever the appellant desires to review only the conclusions of law of the referee from the facts found by him; he can do so without inserting the testimony in his case (*Ferguson* v. *Hamilton*, 35 Barb. 427; see *Bissel* v. *Pearse*, 21 How. 134).

a. The findings of the referee, of fact and of law, must be inserted in the case or the court will not review the judgment (*Rogers* v. *Beard*, 20 How. 38; 282); and the finding of the referee must be inserted in the case separate and apart from the judgment roll (*Bissel* v. *Pearse*, 21 How. 134; and see *Ferguson* v. *Hamilton*, 35 Barb. 427; *Bissel* v. *Hamblin*, 20 N. Y. 519; 13 Abb. 23).

b. **Case how settled.**—Where on appeal from the decision of three referees the case was settled by two in the absence of the third, and without notice to him, held irregular, and that the case must be resettled (*Fielden* v. *Lahens*, 14 Abb. 48).

c. A mandamus is the proper remedy to compel a referee to settle a case (see *The People* v. *Baker*, 14 Abb. 19; 35 Barb. 105).

d. **Date of issue on appeal.**—On an appeal from a judgment on a report of a referee, the date of the issue on the general term calendar, must be the day of filing the report (*Gould* v. *Chapin*, 5 How. 358).

e. **Proceedings on appeal.**—Where there is no exception to a referee's report the court cannot on appeal give any relief as to matters of law (*Tyler* v. *Willis*, 33 Barb. 328); a wrong result upon undisputed evidence is an error of law (*Brown* v. *Penfield*, 24 How. 64). To raise a question of law an exception must be taken and set forth in the case (*Ingersoll* v. *Bostwick*, 22 N. Y. 425).

f. *Semble*, where the facts are correctly found, the court may disregard the conclusions of law if erroneous, and direct the entry of such judgment upon the facts found as may be proper (*Hannay* v. *Hannay*, 3 E. D. Smith, 432; and see *Griffin* v. *Marquardt*, 17 N. Y. 28; *Edmonston* v. *McLoud*, 16 N Y. 543).

g. An exception taken on a trial before a referee, although inserted in the case, but not argued nor mentioned on the points, will be regarded as abandoned (*Flanders* v. *Crolius*, 1 Duer, 209; *Cumings* v. *Morris*, 3 Bosw. 560; and see *Brown* v. *Colie*, 1 E. D. Smith, 269).

h. On a trial before a referee, improper evidence on the subject of damages was offered and objected to; but was taken by the referee subject to the objection, and was afterwards considered by him in awarding damages. Exceptions were filed to his decision, and one of them was that the decision was "contrary to the law and evidence," but no specific objection was taken to the rule of damages adopted; held on appeal the court would review the decision of the referee in respect to the measure of damages adopted by him (*Dean* v. *Roesler*, 1 Hilton, 420).

i. The general conclusion of the referee is to be construed as involving a finding upon all the material questions, though such a finding be not expressed in terms (*Grant* v. *Morse*, 22 N. Y. 323).

j. Where there is evidence sufficient to sustain a report, but the fact established by such evidence is not expressly found in the report, and there is no finding of such fact, the court in support of the judgment will persume the fact was found in accordance with the evidence (*Sinclair* v. *Tallmadge*, 35 Barb. 602).

k. Where a finding on a question of fact is clearly against evidence a new trial will be granted (*Thompson* v. *Menck*, 22 How. 431).

l. A judgment on the report of a referee will not be reversed for the improper admission of testimony, when the court can see that the testimony so admitted did not influence the result (*Lowery* v. *Steward*, 3 Bosw. 506).

m. Where evidence bearing directly on the question in issue has been erroneously admitted, a new trial must be granted, although there may be unobjectional evidence sufficient to sustain the decision (*Williams* v. *Fitch*, 18 N. Y. 546; overruling *Kemeys* v. *Richards*, 11 Barb. 312).

n. Where there is legal ground for reversing a judgment, the court will not sustain it for the reason that an equivalent error has been committed against the respondent (*Ward* v. *Kalbfleish*, 21 How. 283).

o. To warrant the reversal of a judgment on the report of a referee, the weight of evidence must be clearly against his finding (*N. Y. Car. Oil Co.* v *Richmond*, 6 Bosw. 214).

a. Where the statement in the report of the facts found differs from the statement in the case of facts found, the latter will control, and if the facts do not sustain the conclusion, the judgment on the report will be reversed (*Hartman* v. *Proudfit*, 6 Bosw. 191).

b. Where the facts found by a referee authorize his decision, the judgment will not be reversed merely because his report does not formally dispose of all the issues, where there is nothing to warrant a finding of any issue not passed on, in favor of the appellant (*Alger* v. *Raymond*, 7 Bosw. 418).

c. The appellant is bound to procure such a statement of the facts as will show, necessarily, that the law is in his favor (*Grant* v. *Morse*, 22 N. Y. 323; *Bishop* v. *Main*, 17 How. 162); or the judgment will be affirmed. (*Id.*)

See further in *note* to § 348.

d. **Appeal to court of appeals from judgment on report of referees.**—To warrant an appeal to the court of appeals there must be exceptions, either taken during the trial or to the final decision of the referees (*Mills* v. *Thursby*, 12 How. 418; *Brewer* v. *Irish*, *id.* 481; *Hunt* v. *Bloomer*, *id.* 567; 3 Kern. 341; *Johnson* v. *Whitlock*, 3 Kern. 344; 12 How. 571). And for the purposes of the appeal the exceptions should be separated from the case (*Mills* v. *Thursby*, 12 How. 417; see *Sheldon* v. *Wood*, 14 How. 18; *Westcott* v. *Thompson*, 16 N. Y. 613). On the appeal the court will not consider questions not raised before the referees and excepted to (*Morris* v. *Husson*, 4 Selden, 204), nor questions of fact (*Borst* v. *Spelman*, 4 Coms. 284; *Newton* v. *Harris*, 1 Code Rep. N. S. 414). Where the decision of a referee on a question of fact is affirmed by the court at general term, it is conclusive; that question cannot be reviewed in the court of appeals (*Ref'd Prot. Dutch Church* v. *Brown*, 24 How. 76).

e. The *report* of a referee will not be accepted by the court of appeals as a substitute for a case, nor will the court of appeals look outside of the case for the referee's conclusions of fact and law. The case made on appeal to the court of appeals must contain a statement of the referee's conclusions of fact and law, it is not sufficient that they are contained in the judgment roll (*Bissel* v. *Hamlin*, 20 N. Y. 519; 13 Abb. 23; 21 How. 134; see *Ferguson* v. *Hamilton*, 35 Barb. 427).

f. The court of appeals will not look outside of the case for the referee's conclusions of fact and law. The rule of the supreme court requiring the referee to state such conclusions in his report, does not affect the parties upon appeal (*Bissel* v. *Hamlin*, 20 N. Y. 519; 13 Abb. 23).

g. Where the witnesses are not impeached, the court on appeal, will not look further into the testimony than to see that it in any aspect supports the finding (*Cheesbrough* v. *Taylor*, 12 Abb. 227).

h. Where the reference under subd. 3 of § 271 is to report facts, the report has the effect of a special verdict (§ 272), and the questions arising on the facts thus found, may be reviewed on appeal *without exceptions* (*Kirby* v. *Fitzpatrick*, 18 N. Y. 454). But if in such a case any question be made depending not on the facts found, but on any error in the proceedings on the trial, or in the determination of the facts, the point must be raised by exception, and there can be no review in the court of appeals of the correctness of the determination of the facts (*Marshall* v. *Smith*, 20 N. Y. 251).

i. A hearing on the report of a referee to take an account, to enable the court to give judgment, is not a re-trial of the case, but a review only of the proceedings before the referee (*Griffin* v. *Cranston*, 5 Bosw. 658).

CHAPTER VI.

Manner of entering judgment.

SECTION 274. Judgment may be for or against any of the parties to the action; may grant defendant affirmative relief. Complaint may be dismissed for neglect to prosecute the action. Judgment against married woman.
275. The relief to be awarded to the plaintiff.
276. Rate of damages, where damages are recoverable.
277. Judgment in action for recovery of personal property.
278. Judgment, how directed.
279. Clerk to keep a judgment-book.
280. Judgment to be entered in judgment-book.
281. Judgment-roll.
282. Judgments, how and when to be docketed.

§ 274. [230.] (Am'd 1849, 1852, 1862.) *Judgment may be for or against any of the parties; may grant defendant affirmative relief. Complaint may be dismissed for neglect to prosecute action. Judgment against married woman.*

(1.) Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves.

(2.) And it may grant to the defendant any affirmative relief to which he may be entitled.

(3.) In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper.

(4.) The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served.

(5.) In an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of

her separate estate and not otherwise. And in any proceeding to enforce such judgment, the supreme court shall have jurisdiction, though the amount be less than one hundred dollars.

a. **Note to paragraph 1.—Judgment against one of several defendants.** —*The code has modified the common-law rule that in an action on an alleged joint contract, the plaintiff must recover against all the defendants or be defeated in the action.*—Where the contract sued upon, is *in fact joint only*, there can be no recovery against one only of the joint contractors, except in cases where the defence is personal to one or more of the other defendants, as infancy, &c.; if the non-joinder is insisted upon as a defence, either by demurrer or answer (*Fowler* v. *Kennedy*, 2 Abb. 347; *Zink* v. *Attenburg*, 18 How. 108), where the plaintiff sues some only of the parties jointly liable on contract, and the non-joinder is not set up as a defence either by demurrer or answer, the plaintiff may recover against the parties sued, although it may appear on the trial that others are jointly liable with them (*Fowler* v. *Kennedy*, 2 Abb. 347). Where several are made defendants, as upon a joint contract, and it appears on the trial that only a portion of the defendants made the contract, the plaintiff may recover against such of the defendants as in fact are liable (*Zink* v. *Attenburg*, 18 How. 108; see also *Witherhead* v. *Allen*, 28 Barb. 666; and *Sluyter* v. *Smith*, 2 Bosw. 673; *Claflin* v. *Butterly*, 2 Abb. 446; 5 Duer, 327, *McKenzie* v. *Farrell*, 4 Bosw. 193). Thus, where the action was against the defendants, B. & D., as partners, and it appeared that D., without the knowledge or assent of B., had signed the name of B. & D. to the instrument in suit, and on which it was conceded that B. was not liable, it was held that the plaintiff might have judgment against D. alone. (*Id.*) And see *Parker* v. *Jackson*, 16 Barb. 33; *Harrington* v. *Higham*, 15 Barb. 525; *Merrifield* v. *Cooley*, 4 How. 272; and in *Brumskill* v. *James* (1 Kernan, 294), which was an action by Brumskill against two defendants described as William L. James and Eliza Eaglesum, and was for the recovery of the amount of two promissory notes alleged to have been made by the defendants "under and by their co-partnership name of Eaglesum and Co." The defendant described as Eliza Eaglesum did not appear or answer. The defendant James by his answer denied that he jointly with said Eliza, either under the firm name of Eaglesum & Co., or otherwise, made the notes, or that he ever jointly with her, either under said firm name or otherwise, made the promises in the complaint alleged. On the trial it appeared on the part of the plaintiff that the notes were signed by the defendant James with the name of Eaglesum & Co., and that at the date of the notes the defendants carried on business under the firm name of Eaglesum & Co. The defence then proved that at the time of the making of the notes the defendants were husband and wife. For the defence the court was requested to charge the jury, that if they were satisfied that at the time the notes were made the defendants were husband and wife, they should render a verdict for the defendants. The court refused so to charge, and charged that if the jury were satisfied the notes were signed by the defendant James in the name Eaglesum & Co. and that the defendants were at that time husband and wife, the action could not be sustained against the wife; but that where an action is brought against two persons, and it turns out that only one was ever liable, the judgment may be against the one so liable; and that therefore if they should find that the defendants were husband and wife at the time the notes were made, and that the defendant James made them in the name of Eaglesum & Co., their verdict should be in favor of the plaintiff against James alone. To this ruling an exception was taken. The verdict was for the plaintiff against the defendant James alone, and on which a judgment was subsequently entered. The judgment was affirmed at general term and subsequently by the court of appeals.

b. So in an action against two or more defendants upon a contract made by or in behalf of a firm or association, if one of the defendants makes default

and others appear and deny their liability, it is sufficient on the trial for the plaintiff to prove that the contract was made by the firm or association, and that the defendants who appeared are members thereof; and it is not necessary for the plaintiff to prove that the defaulting defendant is also a member (*Downing* v. *Mann*, 9 How. 204; 3 E. D. Smith, 36; *Pruyn* v. *Black*, 21 N. Y. 300). And whenever a plaintiff establishes a cause of action against one or more of the defendants in an action for a tort or upon contract, and it appears in the latter case that the defendants were *not joint contractors* or *jointly liable*, he is entitled to a judgment against those as to whom he establishes his cause of action. Thus, in an action on a joint and several bond purporting to have been executed by the defendants, on the trial it appeared that only one of the defendants had signed the bond. The breach of the condition of the bond was proved, and the plaintiff recovered against the defendant who had signed. (*The People* v. *Crum*, 8 How. 151). And the plaintiff may have judgment against one or more of several defendants, whenever upon the facts of the case a cause of action appear against such defendants (*Harrington* v. *Higham*, 15 Barb. 525; *Bonsteel* v. *Vanderbilt*, 21 *id.* 26; *Marquat* v. *Marquat*, 2 Kernan, 342; and see *Benson* v. *Paine*, 17 How. 408; 9 Abb. 28; *Witherhead* v. *Allen*, 28 Barb. 661).

a. In action of tort, as a several judgment may be rendered against the guilty, and the others acquitted, a misjoinder of defendants is not available in any form (*Montford* v. *Hughes*, 3 E. D. Smith, 591). And in an action against husband and wife for an assault, held that plaintiff might recover against the husband only (*Wagner* v. *Bill*, 19 Barb. 321). So an action against several defendants to recover the possession of personal property, where a taking of the goods by one of the defendants is fully proved, it is not a ground for a nonsuit generally, as to all the defendants, that no joint taking by them was proved (*Woodburn* v. *Chamberlin*, 17 Barb. 446; *Lomer* v. *Meeker*, 25 N. Y. 361, 364). If nothing appears either in the pleadings or the evidence, to charge a portion of the defendants, they will be entitled to a nonsuit, and the plaintiff may proceed and try the issue between himself and the other defendants. (*Id.*) In an action against several partners, on a promissory note, signed with the partnership name, where one of the defendants sets up as a defence, that the note was in renewal of a note made by another firm, of which he was not a member, and that the firm name to the note in suit was signed without his authority, and the jury find for such defendant, a verdict may be entered for him and against the other defendants (*Parker* v. *Jackson*, 16 Barb. 33).

b. In an action against partners to recover money lost in gaming a recovery against one of the defendants without amendment is regular (*Betts* v. *Hillman*, 15 Abb. 184).

c. In an action against the maker and indorser of a note, either defendant may have the complaint dismissed as to him on the trial (*Lomer* v. *Meeker*, 25 N. Y. 361).

d. In an action against three persons as partners, one not being served with summons nor appearing, the partnership being put in issue, on proof of the partnership of the defendants served held that the plaintiff might have judgment against all of the defendants (*Pruyn* v. *Black*, 21 N. Y. 300).

e. Where two defendants were sued on a joint liability, and one answered and one failed to answer, on the trial of the issue raised by the answer the defendant who answered alone appearing judgment was taken against both defendants, without any proof of no answer having been received from one defendant, held that no such proof was necessary and that the plaintiff was regular (*Catlin* v. *Billings*, 13 How. 511).

f. One of several defendants in an action for a tort is entitled to a verdict, before the case of his co-defendant is submitted to the jury, if the testimony be such that, if he were sued alone, he would be entitled to a nonsuit (*Dominick* v. *Eucker*, 3 Barb. 18; *McMartin* v. *Taylor*, 2 Barb. 356). This is not a matter of discretion but of right. (*Id.*)

In an action against seven defendants as joint makers of a promissory note the plaintiff on the trial was allowed to strike out the names of two of the

defendants and take judgment against the remaining five. But the plaintiff had to pay the defendants whose names were struck out their costs of defending (*Marks* v. *Bard*, 1 Abb. 63).

a. This provision is to be construed in connection with § 118 (*Wells* v. *Smith*, 7 Abb. 261; and see *Ford* v. *David*, 1 Bosw. 570).

See *ante*, p. 139, *a*, *b*, *c*.

b. **Judgment on recovery by plaintiff with costs to the defendant.**—When on a recovery by the plaintiff in an action for a money demand, the defendant is entitled to costs, the costs should be set off against the plaintiff's recovery and there should be but one judgment entered and execution awarded for the excess of the one over the other (*Johnson* v. *Farrell*, 10 Abb. 384).

c. A separate judgment for defendant's costs in such a case would be irregular. (*Id.*) See § 870, post.

Note to Paragraph 2.

d. **Affirmative relief to defendant.**—When a defendant claims affirmative relief, legal or equitable, the duty of an actor in bringing the cause to trial devolves upon him. He can only obtain the relief when the cause is brought to a trial upon his own notice or that of the plaintiff. *Roy* v. *Thompson*, 8 How. 253). After issue joined, if a defendant seeks judgment for more than a dismissal of the complaint with costs, he must notice the cause for trial (*Wilson* v. *Wheeler*, 6 *id.* 49; see *Potter* v. *Davidson*, 8 Abb. 43).

e. Section 274 "allows to a defendant affirmative relief; but is not that as against the plaintiff only? For it makes no provision for plaintiffs to set up claims one against another, nor for notifying the adverse co-defendants of such claims. It also authorizes the court to determine the ultimate rights of the parties on each side as between themselves; but must not that be the rights as they arise from the claim set up by the plaintiff only? For as to all claims between co-defendants, neither knows what the other sets up against him" (*Mechanics' Savings Institution* v. *Roberts*, 1 Abb. 382; and see *Woodworth* v. *Bellows*, 4 How. 24; 1 Code Rep. 129; *Norbury* v. *Seeley*, 4 How. 73; 2 Code Rep. 47; see however, *Elliot* v. *Pell*, 1 Paige, 268).

f. A judgment must be based upon the pleadings, and affirmative relief cannot be given to the defendant, unless set up by way of counter-claim (*Wright* v. *Delafield*, 25 N. Y. 266). Thus where the complaint prayed a specific performance of a contract in regard to the sale of land and an injunction against the defendants prosecuting actions on notes given for the purchase of said lands, the defence in effect was that the defendants were not bound to complete until said notes were paid. The defence was established and held that no other judgment could be rendered than one dismissing the complaint and a judgment giving defendant affirmative relief was reversed. (*Id.*)

g. In an action for divorce for cruel treatment, brought by a wife against her husband, the plaintiff failed to make out a case. The defendant set up by answer and proved facts which, had he been plaintiff, would have entitled him to a divorce *a mensa et thora;* held, that as defendant, he was entitled to the same relief (*McNamara* v. *McNamara*, 9 Abb. 18; 2 Hilton, 547).

n. In an action on an award, a defendant may have affirmative relief (*Knowlton* v. *Mickles*, 29 Barb. 465).

Note to Paragraph 3.

i. **Judgment against one defendant leaving the action to proceed against the other.**—A party can avail himself of this provision only through the medium of an order of the court; and in a case in which the court might allow judgment to be entered against one defendant and the action to proceed as to the others, it is irregular for a plaintiff, without an order for the purpose, to enter judgment against one defendant and continue the action against the others (*Bacon* v. *Comstock*, 11 How. 197; and see *Buell* v. *Gay*, 13 How. 31). And where a number of defendants are sued on a *joint* liability, and some de

fend and one fails to answer, the plaintiff is not entitled to judgment against the defendant not answering until the issue raised by the other defendants has been disposed of (*Catlin* v. *Latson*, 4 Abb. 248).

a. "The court has no authority, where the action is to foreclose a mortgage, to render a contingent judgment for the balance of the debt remaining unsatisfied, after a sale of the mortgaged premises previous to the rendition of the principal judgment for a foreclosure and sale of the premises mortgaged. The action cannot be so divided (*Cobb* v. *Thornton*, 8 How. 66). In that case some of the defendants answered, and some did not. The court denied a motion for judgment against the defendants who did not answer. Sec. 274 does not apply to such a case.

b. A several judgment may be entered wherever a several action might have been brought (*Parker* v. *Jackson*, 16 Barb. 33; *Harrington* v. *Higham*, 15 Barb. 525; *Merrifield* v. *Cooley*, 4 How. 272; *Crandall* v. *Beach*, 7 How. 271).

c. In an action for a tort against two defendants, one defendant died and the plaintiff obtained an order for continuing the action against the survivor and the representatives of the deceased. On the trial the court obliged the plaintiff to elect either to proceed against the survivor or the representatives. The plaintiff having elected the representatives, held that the surviving defendant was entitled to costs (*Gardner* v. *Walker*, 22 How. 405).

Note to Paragraph 4.

d. **Dismissal of complaint for not serving copy.**—[*Semble.* This subdivision applies only to the case of a neglect to proceed against one or some of two or several defendants, not a failure to bring the cause to trial. The latter case is within rules 26 and 27, which see.]

e. The statute fixes the time within which the plaintiff must serve a copy of the complaint after demand; and if he fails to serve the copy in time, it is in contemplation of section 274, an *unreasonable neglect to proceed* in the cause against the defendant who has been served with the summons; and the motion may be, in the language of that section, *to dismiss the complaint*, though in point of fact no complaint may have been made. If the motion is granted, the *action* will be dismissed (*Calvin* v. *Bragden*, 5 How. 124; *Baker* v. *Curtiss*, 7 *ib.* 478; and see *Luce* v. *Trempert*, 9 How. 212).

f. If the copy complaint is not served *within* twenty days after demand, and is afterwards tendered, the defendant is not bound to accept it (*Mandeville* v. *Winne*, 5 How. 461). And if, after service of notice of motion under this section to dismiss the complaint for not serving a copy within twenty days after a demand thereof, a copy is served by leaving it at the office of the defendant's attorney, and he neither refused to receive it, nor did he offer to return it, until after the lapse of fifteen days, when he returned the copy complaint with a notice that he disregarded it,—on the hearing, the court granted the motion, with leave to the plaintiff to serve a copy of the complaint within five days, on payment of costs; and the court said, "The affidavits do not show an express waiver by the defendant's attorney of this motion. Had the copy complaint been served before the notice of motion, and the attorney received it without objection, or, if he had no opportunity to object, had retained it without giving notice that he should disregard it, I should not hesitate to apply the doctrine of waiver" (*Wirtz* v. *Norton*, 25 Wend. 699; 3 Hill 476; 1 How. 240; 2 *ib.* 146; 3 *ib.* 64).

g. Where a summons in the form required by the second subdivision of section 129, contained the names of several parties as defendants, and was served, without any copy of the complaint, on one only of the parties named as defendants, and he appeared and demanded a copy of the complaint, which was served, but which contained only the name of the party served as defendant, and no proceedings were had against the other parties named as defendants,—the defendant served, moved to set aside the summons and for a dismissal of the complaint for neglect of the plaintiff to serve a complaint against all the parties named as defendants in the summons. The court denied the motion, and said, the defendant served "has no right to ask the court to dis-

miss the complaint, with costs, in favor of the other defendants, under section 274. It is for those defendants to make the motion, and not the party served (*Travis* v. *Tobias*, 7 How. 90; and see *McKenzie* v. *Hackstaff*, 2 E. D. Smith, 75; *Robinson* v. *Frost*, 14 Barb. 536).

a. A party named as a defendant in the summons, but who has not been served, cannot *voluntarily* appear and move to dismiss the complaint under this section, "unless he has some right to protect, which renders such appearance necessary. Thus, where an injunction has been granted affecting the rights of a party not served with a subpœna, he was allowed to appear voluntarily, and join in a motion to dissolve the injunction (*Waffle* v. *Vanderheyden*, 8 Paige, 45). So in the *Georgia Lumber Co.* v. *Bissell* (9 Paige, 226), it was held that a defendant arrested upon a *ne exeat* might, without waiting for the service of a subpœna, enter his appearance, and demand a copy of the bill" (*Tracy* v. *Reynolds*, 7 How. 327. See *ante*, p. 177, *d*).

b. A motion for judgment for not serving a copy of the complaint must be made in the district, or a county adjoining the county in which the summons states the complaint will be filed (*Johnston* v. *Bryan*, 1 Code Rep. N. S. 46; 5 How. 355); for if no complaint be filed, it will be presumed that the place of trial of the action is the county where the summons states the complaint will be filed. (*Ib.*)

c. **Dismissing complaint for not proceeding to trial.** (*See* Rules 26, 27.) —Where a defendant notices the cause for trial, and omits an opportunity to move it at the circuit, he cannot afterwards move at special term for a dismissal of the complaint for the plaintiff's neglecting to proceed to trial (*McCarthy* v. *Hancock*, 1 Code Rep. N. S. 188; 6 How. 28).

d. Either party may give notice of hearing; and where both parties notice the cause, neither can charge delay or default upon the other for not bringing the cause to a hearing (*Thompson* v. *Krider*, 8 How. 248; *Moeller* v. *Bailey*, 14 *id.* 359). A defendant cannot move for judgment as in case of a nonsuit, or a dismissal of the complaint, merely because the plaintiff has failed to notice the cause for trial, and later issues have been tried at the circuit. (*Id.*)

e. If the plaintiff in an action of claim and delivery, in which issue has been joined, neglects to bring the cause on for trial, the proper course for the defendant is to notice the cause himself, and bring it on. An order that the complaint be dismissed, unless the plaintiff bring the cause to trial within a specified time, is improper in such a case (*Schroeder* a. *Kohlenback*, 6 Abb. 66). But in *Roy* v. *Thompson* (8 How. 253), held "that in order to entitle a defendant to move for a dismissal of the complaint, he was not bound himself to notice the cause for trial, but might make the motion in all cases where the plaintiff had neglected to bring the cause to trial according to the course and practice of the court. The affidavit, however, upon which the motion is founded, must show that the cause was at issue in time to have it noticed, and that at the term for which it ought to have been noticed younger issues had been tried."

f. On a motion by defendant to dismiss the complaint for the reason that the plaintiff did not bring the cause to trial at a previous circuit, held that the defendant was not guilty of *laches* in moving where but one general term had intervened, and no special term having been held before that general term, at which the defendant could have noticed the motion (*Hawley* v. *Seymour*, 8 How. 96).

g. It is no sufficient answer to a motion to dismiss the complaint for want of prosecution, to say that the plaintiff is dead, that no representative can be found to revive the action, but that the attorney *hopes* to find a representative who is willing to revive the action (*Crawford* v. *Whitehead*, 1 Code Rep. N. S. 345). Where one of several defendants died pending the reference of an action, which survived to his legal representatives, and the surviving defendant who had appeared and answered, moved the court for a dismissal of the complaint as against him, the plaintiff having neglected to proceed and bring in the heirs or devisees of the deceased defendant, either by motion or by supplemental complaint, the court directed an order that the complaint be dis-

missed as to the moving defendant with costs, unless the plaintiff within sixty days from the service of the order obtained leave to and filed a supplemental complaint, and issued a summons thereon against the persons representing the interest of the deceased defendant (*Chapman* v. *Foster*, 15 How. 241).

a. Where the plaintiff notices the cause for trial at the circuit, and by agreement of the counsel on both sides it is set down for a future day in the circuit, and before that day arrives the jury are discharged and the circuit adjourns *sine die*, it is a waiver by the defendant of a motion for a dismissal of the complaint, and for judgment for not bringing on the trial by plaintiff previous to the cause being set down (*Fuller* v. *Sweet*, 9 How. 74).

b. In an action to recover possession of personal property, after a stipulation to try, the plaintiff again neglected to bring the cause to trial, but entered a rule to discontinue, and tendered the costs,—held that the defendant could not move for a dismissal of the complaint and judgment for a return, and that his remedy was, himself to notice the cause for trial, and then take such judgment as the circumstances of the case required (*Wilson* v. *Wheeler*, 6 How. 49). See *ante*, 390, *g*.

c. Where the case is at issue as to some only of the defendants and the plaintiff does not proceed against the others, the proper course for the defendants as to whom the cause is at issue to pursue, is to move to dismiss the complaint as to them, they cannot regularly bring the cause on for trial and when called take a dismissal of the complaint (*Morris* v. *Crawford*, 16 Abb. 124). *Semble*, that if a plaintiff fail to prosecute his action against several defendants with diligence one of such defendants may in a proper case, move to have the complaint dismissed as to him, leaving the action to proceed against the others (*Ward* v. *Dewey*, 12 How. 193).

d. When in granting an order dismissing the complaint for plaintiff's neglect to proceed, leave is reserved to him to bring the cause to trial on payment of costs, the costs should include all the costs to which the defendant is entitled up to that time (*Bowles* v. *Van Horne*, 11 Abb. 84).

e. A dismissal of the complaint, on motion at special term, for want of prosecution of the action, is a judgment in favor of the defendant (*Tillspaugh* v. *Dick*, 8 How. 33). It is equivalent to a nonsuit (*Holmes* v. *Slocum*, 6 How. 218; *Harrison* v. *Wood*, 2 Duer, 50; and see *Robins* v. *Wells*, 26 How. 15).

f. One of several defendants may make the motion to dismiss for not proceeding (*Bishop* v. *Morgan*, 1 Code Rep. N. S. 340; *Hoyt* v. *Loomis*, 1 Code Rep. 128; *Ward* v. *Dewey*, 12 How. 193). The code has not altered the rule of practice formerly existing in suits in equity, that where the plaintiff does not proceed with due diligence any defendant who has perfected his answer may move to dismiss the action (*Salters* v. *Pruyn*, 15 Abb. 224). The defendant having stayed plaintiff's proceedings until security given for the costs, does not prevent his making the motion. Nor does the fact that defendant has actually noticed the cause for trial (*Bowles* v. *Van Horne*, 11 Abb. 84. This case was in the superior court, and refers to *Moeller* v. *Bailey*, 14 How. 359; and see *Champlin* v. *Petrie*, 4 Wend. 209). The motion cannot be made after an order obtained by defendant for a new trial, until the order has been served (*Robb* v. *Jewell*, 6 How. 276).

g. **Note to paragraph 5. Judgment against married woman.**—The judgment against a married woman does not cease to be *in rem*, although as to form *in personam*. In all cases of judgment against a married woman it should be expressly stated therein that the amount is "to be levied or collected out of her separate estate and not otherwise," and the execution should fellow the judgment in its terms (*Baldwin* v. *Kimmel*, 16 Abb. 353; and see Laws 1853, p. 1057, *ante*, p. 230 *d*).

§ 275. [231.] *The relief to be awarded to the plaintiff.*

The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint;

but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue.

a. Where a complaint asks for specific relief, and the defendant makes no defence, the plaintiff cannot take judgment for a greater amount than is asked for in the complaint (*Hurd* v. *Leavenworth*, 1 Code Rep. N. S. 278). The plaintiff in the complaint asked to have notes to the amount of $5,000 delivered up and canceled, and to have a judgment for $2,000,—held, that a judgment for $7,000 exceeded the relief sought in the complaint; and the judgment was reversed. (*Ib.*) It is not enough that the complaint states facts entitling the plaintiff to certain relief, he cannot in the absence of an answer have any relief not demanded (*Simonson* v. *Blake*, 12 Abb. 331; 20 How. 484). Thus where in a foreclosure the complaint only prays for a sale, the plaintiff cannot, in the absence of an answer, take a judgment for payment of any deficiency (*id.*). And in partition, defendants not having answered cannot be required to account for rents, if the complaint does not specifically ask such relief (*Bullwinker* v. *Ryker*, 12 Abb. 311).

b. A judgment giving plaintiff relief not demanded in the complaint is not merely irregular but voidable as unauthorized, and the right to move to vacate it is not limited to one year (*Simonson* v. *Blake*, 12 Abb. 331; 20 How. 484).

c. Where there is an answer the court is to give such relief as the parties are entitled to, whether demanded in the complaint or not (*Jones* v. *Butler*, 20 How. 189), provided the relief is limited to such as is proper in reference to the parties before the court (*Smith* v. *Howard*, 20 How. 151); and is consistent with the case made by the complaint and embraced within the issue (*Cowenhoven* v. *City of Brooklyn*, 38 Barb. 9). A plaintiff cannot recover damages for injuries to his possession, when the complaint negatives the existence of possession in him (*id.*) and provided an action is the proper remedy; thus where the complaint asked for damages for keeping plaintiff out of office, and to have the certificate of defendant's election declared void, the complaint was dismissed because the plaintiff should have proceeded by *quo warranto* (*Hartt* v. *Harvey*, 21 How. 382).

d. Where the complaint unites legal and equitable causes of action, if the evidence sustains either, judgment should be rendered accordingly, whether the action be tried at circuit or special term (*N. Y. Ice Co.* v. *N. West. Ins. Co.*, 21 How. 296; 23 N. Y. 357; reversing, 20 How. 424; and as it seems overruling *Von Beck* v. *Village of Rondout*, 15 Abb. 48; *Stevenson* v. *Buxton*, 15 Abb. 352; reversing, 8 Abb. 414; and see *Craig* v. *Hyde*, 24 How. 313; *See* v. *Partridge*, 2 Duer, 463). Thus where the complaint prays the reformation of a contract and damages for its breach, and the court finds the plaintiff not entitled to have the reformation of the contract, but entitled to damages for the breach of the contract, the plaintiff should have judgment for the damages proved (*N. Y. Ice Co.* v. *N. West. Ins. Co.*, 23 N. Y. 357; *Bidwell* v. *Astor Mut. Ins. Co.*, 16 N. Y. 263).

e. A complaint without averring that the parties had stated an account, set forth a state of facts showing that the plaintiff was entitled to an accounting and tending to show an account stated. It demanded judgment for a sum certain as an ascertained balance, held that the complaint should not be dismissed, but that the action should proceed as if the plaintiff had prayed an accounting and judgment for the amount which should thereupon be found due (*Emery* v. *Pease*, 20 N. Y. 62). It is sufficient if facts be stated in the complaint which warrant the judgment, although the grounds upon which the judgment was rendered were other than those evidently contemplated by the pleader (*Wright* v. *Hooker*, 10 N. Y. 51). If the facts stated in the complaint give a right of action, the plaintiff may recover, no difficulty can arise as to the form of action whether in case or on contract (*Scott* v. *Pilkington*, 15 Abb. 280). See in note to § 140.

a. Where the complaint alleges fraudulent representations of defendant, by which plaintiff was induced to pay him money, and which is sought to be recovered, plaintiff may recover as for money received to his use without any proof of fraud (*Byxbie* v. *Wood*, 24 N. Y. 607).

b. Where plaintiff fails to prove the cause of action alleged in the complaint in its entire scope and meaning, but proves a cause of action different from that alleged, he is not entitled to any judgment (*Saltus* v. *Genin*, 3 Bosw. 250; and see *Redmond* v. *Dana*, 3 Bosw. 615; *Bailey* v. *Ryder*, 10 N. Y. 368).

c. In an action for specific performance, the court has power, where the defendant cannot make title to all the property, to decree performance as to so much as he may be able to make title to; but (for the reasons stated in the report) it is a power which should "be exercised with great deliberation and caution." It may be decreed although not asked for by the complaint, but it must be asked for at the trial; and if not demanded there, it cannot be decreed on appeal (*Mills* v. *Van Voorhies*, 10 Abb. 160). And in an action for a specific performance, the court may give damages for the non-performance (*Barlow* v. *Scott*, 24 N. Y. 40; *Marquat* v. *Marquat*, 2 Ker. 336; reversing 7 How. 417; *semble*, sustaining *Stevenson* v. *Buxton*, 8 Abb. 414; and overruling S. C. 15 Abb. 352; and *Craig* v. *Hyde*, 24 How. 315; and see *Wiswall* v. *McGown*, 2 Barb. 270; *Woodward* v. *Harris*, 2 Barb. 440). See *ante*, pp. 253 *a*, 254 *c*, *d*, 205 *a*, 343 *b*.

§ 276. [232.] *Rate of damages where damages are recoverable.*

Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action.

See note to § 261.

§ 277. *Judgment in action for recovery of personal property.*

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

b. A defendant who succeeds in an action to recover the possession of personal property, when the property has been delivered to the plaintiff, must, under this section take judgment in the alternative, for a return of the property or for the value thereof as assessed, in case a return cannot be had; this section having deprived the defendants in such actions of the election given them by the revised statutes, to take judgment either for a return or for the value of the property, at their option (*Dwight* v. *Enos*, 5 Sel-

den, 470). Where the judgment was not in the alternative, held that a new trial was not necessary; but the judgment might be modified so as to conform to the code by changing it into a judgment in the alternative, for the recovery of the possession of the property or of its value in case a delivery cannot be had, assuming the amount recovered as damages to be the true value of the property to the plaintiffs (*Fitzhugh* v. *Wiman*, 5 Selden, 559; *Seaman* v. *Luce*, 23 Barb. 240; and see *Wood* v. *Orser*, 25 N. Y. 348; *Glann* v. *Younglove*, 27 Barb. 480). A judgment not in the alternative is valid until reversed or amended (*Gallarati* v. *Orser*, 4 Bosw. 94).

a. Where the relief demanded by the complaint was a judgment for the return of personal property or its value, and no answer was put in, it was held that the plaintiff might elect which judgment he would take, but that he could not take judgment in the alternative (*Commercial B'k.* v. *White*, 3 How. 292; 1 Code R. 68). See *Aldrich* v. *Thiel*, 3 Code Rep. 91.

See note to § 261.

§ 278. [233.] (Am'd 1849, 1851, 1852.) *Judgment, how directed.*

Judgment upon an issue of law, or of fact, or upon confession, or upon failure to answer (except where the clerk is authorized to enter the same by the first subdivision of § 246, and by § 384, and except where it may be given at the general term as provided in § 265) shall in the first instance be entered upon the direction of a single judge, or report of referees, subject to review at the general term, on the demand of either party, as herein provided.

b. A judgment upon a written offer, pursuant to § 385, is not within this section, and may be entered without the previous permission of a judge (*Hill* v. *Northrop*, 9 How. 525).

c. Where there is an issue of law and an issue of fact, no judgment can be entered until both issues are disposed of (*Masters* v. *Barnard*, 1 Code Rep. N. S. 407; 6 How. 133; *Belknap* v. *McIntyre*, 2 Abb. 366).

d. Where an answer sets up more than one defence, and one of them is held bad on demurrer, the plaintiff can have an order only that judgment shall be entered in his favor, unless the defendant shall succeed upon the other issues. An absolute judgment for the plaintiff on the demurrer is improper in such a case (*Belknap* v. *McIntrye*, 2 Abb. 366.

e. Where the decision at the circuit is correct, but the judgment is erroneously entered, the remedy of the party is not by appeal from the judgment, but by motion at special term to correct the error (*Campbell* v. *Adams*, 38 Barb. 132).

f. The court have not the power to order judgment *nunc pro tunc*, as of a date prior to the actual judgment, to affect the parties' right to costs (*Moore* v. *Westervelt*, 14 How. 279). As to allowing judgment to be entered *nunc pro tunc* after the death of a party (*Crawford* v. *Wilson*, 4 Barb. 505).

g. After a verdict upon issues settled, it is immaterial whether the subsequent proceedings to obtain judgment is at the circuit or special term (*Dort* v. *McAdam*, 27 Barb. 187).

h. Where an order granting a favor to a plaintiff imposed on him the payment of costs, and provided that if the costs were not paid within twenty days after adjustment, the defendant might enter a judgment of nonsuit, held that on proof to the clerk of the non-payment of these costs he might enter a judgment of nonsuit without any further order of the court (*Hanna* v. *Dexter*, 15 Abb. 136).

a. In an action on a penal bond, the judgment in form is for the penalty (*Western Bank* v. *Sherwood*, 29 Barb. 383).

b. A judgment against an executor, except on the plea of *ne ungues executor*, or of release to himself, is not against him personally, but to be levied of the goods of the testator (*Mills* v. *Thursby*, 12 How. 390).

c. Where defendant has appeared, plaintiff cannot settle *ex parte* the form of the judgment, if it grant special relief (3 Sand. 724).

See note to § 347.

§ 279. [234.] *Clerk to keep a judgment-book.*

The Clerk shall keep, among the records of the court, a book for the entry of judgments, to be called the "judgment-book."

§ 280. [235.] *Judgment to be entered in judgment-book.*

The judgment shall be entered in the judgment-book, and shall specify clearly the relief granted, or other determination of the action.

d. The clerk is bound to enter judgment on being paid the fee prescribed therefor, and cannot justify a refusal on the ground that fees for other services in the cause remain unpaid (*Purdy* v. *Peters*, 15 Abb. 160).

e. In *Schenectady & Saratoga Plank Road Co.* v. *Thatcher* (6 How. 226; 1 Code Rep. N. S. 380), it was held that the decision of the court in writing, when filed, is not the entry of judgment, but that in such a case, as in all others, the clerk must enter the judgment in the judgment-book. And see *Lentilhon* v. *Mayor, &c. of New York* (1 Code Rep. N. S. 111; 3 Sand. 721).

f. If, after the judgment is entered, a case is made, it may *by order* be annexed to the judgment-roll (*Lynde* v. *Cowenhoven*, 3 Code Rep. 7; 4 How. 327; *Renoud* v. *Harris*, 1 Code Rep. 125; 2 Sand. 641; and *Church* v. *Rhodes*, 6 How. 285; *Anderson* v. *Dickie*, 26 How. 201).

See Rules 9, 72.

§ 281. [236.] (Am'd 1849, 1851, 1852.) *Judgment-roll.*

Unless the party or his attorney shall furnish a judgment-roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers, which shall constitute the judgment-roll:

1. In case the complaint be not answered by any defendant, the summons and complaint, or copies thereof, proof of service and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, *and all orders and papers* in any way involving the merits, and necessarily affecting the judgment.

a. It is the clerk's and not the attorney's duty, to make up the judgment-roll (*Renouil* v. *Harris*, 1 Code Rep. 125; 2 Sand. 641; *Earle* v. *Barnard*, 22 How. 437). It is optional with the prevailing party to furnish a judgment-roll or not, and he cannot be compelled to furnish a judgment-roll (*Heinemann* v. *Waterbury*, 5 Bosw. 686). And see § 422.

b. The bill of costs, notice of adjustment, and affidavit of disbursements, should not be annexed to the judgment-roll; and if they are, the court will order them to be taken off (*Schenectady & Saratoga Plank Road Co.* v. *Thatcher*, 1 Code Rep. N. S. 380; 6 How. 226). The affidavit and order of arrest are no part of the record, and should not be engrafted upon it or entered in it (*Corwin* v. *Freeland*, 2 Selden, 565). The affidavit on which a requisition to the sheriff to take personal property is founded (§ 207), forms no part of the judgment-roll (*Kerrigan* v. *Ray*, 10 How. 215). The provisions of the code regulating the mode of entering the judgment and the filing the judgment-roll, are not to be considered imperative, but merely directory (*Stimson* v. *Huggins*, 9 How. 86; 16 Barb. 658).

c. A judgment-roll upon "a judgment by default, besides the summons and complaint, must contain evidence that the summons was served and that no answer has been received, thus showing that the court had jurisdiction over the defendant and that he had waived his right to defend. If the defendant has appeared and an issue has been joined, it must appear from the roll how that issue has been disposed of, so as to authorize the court to proceed to judgment. When an issue of fact has been tried by a jury, a copy of the verdict entered in the manner prescribed by § 264 must be inserted in the roll. If the issue has been tried before a referee, his report stands as the decision of the court, and must appear in the judgment-roll. In like manner if the trial of the issue be before the court, without a jury, the decision must be in writing; and when the record is made up the *decision* becomes a necessary part of it. If there are any other papers which materially affect the judgment, these also should appear in the roll. Thus it should be made to appear in every judgment-roll that the judgment has been rendered by a court which has jurisdiction of the proceedings, and when issues have been joined that those issues have been tried in some manner prescribed by law, so as to authorize the judgment." The opinion, if any, should not be inserted in the judgment-roll (*Thomas* v. *Tanner*, 14 How. 427).

d. The proof of service of the summons and complaint is no part of the record on demurrer (*Smith* v. *Holmes*, 19 N. Y. 271); but proof of service of the summons where the defendant does not appear, forms part of the judgment-roll (*Macomber* v. *Mayor of N. Y.*, 17 Abb. 36; *Thomas* v. *Tanner*, 14 How. 427).

e. The omission in a judgment record of a pleading stated to have been withdrawn before judgment and to have been lost or mislaid, does not affect the validity of the record or judgment (*Hatcher* v. *Rocheleau*, 18 N. Y. 87). A demurrer which a party has abandoned, like a pleading which has been amended, is no longer a part of the record, and will on motion be stricken from the case (*Brown* v. *Saratoga R. R. Co. id.* 495).

f. Omitting to annex the summons and complaint to the judgment-roll, is an irregularity only; it does not prevent there being a judgment in the action (*Martin* v. *Kanouse*, 2 Abb. 393; and see *Calkins* v. *Parker*, 21 Barb. 276; *Cook* v. *Dickerson*, 1 Duer, 679; *Conolly* v. *Conolly*, 16 How. 224; but see *Townshend* v. *Wesson*, 4 Duer, 342; *Decker* v. *Judson*, 16 N. Y. 450).

g. Signing by the clerk is not indispensably necessary to the validity of a judgment (*Artisan's Bank* v. *Treadwell*, 34 Barb. 553; *Townshend* v. *Wesson*, 4 Duer, 342; *Macomber* v. *Mayor of N. Y.* 17 Abb. 45; apparently overruling *Wheeler* v. *Williams*, 1 Barb. 48; *Manning* v. *Guyon*, 1 Code Rep. 43; and see *Van Orman* v. *Phelps*, 9 Barb. 500).

h. That damages were assessed against the defendant in the court below, without any affidavit proving his default in not answering, is a matter of practice not reviewable in the court of appeals, upon an appeal from the judgment (*Catlin* v. *Billings*, 16 N. Y. 622).

i. A variance between the form of judgment as entered on the clerk's min-

utes and as entered in the judgment-roll is an irregularity which must be taken advantage of within one year (*Martin* v. *Lott*, 4 Abb. 365).

* § 282. [237.] (Am'd 1851.) *Judgment, when and how to be docketed. Lien—Secured on appeal.*

On filing a judgment-roll upon a judgment directing in whole or part the payment of money, it may be docketed with the clerk of the county where it was rendered, and in any other county upon the filing with the clerk thereof a transcript of the original "docket," and shall be a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of docketing thereof, in the county in which such real estate is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where it was rendered. But whenever an appeal from any judgment shall be pending and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in the code, the court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, in such terms as they shall see fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is "secured on appeal;" and thereupon it shall cease during the pending of the appeal, to be a lien on the real property of the judgment debtor as against purchasers, and mortgagees in good faith.

a. This section applies to judgments in the United States' courts (*Crandell* v. *Cropsey*, 10 N. Y. Leg. Obs. 1).

b. A judgment-roll delivered to the clerk to be filed before the hour prescribed by law for opening his office (2 R. S. 285, § 54, laws 1860, ch. 276), will be considered as filed at the hour for opening his office. No preference can be gained by taking a judgment-roll to the clerk's office before that hour (10 Wend. 573; and see *France* v. *Hamilton*, 26 How. 180).

c. The perfecting an appeal, and giving security to stay proceedings on the judgment, does not prevent the respondent from filing transcripts of the judgment appealed from (*Bulkley* v. *Keteltas*, 1 Code Rep. N. S. 119).

d. A judgment does not lose its lien upon real estate, by the suffering an execution issued thereon to lie dormant in the sheriff's hands (*Muir* v. *Leitch*, 7 Barb. 341). No indulgence or negligence of the sheriff in selling, without any act of the plaintiff, will render an execution dormant as to subsequent purchasers (*Talbert* v. *Melton*, 9 Sme. & M. 9). But where the lien of a judgment had ceased by lapse of time, the court will interfere in a summary way in behalf of *bona-fide* purchasers, and order a perpetual stay of execution, unless the judgment creditor shall satisfy the court that there is probable cause for alleging that the purchase was not *bona-fide*. The mere allegation

**Amended—See Appendix.*

of the creditor that he thinks he can prove that they are not *bona-fide* purchasers, is not enough (*Wilson* v. *Smith*, 2 Code Rep. 18).

a. The liens of judgment creditors, if the land be sold on a prior judgment, are transferred to the surplus, which must be applied to them in their order of priority (*Averill* v. *Loucks*, 6 Barb. 470).

b. The judgment continues a lien, after ten years as against the judgmen debtor (*Scott* v. *Howard*, 3 Barb. 319).

c. A judgment filed and docketed after the decease of the defendant, does not bind real estate (*Clarke's case*, 15 Abb. 227).

d. A mortgage for subsequent advances takes priority of a judgment obtained intermediate the mortgage and making the advances (*Robinson* v. *Williams*, 22 N. Y. 380).

e. Priority of judgments in distribution of estates in surrogates' courts, depends upon the date of their recovery, not the date of docketing (*Harned's case*, 4 Abb. 270).

f. A judgment for costs recovered against husband and wife during coverture, did not bind the wife's separate estate (*Tisdale* v. *Jones*, 38 Barb. 523).

g. Where a judgment is vacated and afterwards the order vacating it is reversed, the lien of the judgment is revived, except as to intervening *bona-fide* purchasers or incumbrancers (*King* v. *Harris*, 30 Barb. 471).

h. The tender of the amount due upon a judgment not accepted, does not operate to extinguish the lien (*The People* v. *Beebe*, 1 Barb. 379; see however, *Kortright* v. *Cady*, 21 N. Y. 343).

i. When the amount due on a judgment is paid by one not bound by it, the judgment is extinguished or not according to the intent of the payer (*Harbeck* v. *Vanderbilt*, 20 N. Y. 395; and see *Alden* v. *Clark*, 11 How. 209).

j. On a judgment against principal and surety, the surety may pay the amount of the judgment and take an assignment of it and prosecute the judgment against the principal (*Alden* v. *Clark*, 11 How. 209).

k. The test of a right to docket a judgment is, whether there is a right to issue an execution upon it immediately; and therefore a judgment for sale of real estate and that a party to the suit pay any deficiency, cannot be docketed until such deficiency is ascertained (*De Agreda* v. *Mantel*, 1 Abb. 134).

l. A judgment against several defendants for separate sums, but providing that in case of the insolvency of any of such defendants the others shall be liable in a fixed proportion, but not to exceed a certain sum is to be docketed as a judgment for the amount of the ultimate contingent liability (*Rankin* v. *Sacchi*, 16 Abb. 368).

m. Where a judgment was docketed correctly as to the Christian and surname of the defendant, but incorrectly as to the initial of the middle name and the docket was afterwards corrected on motion,—held that the judgment took priority as a lien from the date of the original docketing, as against a subsequent judgment obtained before the correction (*Geller* v. *Hoyt*, 7 How. 265, and see *Aylesworth* v. *Brown*, 10 Barb. 167).

n. The date and order of a judgment lien is in all cases a question of time, depending on the day and hour when the judgment was docketed (*Blydenburgh* v. *Northrop*, 13 How. 289).

o. The lien of a judgment does not in equity attach upon the mere legal title to lands, existing in the defendant when the equitable title is in another (*Lounsbury* v. *Purdy*, 11 Barb. 490; 16 Barb. 376; 18 N. Y. 515; *Averill* v. *Loucks*, 6 Barb 20). Judgments do not become liens on leasehold premises unless or until the judgment debtor, the lessee, is in possession (*Crane* v. *O'Connor*, 4 Edw. Ch. R. 409).

p. As to docketing and filing transcripts of judgments against stockholders in banking corporations see laws 1863, ch. 372, § 6

q. **Secured on appeal.**—[This provision does not apply to judgments docketed prior to July 10, 1851.] Are the sureties upon an appeal entitled to notice of an application on the part of the applicant for an order directing an entry

secured on appeal on the docket? Whiting, J., held that they are (*Munn* v. *Barnum*, 2 Abb. 411). Bosworth, J, held they were not (*Livingston* v. *Roberts*, 3 Abb. 231; 5 Duer, 680). The omitting to give them notice does not discharge them (*Burrall* v. *Vanderbilt*, 6 Abb. 70). The granting or refusing such an order rests in the discretion of the court (*Fitch* v. *Livingston*, 4 Sand. 712; *Livingston* v. *Roberts*, 3 Abb. 231). The leave to make this entry cannot be granted until security be given sufficient to stay execution (*Hoppock* v. *Cottrell*, 13 How. 461). The order will not be granted where the respondent has done any act wherebythe sureties on the appeal are discharged of their liability. As where the respondent has since perfecting the appeal released from the operation of the judgment part of the appellant's real estate (*Wells* v. *Kelsey*, 25 How. 384; 16 Abb. 221, *note*.)

a. **Setting aside judgment for irregularity.**—What degree of laches in moving to set aside a judgment for irregularity will authorize the court to deny the motion (*Martin* v. *Lott*, 4 Abb. 365).

b. *Semble*, a motion to set aside a judgment must be made in the district in which the action was triable (*Gould* v. *Torrance*, 19 How. 560).

c. Motion to set aside a judgment for irregularity must be made within one year (see *ante* p. 356, *a*; and *Park* v. *Church*, 5 How. 381; *Cook* v. *Dickerson*, 1 Duer, 687.) This does not apply to a motion to set aside a void judgment (*Hallett* v. *Righters*, 13 How. 43; and see p. 517, *i*).

d. No appeal lies from an order denying an application for leave to make the entry (*Fitch* v. *Livingston*, 4 Sand. 712). It may be referred to a referee to report on the sufficiency of the sureties (*Munn* v. *Barnum*, 2 Abb. 411.)

TITLE IX.

Of the execution of the judgment in civil actions.

CHAPTER I. THE EXECUTION.
II. PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

CHAPTER I.

The Execution.

SECTION. 283. Execution within five years of course.
284. Execution can only be issued by leave of court after five years. Leave, how obtained.
285. Judgments, how enforced.
286. The different kinds of execution.
287. To what counties execution may be issued. Execution against a married woman.
288. Execution against the person, in what cases.
289. Form of the execution.
290. Execution to be returnable in sixty days.
291. Existing laws relating to execution continued.

§ 283. [238.] (Am'd 1849.) *Execution within five years, of course.*

Writs of execution for the enforcement of judgments as now used, are modified in conformity to this title, and the party in whose favor judgment has been heretofore or shall hereafter, be given, may, at any time within five years after the entry of judgment, proceed to enforce the same as prescribed by this title.

a. **To what judgments this section applies.**—This and the next section apply as well to judgments rendered before the code took effect, as to those rendered in actions commenced since (*Catskill Bank* v. *Sandford*, 2 Code Rep. 58; 4 How. 101; *Swift* v. *De Witt*, 1 Code Rep. 25; 3 How. 280; *Clark* v. *Hutchinson*, 1 Code Rep. 127).

b. **When executions may issue.**—Executions may be issued immediately on perfecting judgment, and at any time within five years thereafter (*Swift* v. *De Witt*, supra). But the judgment record should be actually filed before execution issues (5 Wend. 109; 20 Johns. 307; 2 R. S. 360, § 11); it may however be ordered to be filed *nunc pro tunc* (8 Cow. 39; 22 Wend. 566; and see 11 Barb. 500; *Townshend* v. *Wesson*, 4 Duer, 342).

c. **Judgment standing as security.**—Where a judgment is permitted to stand as security, and the defendant admitted to come in and defend, the judgment creditor has no right to enforce payment of the judgment pending the litigation on the defence interposed (*Ford* v. *Whitridge*, 9 Abb. 416; and see

Union Bank v. *Mott*, id. 106; 17 How. 354); and the fact that a party is permitted to enter judgment on a verdict *as security*, does not prevent a motion for a new trial on a case (*Benedict* v. *Caffee*, 3 Duer, 669).

a. **Corporation of New York City, execution against.**—No execution can be levied upon property of the Corporation of the City of New York "until after ten days' notice in writing of the issuing of such execution shall have been given to the Comptroller of said city by either the party adverse in interest, his agent, attorney or sheriff" (1860, p. 646, § 5). This provision applies only to actions commenced subsequent to 14 April, 1860 (*id.* § 6).

b. **Execution against executor or administrator.**—No execution shall issue upon a judgment against an executor or administrator, until an account of his administration shall have been rendered and settled, or unless on an order of the surrogate who appointed him. And if an account has been rendered to the surrogate by such executor or administrator, execution shall issue only for the sum that shall have appeared on the settlement of such account to have been a just proportion of the assets applicable to the judgment (2 R. S. 88, § 32. See *Winne* v. *Van Schaick*, 9 Wend. 448; *The People* v. *Judges of Albany*, 9 Wend. 489; *Mulheran's Ex'ors* v. *Gillespie*, 12 Wend. 349; *The People* v. *Judges of Erie*, 4 Cow. 445; *Olmstead* v. *Vredenburg*, 10 How. 215; *Mills* v. *Thursby*, 11 How. 126; *Mills* v. *Thursby*, 2 Abb. 432, and note to § 289, *post*.

c. Where a creditor shall have obtained a judgment against any executor or administrator, after a trial at law upon the merits, he may at any time thereafter apply to the surrogate having jurisdiction, for an order against such executor or administrator, to show cause why an execution on such judgment should not be issued (2 R. S. 116, § 19), proceedings to obtain said order, see *id.* §§ 20, 21, 22.

d. The surrogate has not power to order an execution where the debts of the deceased exceed the assets, in such a case as to give a preference to a debt which is not by statute entitled to such preference (*Mitchell* v. *Mount*, 17 Abb. 265). The recovery of judgment creates no preference. No execution can be ordered unless it has been ascertained by an accounting what sum is properly applicable to the payment of the judgment, and then the execution can issue only for the sum so applicable. (*Id.*)

e. **Execution against property of a deceased judgment debtor.**—Where a sole defendant dies after judgment and before execution, no execution can issue within one year after. But where the judgment is against several defendants, the death of one does not stay execution against the surviving defendants (19 Wend. 614; *Bellinger* v. *Ford*, 21 Barb. 311; see however laws 1850, ch. 295; *Alden* v. *Clarke*, 11 How. 213; and *Execution* against *Executor* &c. *supra*.

f. *It seems* that the law of 1850, ch. 295, does not supersede the necessity of proceedings in the nature of a *scire facias*, before an execution can be issued after the death of a judgment debtor (*Frink* v. *Morrison*, 13 Abb. 80).

g. A mortgagor, or subsequent judgment creditor, cannot move to have an execution set aside for irregularity, as issued after the death of the judgment debtor, and without a proceeding in the nature of a *scire facias* (*Frink* v. *Morrison*, 13 Abb. 80).

h. When a surrogate on the application of a judgment creditor of a decedent has determined that the judgment is a subsisting claim against the estate, and has entered his determination in the book of his proceedings his duty is ended; he cannot determine what the judgment creditor owes the estate and deduct the amount from the judgment (*Cleveland* v. *Whiton*, 31 Barb. 544).

i. **Execution in favor of a deceased judgment creditor.**—Where it appeared that a transcript of a judgment was filed in April, 1844, and that in *January*, 1850, an execution on such judgment was issued by order of the court; and it further appeared, that at the time of making such order the plaintiff had been dead upwards of three years; and it did not appear that the parties

who procured the order to issue the execution were the legal representatives of the deceased,—the execution was set aside (*Bellinger* v. *Ford*, 14 Barb. 250; 21 *id.* 311).

a. An execution cannot issue on a judgment after the death of the judgment creditor. The remedy to enforce the judgment is an action by the executor of the judgment creditor—praying a judgment that he be at liberty to issue execution on the judgment in the name of such executor, to be levied of any lands which the defendant held when the judgment was docketed (*Thurston* v. *King*, 1 Abb. 127; *Wheeler* v. *Dakin*, 12 How. 537). Such an action is not an action on a judgment, and may be brought without leave of the court. (*Id.*)

b. After the death of a judgment creditor his executors moved, on notice to the judgment debtor, for leave to issue execution on the judgment; the motion was denied (*Jay* v. *Martine*, 2 Duer, 654). The executors should have proceeded on the judgment, and to enforce it by an action under ch. 2, tit. 13, of the code, § 428. An assignee of a judgment, if the plaintiff be dead, can maintain an action to obtain judgment, that he have execution of the original judgment (*Cameron* v. *Young*, 6 How. 372).

c. **Execution after discharge under insolvent debtors' act.**—The proper mode of testing the validity of a discharge in insolvency, is by an action on the judgment, not by issuing an execution or an order to examine the defendant in proceedings supplementary to the execution; for the validity of the discharge will not be considered on a motion to set aside an execution or an order for the examination of a judgment debtor on the ground of such discharge (*Dresser* v. *Shufeldt*, 7 How. 85; *Rich* v. *Salinger*, 11 Abb. 344; *Stuart* v. *Salinger*, 14 Abb. 291, and cases in notes, *id.*; see also *Smith* v. *Paul*, 20 How. 97); but *semble*, a discharge in insolvency which has been declared void will not prevent the judgment creditor issuing an execution on his judgment (see *Small* v. *Wheaton*, 2 Abb. 316; 4 E. D. Smith, 427; *Browne* v. *Bradley*, 5 Abb. 141.)

d. **Execution on satisfied judgment.**—An execution cannot issue on a judgment satisfied by filing a certificate as prescribed 2 Rev. Stat. 362. If the satisfaction is voidable for any cause, the satisfaction should be vacated before issuing execution (*Ackerman* v. *Ackerman*, 14 Abb. 229).

e. When the satisfaction of a judgment was produced by the sale upon the execution of real estate supposed to belong to the judgment debtor, and it was afterwards discovered that he had no title, and that none was obtained by the purchaser, an order of the supreme court vacating the satisfaction and authorizing a new execution was affirmed (*Suydam* v. *Holden*, Court of Appeals, October, 1853; and see *Field* v. *Paulding*, 3 Abb. 139; 1 Hilton, 187).

f. An execution should not be set aside on motion on the ground that the judgment has been satisfied, where the evidence is conflicting (*Frink* v. *Morrison*, 13 Abb. 80).

g. **Execution against husband and wife.**—On judgment for the plaintiff in an action for a tort against husband and wife, "execution may issue against both defendants * * * and it may be satisfied out of the property of the husband, or the separate property of the wife (*Marsh* v. *Potter*, 30 Barb. 506; and see *Solomon* v. *Waas*, 2 Hilton, 181; *Charles* v. *Lowenstein*, 26 How. 29; as to execution against property of married woman, see § 287; and as to execution against the person of a married woman see in note to § 288).

§ 284. [239.] (Am'd 1851, 1858.) *After five years, to be issued only by leave of court. Leave, how obtained.*

After the lapse of five years from the entry of judgment, an execution can be issued only by leave of the court, upon motion, with personal notice to the adverse party, unless he be absent or non-resident, or cannot be found to make such service,

in which case such service may be made by publication, or in such other manner as the court shall direct. Such leave shall not be given unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due. But the leave shall not be necessary when execution has been issued on the judgment within the five years, and returned unsatisfied in whole or in part.

When judgment shall have been rendered in a court of justice of the peace, or in a justice's or other inferior court in a city, and docketed in the office of the clerk of the county, the application for leave to issue execution must be to the county court of the county where the judgment was rendered, or in the city and county of New York to the court of common pleas of that city and county.

a. A defendant may waive the provisions of this section (*Pierce* v. *Crane*, 4 How. 257; 3 Code Rep. 21; *Hulbert* v. *Fuller*, 3 Code Rep. 55; *Morgan* v. *Burgess*, 1 Dowl N. S. 850). *Semble*, that an execution on a judgment in the marine court, issued without leave of the court, more than five years after the judgment was rendered, is not merely irregular but void (*Bates* v. *James*, 3 Duer, 45; *Morse* v. *Gould*, 1 Kernan, 285). An application under this section should not be made until the expiration of five years from the entry of judgment (*Field* v. *Paulding*, 3 Abb. 139).

b. On an application for leave to issue an execution on a judgment entered more than five years previously, the court will not go behind the judgment and inquire into its validity, and the judgment debtor cannot be heard to show that no summons was ever served on him in the action in which the judgment was rendered. The only inquiry contemplated is, whether the judgment, or any part thereof, has been satisfied (*Lee* v. *Watkins*, 3 Abb. 243; 13 How. 178). *Sed* query?

c. In *Kennedy* v. *Mills* (4 Abb. 132), application was made in January, 1857, for leave to issue execution on a judgment entered in 1836. It appeared that execution issued soon after the judgment was recovered, and was partially satisfied, and that nothing had been since done towards collecting the judgment. The application was denied on the sole ground that as there was no proof of any payment, or written acknowledgment, within twenty years, the judgment was presumed to be paid.

b. On a motion under this section for leave to issue execution, if the judgment debtor denies that any thing is due upon the judgment (or that less is due than is claimed by the judgment creditor), the court before granting the motion will refer the matter to a referee to report what, if any thing is due upon the judgment (*Catskill Bank* v. *Sandford*, 2 Code Rep. 58; 4 How. 101; *Kennedy* v. *Mills*, 4 Abb. 132; *Lee* v. *Watkins*, 3 *id.* 243; 13 How. 178). And if it is considered a proper case for granting the motion, the court will direct that on filing the report of the referee with the county clerk, the judgment creditor be at liberty to issue execution for the amount reported due. (*Ib.*)

c. Where a judgment remained unpaid more than five years, from 1845 to 1855, and after its recovery—namely, in 1848—the defendant obtained a discharge in insolvency, which was afterwards adjudged void, the plaintiff had leave in 1855 to issue execution on the judgment (*Small* v. *Wheaton*, 2 Abb. 316; 4 E. D. Smith, 427; *Browne* v. *Bradley*, 5 Abb. 141).

d. A plaintiff may have leave to issue execution on a judgment five years

old and upwards, notwithstanding that he has brought an action upon it and has recovered a new judgment in such action. (*Ib.*)

a. But where a creditor's suit was instituted before the passage of the code of 1848, and a receiver appointed, and an assignment made to such receiver, and the plaintiff, after the code went into effect, issued and levied an *alias fieri facias* on property covered by such receivership, the court set aside such levy, unless the plaintiff waived his receivership, and dismissed his creditor's suit (*Gouverneur* v. *Warner*, 2 Sand. 624).

b. The court should not grant leave to issue execution on a judgment after a lapse of five years from its rendition, when it appears that the judgment debtor holds a judgment against the moving party exceeding in amount the judgment upon which it is sought to issue execution. The moving party should be left to an action on his judgment, or a motion to set off the judgments (*Betts* v. *Garr*, 1 Hilton, 411).

c. Executions were issued in May, 1848, in two actions on judgments in the New York common pleas; by mistake, the executions purported to be issued on judgments of the supreme court. The error was not discovered until after a sale on the executions, and an acknowledgment thereon of payment. Subsequently, and in 1851, an order was made, on application of the plaintiffs, granting leave to issue new executions, but none were issued until 1856. Held that such executions were irregular, and must be set aside. The application for leave to issue execution for the purpose of removing the bar of § 248, cannot be made until after five years from the date of the judgment. After five years, the law presumes the judgment has been paid, and such presumption is not removed by an order made prior to that time (*Field* v. *Paulding*, 1 Hilton, 187).

d. An order refusing to set aside an execution issued without leave, after five years, is not appealable (*Bank of Genesee* v. *Spencer*, 18 N. Y. 150). It seems such an execution is not void, but only voidable, in the discretion of the court from which it issued. (*Id.*)

e. Upon an application by the assignee of a judgment for leave to issue execution under this section, the fact that the judgment-debtor is the owner, by assignment, of judgments to a greater amount against the moving party, is no answer to the motion (*Betts* v. *Garr*, court of appeals, June, 1864).

f. The right to an execution in such case is a legal one, and it cannot be countervailed by the allegation of what may be an equitable offset, without giving the party demanding his legal right an opportunity to controvert the equitable ground, *e. g.* his insolvency, on which a right to set off the counter-judgment might be founded. (*Id.*)

g. Upon such an answer to such an application, the most the Court should do is to suspend the decision for the purpose of giving time to the party resisting to make his motion to allow a set off. (*Id.*)

h. The denial of a motion for leave to issue execution in such a case affects a substantial right, and the order is appealable. (*Id.*)

See note to § 283.

§ 285. [240.] (Am'd 1849.) *Other judgments, how enforced.*

Where a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or the person or officer who is required thereby or by

law to obey the same, and his obedience thereto enforced. If he refuse, he may be punished by the court as for a contempt.

a. Where the plaintiff brought his action to compel the defendant to make or acknowledge satisfaction of a mortgage, and the defendant served notice that judgment might be entered as prayed for in the complaint, which was accordingly done—held on motion by the plaintiff for an order to compel the defendant to execute such satisfaction that such a motion was unnecessary; the judgment (if correctly entered) contained the proper order. The defendant should be served personally with a copy of the judgment. A transcript served on the defendant's attorney, with a personal demand upon the defendant, was insufficient (*Fero* v. *Van Evera*, 9 How. 148).

b. Where a judgment requires a party to execute an assignment or conveyance and an instrument in proper form is tendered to him, he is bound to execute it, although it has not been submitted to the court or judge for approval (*Hilliker* v. *Hathorne*, 5 Bosw. 710). And the deed need not necessarily be tendered for execution simultaneously with the service of a copy of the judgment, its tender at any time after service of a copy of the judgment is sufficient to put the party refusing to execute, in contempt; the absence of a seal on the instrument tendered or of a commissioner or attesting witness is no excuse for not executing the deed (*Morris* v. *Walsh*, 14 Abb. 388).

c. Besides service on the defendant of a copy of the judgment, there must be a demand and refusal to comply with the judgment, to authorize proceedings for a contempt (*Gray* v. *Cook*, 21 How. 432).

d. An attachment for disobedience of an injunction enjoining a particular act is a proceeding on the judgment and will not be granted where defendant has appealed and given security staying proceedings on the judgment (*Howe* v. *Searing*, 11 Abb. 28).

§ 286. [241.] (Am'd 1849.) *The different kinds of execution.*

There shall be three kinds of execution; one against the property of the judgment debtor; another against his person; and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, but they need not be sealed nor subscribed, except as prescribed in section 289.

§ 287. [242.] (Am'd 1851, 1852, 1862.) *To what counties execution may be issued. Execution against married woman.*

When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where judgment is docketed. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties.

Real property adjudged to be sold, must be sold in the county where it lies, by the sheriff of the county, or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold.

An execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise.

a. An execution which directs the seizure of real property, in a county in which the judgment has not been docketed is irregular; but such an execution against personal property only is regular, and the court will permit an execution to be amended by striking out the direction to seize real property (*Stephens* v. *Browning*, 1 Code Rep. 123), or the court may order a new transcript to be filed and the judgment docketed *nunc pro tunc* (*Roth* v. *Schloss*, 6 Barb. 308).

b. **Execution against married woman.**—On judgment for plaintiff in an action for a tort against husband and wife, execution may be issued against the property of both and if returned unsatisfied an execution against the persons of both may issue (*Marsh* v. *Potter*, 30 Barb. 506; and see *Soloman* v. *Waas*, 2 Hilton, 181; *Charles* v. *Lowenstein*, 26 How. 29).

See Laws 1860, ch. 90, 1862, ch. 172.

c. A judgment for costs against a married woman may be collected by execution against her separate property (*Moncrief* v. *Ward*, 25 How. 94; 16 Abb. 354, *note*).

d. The provision that the execution against a rmaried woman shall direct the levy and collection out of her separate estate is directory merely (*Thompson* v. *Sargent*, 15 Abb. 452).

e. The execution against the property of a married woman should direct that it be levied of her separate property (*Baldwin* v. *Kimmel*, 16 Abb. 354).

See Rule 73.

§ 288. [243.] (Am'd 1849, 1862.) *Execution against the person, in what cases, and when.*

If the action be one in which the defendant might have been arrested, as provided in section 179 and section 181, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court, after the return of an execution against his property unsatisfied in whole or in part. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as in this act provided, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by section 179.

a. **When an execution against the person may issue.**—An execution against the person may issue only where an order of arrest has been issued and served before judgment or where the complaint states facts bringing th case within one of the causes for arrest mentioned in section 179. Where an order of arrest has been issued and served before judgment and is not vacated or where the complaint states facts showing a cause of arrest, then on judgment for the plaintiff and execution against the property of the defendant returned unsatisfied, an execution against the person may issue of course and without any order of the court or a judge or entry in the judgment (*Purchase* v. *Bellows*, 14 Abb. 357; 23 How. 421; *Atocha* v. *Garcia*, 15 Abb. 304; 24 How. 186; *Molaer* v. *Koerner*, 13 Abb. 241, *note;* 22 How. 190; *Bull* v. *Mellis*, 13 Abb. 241; *How* v. *Frear*, id. *note;* 21 How. 343; and see *Alden* v. *Sarsan*, 4 Abb. 102; *Sleight* v. *Leavenworth*, 5 Duer, 122; *Crowell* v. *Brown*, 17 How. 68; *Delamater* v. *Russell*, 2 Code R. 147; 4 How. 234; *Burkle* v. *Ells*, 4 How. 288; 1 Code R. 148; *Fake* v. *Edgerton*, 3 Abb. 230, 5 Duer, 681; *Squire* v. *Flynn*, 2 Code R. 117; *Cheney* v *Garbutt*, 5 How. 467; *Ginochio* v. *Figari*, 2 Abb. 185; 4 E. D. Smith, 227; *Livesey* v. *Sanders*, 3 Abb. 176; 12 How. 25; *Lockwood* v. *Styks*, 18 How. 45; *Humphrey* v. *Brown*, 17 How. 481; *Kendenburgh* v. *Morgan*, 18 How. 469; *Hall* v. *McMahon*, 10 Abb. 103; 319; *Cooney* v. *Van Rensselear*, 1 Code R. 38; *Crowell* v. *Brown*, 17 How. 68). These decisions were made prior to the amendment of this section in 1862. That amendment (the last sentence in the section) seems to confirm these decisions.

b. Where a defendant has been arrested in an action authorizing his arrest and he is released from arrest on giving security, he is not thereby exempt from an execution against his person (*Meech* v. *Loomis*, 23 How. 484; 14 Abb. 428).

c. The fact that a party arrested before judgment has given bail, who have justified, does not estop him from insisting that he is not liable to an execution on the judgment against his person, nor prevent his having such execution set aside if improperly issued (*Bridgewater Paint Co.* v. *Messmore*, 15 How. 12; *Moore* v. *Culvert*, 9 *id.* 474; see, however, *Crowell* v. *Brown*, 17 *id.* 68).

d. After a defendant has been arrested pending the action and the order of arrest is vacated on motion, he is not liable to arrest on execution because the jury have found him guilty of fraud in contracting the debt (*Stelle* v. *Palmer*, 11 Abb. 62; see *Meech* v. *Loomis*, 23 How. 484; 14 Abb. 428).

e. In an action to compel the delivery of specific personal property, an execution against the person cannot issue unless an order of arrest was issued and served before judgment (*Purchase* v. *Bellows*, 14 Abb. 357; 23 How. 421; approved at general term, see 16 Abb. 105).

f On a judgment in an action to recover possession of real property and damages for the detention an execution against the person may issue (*Merritt* v. *Carpenter*, 30 Barb. 61; but not on a judgment in an action to recover possession of real property merely; (see *Fullerton* v. *Fitzgerald*, 18 Barb. 441; 10 How. 37; *Brush* v. *Mullen*, 12 Abb. 242).

g. In a case prior to the amendment of 1862, held on a judgment for the plaintiff in an action to set aside a conveyance as fraudulent against creditors, an execution cannot issue against the person without leave of the court (*Fussett* v. *Tallmadge*, 14 Abb. 188; 23 How. 244).

h. To justify the issuing an execution against the person, it is not necessary that sixty days should intervene between the issuing of the execution against property and the execution against the person. It is enough that the first has been actually returned by the sheriff, when he has acted *bona fide* (*Fake* v. *Edgerton*, 3 Abb. 229; 5 Duer, 681). Nor is it necessary that the execution against the property should be issued to the sheriff of the county where the plaintiff resides. (*Ib.*)

i. The issuing an execution against the person before the return of an execution against the property, is an irregularity merely, and does not make the execution against the person void (*Renick* v. *Orser*, 4 Bosw. 384). Where the

execution against the property is in fact returned and filed but by the sheriff's neglect his return is not endorsed, the defect is amendable, and the execution against the person may be upheld by allowing the return to be endorsed *nunc pro tunc* (*Hall* v. *Ayer*, 9 Abb. 220; 19 How. 91).

a. **Execution against person of a married woman.**—An execution may issue against the person of a married woman. Where in an action for an assault against a *feme sole*, she married after judgment against her, on return of an execution against her property unsatisfied, an execution was issued against her person: on motion before Hon. C. P. Daly, first judge of the New York Common Pleas, he, on careful review of the authorities, held, (1), that the execution was properly issued without making the husband a party (*Cooper* v. *Hunchin*, 4 East, 521). (2), that it was in the discretion of the court to discharge or refuse to discharge a married woman out of custody. (3), that the court would order the discharge only in those cases where it appeared that the married woman had no separate estate. In that case it appearing the defendant had a separate estate the judge refused to order her discharge (*Wilson* v *Sulzer*, MS. Osborn E. Bright, Esq., who appeared for the plaintiff cited the following authorities: Cro. Jac. 323; Buller, 23; 3 Maule & S. 557; *Pitts* v. *Miller*, 2 Stra. 1167; 1237; *Twigg* v. *Twiggs*, 2 M. & Ry. 126 *n.*; *Benyon* v. *Jones*, 15 M. & W. 566; *Com'wealth* v. *Badlen*, 9 Pick. 362; *McKinstry* v. *Davis*, 3 Cowen, 339; *Chalk* v. *Deacon*, 6 Moore, 128; to which we would add *Metcalf* v. *Boote*, 6 D. & R. 46; *Thorp* v. *Argles*, 1 D. & L. 831; *Evans* v. *Chester*, 6 Dowl. 140; *Edwards* v. *Martyn*, 21 Law Jour. Q. B. 86; 2 L. M. & P. 669; Clancy's Rights of Married Women, ch. 5; *Hollingdale* v. *Lloyd*, 1 Horn & Hurl. 119; Bagley's Prac. 353).

b. **When execution may issue against the person of the plaintiff.**—A plaintiff who fails in *an action in tort*, in which the defendant was liable to arrest, is liable to an execution against his person, although the defendant was not in fact arrested, and no order has been made for the defendant's arrest, or for an execution against his person (*Kloppenburgh* v. *Necfus*, 4 Sand. 655; *Corwin* v. *Freeland*, 6 How. 245).

c. **Execution against the person on justice's judgment.**—An execution against the person may issue out of the common pleas on a judgment of the marine court, after a transcript of such judgment has been filed with the county clerk (*Ginochio* v. *Figari*, 2 Abb. 185; 4 E. D. Smith, 227; *Hall* v. *McMahon*, 10 Abb. 319; *Whiting* v. *Putnam*, 16 Abb. 382).

d. To justify the arrest of a defendant on an execution issued upon a judgment obtained in a district court in the city of New York, the justice must state in the judgment, and enter in his docket, that the defendant is subject to arrest and imprisonment (*Carpenter* v. *Willett*, 18 How. 400). Where subsequent to a judgment for plaintiff, which did not show any right of arrest, the plaintiff, on an affidavit that the demand upon which judgment was rendered, was for moneys received in a fiduciary capacity, obtained an order that an execution issue against the person of the defendant; held that such order the execution issued pursuant to it were void. (*Id.*)

e. The marine court of the city of New York cannot issue an execution against the person (*The People* v. *Smith*, 9 How. 464).

f. The execution on a justices' judgment, of which a transcript has been filed in the Common Pleas will not be set aside on motion for any irregularities in the method of obtaining judgment. The remedy for such irregularities is an appeal from the judgment (*Whiting* v. *Putnam*, 16 Abb. 382).

g. **Effect of arrest on the judgment.**—The effect of taking the body of a party in execution, is as a general rule, a satisfaction of the judgment (1 Cow. 56; 9 Wend. 241; 11 *ib.* 41; 5 *ib.* 58-240). But if the party die in execution, or is rescued or improperly discharged, a new execution may issue (*Wesson* v. *Chamberlain*, 3 Coms. 331).

h. **Discharge from arrest on execution.**—A defendant arrested on an execution against the person, may be discharged by paying the amount of the levy to the sheriff or the plaintiff's attorney. But the sheriff cannot discharge the party arrested on his giving security (6 Cow. 465; 1 *ib.* 46; 5 Wend. 207; 9

Johns. 263). And the attorney has no power to give a discharge except on an actual payment (8 Johns. 361; 6 *ib.* 51; 21 Wend. 362; 7 Cow. 739). It is no ground for discharging one of several defendants from an arrest on execution, that at the time the execution was delivered to the sheriff, instructions were given him not to arrest the other defendants, and that the sheriff has acted on such instructions (*Fake* v. *Edgerton*, 3 Abb. 229; 5 Duer, 681.)

a. The taking in execution the body of a county treasurer at the suit of the State, does not affect the action at the suit of the county (*Supervisors of Livingston* v. *White*, 30 Barb. 72).

b. A voluntary discharge of the party arrested is a discharge of the judgment (5 Johns. 364; 8 Cow. 171; 3 Wend. 184). If a party is discharged on the ground of irregularity in the execution, a new execution may issue on the judgment (5 Wend. 90; 3 Adol. & El. N. S. 1; *Ginochio* v. *Figari*, 2 Abb. 185; 4 E. D. Smith, 227). See *Charging in execution*, infra.

c. Where an execution against the person is improperly or irregularly issued the remedy it would seem is on a motion to set aside the execution, but *semble*, a party arrested under such an execution may be discharged on habeas corpus (see *The People* v. *Willett*, 26 Barb. 78; 6 Abb. 37; 10 How. 210; see however, *Wiles* v. *Brown*, 3 Barb. 37).

d. **Jail liberties.**—If the defendant do not discharge the execution, he may be admitted to the liberties of the jail, on executing a bond to the sheriff (2 R. S. 433; 19 Johns. 233; 7 *ib.* 168; 6 *ib.* 121; 15 *ib.* 256; 12 *ib.* 88). The liberties of the city of New York are "all the city and county of New York" (Laws 1846, ch. 32). In other counties (with some exceptions) the liberties are designated by the county courts of each county, and are not to exceed 500 acres in extent (Laws 1851, ch. 21), Erie (Laws 1861, p. 61), Rensselaer (Laws 1830, ch. 252), Onondaga (Laws 1851, ch. 202), Schenectady (Laws 1830, ch. 244), Allegany (Laws 1831, ch. 217), Dutchess (Laws 1861, ch. 130), of Kings include town of Flatbush and Brooklyn, excluding so much as was formerly Bushwick and Williamsburgh (Laws 1831, ch. 217; *Chamberlain* v. *Campbell*, 39 Barb. 640).

e. The provisions of 2 Rev. Stat. 31, § 1, providing for the discharge by the court of an imprisoned debtor on submitting to an examination, &c., held to apply as well to debtors on the limits as to those in close custody (*Coman* v. *Storm*, 26 How. 84; overrul'g Comstock's case, 16 Abb. 233; 25 How. 429).

f. Defendants against whom judgment is obtained on any bond given under the act to suppress intemperance, or for any penalty incurred under that act, are not entitled to jail liberties (Laws of 1857, vol. 2, p. 416, § 32).

g. The court cannot order the sheriff to accept bail for the jail liberties (*Sartes* v. *Merceques*, 9 How. 188). If the sheriff improperly refuse bail the remedy is by action. (*Id.*)

h. Assignment of bond for jail liberties after death of sheriff (*Ridgway* v. *Barnard*, 28 Barb. 613).

i. **Charging in execution.**—When a defendant against whom an order of arrest has been obtained is, at the time judgment is rendered, in custody of the sheriff, the plaintiff must charge him in execution within three months from the last day of the term next following that at which judgment is obtained. If the defendant is surrendered in discharge of his bail, he must be charged in execution within three months after his surrender, and in all cases, as it would seem, within three months from the return unsatisfied of an execution against the property of the defendant. A neglect to charge the defendant in execution entitles him to apply for a *supersedeas* to be discharged from custody (2 R. S. 556, §§ 36, 37). After a judgment debtor has "remained charged in execution thirty days from the date of his imprisonment," the judgment creditor may by a written notice require the sheriff to discharge him; and thereupon the sheriff may discharge him. He cannot be again arrested on the same judgment; but the judgment creditor "may have the same civil remedies to enforce payment of the judgment upon which such execution was issued, and as if such execution had not been issued" (Laws 1857, ch. 427).

j. A motion for a *supersedeas* cannot be granted on the ground that plaintiff has neglected for three months to charge defendant in execution, unless the bail have been exonerated. When the moving papers on such a motion do not show that the bail have been exonerated, plaintiff's allegations that he had no notice of the surrender is in effect a denial that the bail have been exonerated (*Hills* v. *Lewis*, 13 Abb. 101 *note*).

a. The time for charging in execution is to be computed from the date of actual entry of judgment, not from the date when the plaintiff might have entered it (*Lippman* v. *Petersberger*, 9 Abb. 209; 18 How. 270). The mere acceptance of an offer to allow judgment, is not obtaining judgment within the meaning of the statute. (*Id.*)

b. A motion for a supersedeas may be made to a judge of the first district although the action is triable elsewhere (*Wells* v. *Jones*, 2 Abb. 20, A. D. 1855).

c. An order of supersedeas is appealable to the general term. (*Id.*)

d. **Escape.**—After a *voluntary* escape from custody or execution, the party cannot be retaken (*Lansing* v. *Fleet*, 2 Johns. Cas. 3). But by voluntarily returning he may by renewal of process be retained in custody (*Thompson* v. *Lockwood*, 15 Johns. 556; *Littlefield* v. *Brown*, 1 Wend. 398). After a negligent escape the party may be recaptured out of the State (see *Lockwood* v. *Mercereau*, 6 Abb. 206).

e. Where a prisoner who has given bonds for the limits and is arrested by authority of law within the limits and carried beyond the limits against his consent, and he returns to the limits as soon as practicable, such going beyond the limits is not an escape for which the sheriff is liable (*Wickelhauser* v. *Willett*, 12 Abb. 319: see, contra, *Brown* v. *Tracy*, 9 How. 93; and see *Dexter* v. *Adams*, 2 Denio, 646; 4 How. 367).

f. The insolvency of the debtor is no bar to an action against the sheriff for an escape founded on 2 Rev. Stat. 437, § 63 (*Barnes* v. *Willett*, 11 Abb. 225; 12 Abb. 448).

§ 289. [244.] (Am'd 1849.) *Form of the execution.*

The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the party issuing it, or his attorney, and must intelligibly refer to the judgment, stating the court, the county where the judgment-roll or transcript is filed, the names of the parties, the amount of the judgment if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

1. If it be against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the officer to satisfy the judgment out of such property.

3. If it be against the person of the judgment debtor, it shall require the officer to arrest such debtor, and commit him to the jail of the county, until he shall pay the judgment or be discharged according to law.

4. If it be for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, or rents and profits recovered by the same judgment out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein; if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and shall in that respect be deemed an execution against property.

a. An execution must truly describe the party whose property is to be levied upon (*Farnham* v. *Hildreth*, 32 Barb. 277). It need not state any time or place for its return (*Fake* v. *Edgerton*, 3 Abb. 229; 5 Duer, 681). It is sufficient if it substantially follow the terms of the statute, and any defect in its form may be amended (*Fierce* v. *Crane*, 4 How. 257; 3 Code R. 21; *Park* v. *Church*, 5 How. 381; 1 Code R. N. S. 47).

b. An irregularity in an execution which would be amendable, can only be taken advantage of by the execution debtor (*Berry* v. *Riley*, 2 Barb. 307; *Grosvenor* v. *Hunt*, 11 How. 355; *Oakley* v. *Becker*, 2 Cow. 454; *Abels* v. *Westervelt*, 15 Abb. 230). An execution on a judment, by confession, will not be set aside at the instance of creditors because it was issued before the maturity of the note; nor is it a substantial defect in the execution that it describes the judgment to have been obtained in an action (*Healey* v. *Preston*, 14 How. 20; and see *Oakley* v. *Becker*, 2 Cow. 454).

c. As to the form of an execution to collect an installment due on a judgment by confession, see § 384; and after an attachment, *ante*, p. 426, *a*.

d. Where the execution recited that the judgment-roll was filed in the office of the Clerk of the City and county of New York, instead of reciting as the fact was that a transcript of the judgment was so filed, held that the execution might be amended so as to make it conform to the fact (*Abels* v. *Westervelt*, 15 Abb. 230).

e. A judgment issued out of the supreme court, upon a judgment recovered in a court of common pleas, is absolutely void (*Clarke* v. *Miller*, 18 Barb. 269).

f. **Execution against executors or administrators.**—Executions against executor or administrator should not issue until his account has been rendered and settled, or unless by order of surrogate. And if issued after the settlement of account then only for the proportion of assets applicable to judgment (2 R. S. 88, § 32; 2 Abb. 437; 11 How. 126; 10 How. 217; 23 Wend. 478; 12 Wend. 543; 9 Wend. 448; 487; 2 Bradford, Sur. 24).

g. An execution against property on a judgment against executors, must direct the sheriff to collect the judgment out of the personal estate of the testator, naming him, in the hands of the defendants as his executors. It is not enough in such a case that in the execution the defendants are described as

executors, because this alone will not prevent the sheriff levying on the individual property of the executors. The second subdivision of § 289 is imperative that the execution shall require the officer to satisfy the judgment out of the property which, according to the judgment, is liable for its payment. If at the time of issuing the execution the defendant's accounts have been "rendered and settled," it is unecessary to procure an order of the surrogate granting leave to issue the execution. But the execution can issue only for the sum that shall have appeared, on the settlement of such accounts, to have been a just proportion of the assets applicable to the judgments" (2 R. S. 88. § 32). This provision of the revised statutes is still operative (Code, § 471; *Olmstead* v. *Vredenburgh*, 10 How. 217). And extends to debts contracted after the decease of the testator or intestate (*Coules* v. *Thompson*, 5 Surrogate Report, 490).

See note to § 283.

a. **Execution against the person.**—It is not necessary (although it is better so to do) to state in an execution against the person, the nature of the action (*Fullerton* v. *Fitzgerald*, 10 How. 37; 18 Barb. 441). Nor is it necessary to recite the facts which authorize the arrest, namely, the nature of the action and the return of an execution against property unsatisfied; it is sufficient if those facts exist (*Hutchinson* v. *Brand*, 5 Selden, 208). An execution against the person which recited the judgment as prescribed in section 289, and commanding the sheriff to commit the defendant "to the jail of said county of M., until he shall pay the said judgment, according to law," the words "or be discharged" being omitted, is valid: and a sheriff discharging a prisoner arrested upon such execution, is liable as for an escape. (*Id.*)

b. **Execution against joint debtors.**—Where the execution is issued in an action against two joint debtors, and in which only one of the defendants has been served with process, the execution may be in form against both the defendants, but should be endorsed with a direction to the sheriff not to levy on the *sole* property of the defendant not served (2 R. S. 377, § 3).

c. Where an execution issued against two joint debtors, has been levied upon the property of one of them, the plaintiff will not be allowed to countermand it and issue a new execution for the purpose of making a levy upon the sole property of the other defendant (*McChain* v. *McKeon*, 2 Duer, 645). An execution against joint debtors has priority over an attachment against one of the debtors, though the attachment is also for a joint debt (*Abels* v. *Westervelt*, 15 Abb. 230).

§ 290. [245.] (Am'd 1849.) *To be returnable in sixty days.*

The execution shall be returnable within sixty days after its receipt by the officer, to the clerk with whom the record of judgment is filed.

d. It is not necessary that an execution should remain in the hands of the officer sixty days. The return cannot be sooner compelled; but the officer may return it sooner (*Morange* v. *Edwards*, 1 E. D. Smith, 415; *Spencer* v. *Cuyler*, 17 How. 157; 9 Abb. 383). A sheriff is bound by law to return an execution according to the requisition of the statute, at his peril. If he neglects it, he renders himself liable to an attachment or an action, at the election of the party aggrieved; and in all cases the *onus* is on the sheriff to excuse the default (*Wilson* v. *Wright*, 9 How. 460).

e. It is the duty of a sheriff to return process to the proper office, either personally, by deputy, or by mail. Or it may, at the request of the attorney of the execution creditor, be returned to such attorney. If the process be returned by mail, the sheriff must prepay the postage on the letter inclosing such process, as the county clerk is not bound to pay the postage on a letter containing process (*Jenkins* v. *McGill*, 4 How. 205; Laws 1850, c. 225, § 3).

a. Where a sheriff neglects to collect and return an execution within the time prescribed by law, he is liable to the plaintiff in the judgment for the damages sustained by his neglect, unless he can show that the defendant in the execution had no property out of which the debt could be collected (*Bowman* v. *Cornell*, 39 Barb. 69; *Humphrey* v. *Hathorn*, 28 Barb. 278). In such an action the amount of the judgment is the measure of damages. The right of action having accrued is not divested by an appeal from the judgment (*Id. The People* v. *Lott*, 21 Barb. 131). The attorney for the execution creditor may extend the time for the sheriff to collect the execution; such extension is a justification of the sheriff (see *Humphrey* v. *Hathorn*, 28 Barb. 278; and further as to liability of sheriff for not returning execution see *Sweezy* v. *Lott*, 21 N. Y. 481).

b. Executions on judgments of a District court of New York City or the Marine court where a transcript has been filed in New York, should be returnable to the Clerk of New York Common Pleas.

c. A judgment against a sheriff for not returning an execution is not a satisfaction of the judgment on which such execution issued (*Baker* v. *Martin*, 3 Barb. 634).

d. The omission of the sheriff to endorse upon the execution the proper return before it is filed is amendable *nunc pro tunc* after the filing, but the sheriff must pay the costs of the motion to amend (*Hill* v. *Ayer*, 19 How. 91; 9 Abb. 220).

e. The supreme court has power to authorize a sheriff to withdraw from the files an execution, and to cancel a return of *nulla bona* made thereon (*Barker* v. *Binninger*, 4 Kern. 270).

See Rule 8.

§ 291. [246.] (Am'd 1849, 1851.) *Existing laws relating to execution continued until otherwise provided.*

Until otherwise provided by the legislature, the existing provisions of law, not in conflict with this chapter, relating to executions and their incidents, the property liable to sale on execution, the sale and redemption thereof, the powers and rights of officers, their duties thereon, and the proceedings to enforce those duties, and the liability of their sureties, shall apply to the executions prescribed by this chapter.

f. **Receipt of execution.**—On receipt of the execution the sheriff is required to indorse thereon the year, month, day, and hour when he received it (2 R. S. 364, § 10).

g. **Sheriff bound to enforce execution.**—Where the execution is regular on its face and there is no defect of jurisdiction neither irregularity nor error in issuing the execution will justify the sheriff in neglecting or refusing to execute it (*French* v. *Willet*, 4 Bosw. 649), otherwise if the execution is void. (*Id.*) But the sheriff may require indemnity before levying on property not in the possession of the execution debtor (*Chamberlain* v. *Beller*, 18 N. Y. 115).

h. **When execution may be levied.**—The execution cannot be levied on a Sunday (1 R. S. 675, § 69).

i. **What attorney may issue execution.**—An execution may be issued by an attorney other than the one by whom the judgment was recovered (*Cook* v. *Dickerson*, 1 Duer, 679).

k. **Priority of executions.**—Where several executions are issued against the same defendant, that which has been first delivered to the sheriff must be first executed, and shall have preference, notwithstanding a former levy under

another execution; but if a levy and sale shall have been made under such other execution, before an actual levy under the execution first delivered, the latter will lose its priority (*Peck* v. *Tiffany*, 2 Coms. 451).

a. Where there are two executions in the sheriff's hands a sale on the junior one is valid, but the proceeds must in the first place be applied to the senior execution (*Rowe* v. *Richardson*, 5 Barb. 385).

b. DORMANT EXECUTION.—The mere aquiescence of an execution creditor in the delay of a sheriff in selling under an execution, where the creditor does not direct such delay, does not render the execution dormant as to subsequent ones; but delays directed by the creditor, render the execution dormant as to subsequent purchasers and mortgagees, as well as executions (*Thompson* v. *Van Vechten*, 5 Abb. 459). But if a judgment creditor after execution issued instructs the sheriff to levy, merely for the purpose of securing a preference and to leave the debtor in possession of the property seized, such execution becomes dormant (*Dunderdale* v. *Sauvestre*, 13 Abb. 116). A sheriff holding several executions against the same debtor, received at different times, cannot be required to treat those first received as dormant, merely because the plaintiff therein gave to the sheriff a written consent that he might adjourn a sale under them for forty-seven days after their return-day, there being no agreement giving to the debtor a delay, or the use or benefit of the property in the meantime (*Paton* v. *Westervelt*, 2 Duer, 362).

c. A sale made ostensibly under dormant executions, while another execution is in the hands of the sheriff, is valid to vest a title in the purchaser (*Richards* v. *Allen*, 3 E. D. Smith, 399). The plaintiff in the other execution may have the proceeds of the sale applied to his execution. (*Id.*)

d. The doctrine of the subject of dormant executions does not apply to real estate (*Muir* v. *Leitch*, 7 Barb. 341; see *ante*, 518, *d.*).

e. **Death or removal of sheriff.**—If the sheriff die, or be removed from office before the execution is satisfied, his under-sheriff is required to proceed thereon, in the same manner as the sheriff might have done (2 R. S. 374, §§ 65, 66, 67; 10 Wend. 562).

f. **Sheriff's fees and poundage.**—The only law regulating sheriffs' fees in civil actions is contained in the revised statutes (2 R. S. 645, § 38; *Benedict* v. *Warriner*, 14 How. 568).

g. The sheriff may also levy his fees and poundage for collecting, on $250 or less, 2 cents and 5 mills per dollar; and for every dollar above $250, 1 cent and 2½ mills per dollar. For advertising sale, $2; and if the execution be stayed or settled after sale advertised and before sale; $1; mileage 6 cents per mile, for going only, to be computed from the court house of the county.

h. On a levy being actually made, the sheriff's right to poundage attaches on the whole amount directed to be levied; and he is not deprived of his right by the judgment being satisfied without sale, nor by any arrangement between the parties, nor by the property levied on being encumbered beyond its value (1 How. 151; 17 Wend. 14; 1 Caines R. 192; 5 T. R. 470; 4 M. & S. 256; 1 Code Rep. N. S. 226). But the sheriff cannot, after the judgment is satisfied, sell the goods of the judgment debtor to collect his poundage; he must collect it of the judgment creditor (4 Wend. 474; *Craft* v. *Merrill*, 4 Kernan, 456; *Bank of Whitehall* v. *Weed*, 8 How. 104). Where necessary, a new execution will be ordered for the sheriff's benefit (19 Wend. 79).

i. An agreement by a sheriff to accept less than the amount of his fees on payment of the smaller sum, is not binding on him (*Van Nest* v. *Lott*, 16 Abb. 130).

k. The attorney in the action is liable to the sheriff for his fees (*Birkbeck* v. *Stafford*, 23 How. 236; 14 Abb. 285).

l. **Sheriff cannot enforce execution for his own benefit.**—A sheriff upon whom a fine has been imposed by the court to the amount of an execution issued to him, for wilful neglect of his duty in regard to it, and who, pursuant to the order of the court, has paid the fine to the judgment creditor, has no

authority to enforce the execution against the debtor for his own indemnity. An officer cannot execute final process in his own favor, or for his own benefit (*Carpenter* v. *Stillwell*, 1 Kernan, 61; *Craft* v. *Merrill*, 4 *id.* 456; see *Baker* v. *Martin*, 3 Barb. 364; *ante*, 535, *h*).

a. **Attaching sheriff for not paying over money.**—The court will not attach a sheriff for not paying over moneys, where it appears he has been sued for the money by a third party, and that a fourth party also makes a claim on the money. The parties will be left to an action to determine their several rights (9 How. 460; and see 1 Denio, 641; 1 How. 220).

b. **Official bond of sheriff and deputy.**—Liability of sureties on official bond of sheriff (*The People* v. *Schuyler*, 5 Barb. 166); and of deputy sheriff (*Rowe* v. *Richardson*, 5 Barb. 385).

c. **When execution becomes a lien on personal property.**—Goods and chattels are bound only from the time of the delivery of the execution to the sheriff to be executed, except in the hands of *bona-fide purchasers* without notice (11 Wend. 548; 8 Johns. 446; 12 *ib.* 320; 16 *ib.* 287; 5 Denio, 198; 8 Barb. 333).

d. Where a judgment was perfected in Columbia county, and a transcript sent to the clerk, and execution (against both real and personal property) to the sheriff of Greene county, on the same day, but the execution was received one day before the transcript was docketed, held that the execution became operative in the hands of the sheriff from the time the judgment was actually docketed in Greene county, and took priority from that time (*Stoutenburg* v. *Vandenburgh*, 7 How. 229).

e. The delivery of an execution to the sheriff creates a lien upon the personal property afterwards levied upon from the date of such delivery, except as to one who between the delivery and the levy becomes a *bona-fide* purchaser or mortgagee without notice. With that qualification, a regular sale by the sheriff transfers to the purchaser the title of the judgment debtor as it existed on the day of the delivery of the writ (*Thompson* v. *Van Vechten*, 5 Abb. 458; and see *Fuller* v. *Allen*, 7 *id.* 12; 16 How. 247).

f. **What personal property may be levied on.**—All the personal property of the judgment debtor, except such as is exempt by special provision of law, and—except choses in action (*Ransom* v. *Miner*, 1 Code Rep. N. S. 98)—things fixed to the freehold (5 B. & A. 625; 1 D. & R. 247; 1 B. & P. 506), are liable to be seized and sold by the sheriff on an execution against the property; but growing trees, fruit, and grass cannot be taken on an execution (*Bank of Lansingburg* v. *Crary*, 1 Barb. 542). In the property liable to execution is included the interest of the judgment debtor in goods pledged (6 Hill, 485), or mortgaged (*Hull* v. *Carnley*, 1 Abb. 158; 17 N. Y. 202; *Saul* v. *Kruger*, 9 How. 569; *Hall* v. *Sampson*, 19 How. 48; see, however, *Farrell* v. *Hildreth*, 38 Barb. 178). And a sheriff holding an execution against a pledgor, may by virtue thereof take the property pledged out of the hands of the pledgee into his own possession, and sell the right and interest of the pledgor therein; and after a sale in such a case, the pledgee is entitled to the possession of the property until the purchaser redeems it from the pledgee (*Stief* v. *Hart*, 1 Comst. 20); *semble*, the goods should be sold in one parcel (*Tiffi* v. *Barton*, 4 Denio, 171). But in *Brownell* v. *Carnley* (3 Duer, 14), the superior court say it is still an open and doubtful question whether the statute, in authorizing a sale under an execution of the interest of the pledgor, has authorized the sheriff to remove the property from the possession of the pledgee. Such was indeed the decision of the supreme court in *Stief* v. *Hart*, but although the judgment in that case was affirmed in the court of appeals, it was so not by a majority of its members, but solely as a consequence of an equal division in their opinions. And in *Brownell* v. *Carnley*, supra, it was held that goods in the possession of a consignee who has made advances thereon, cannot be seized and taken possession of by a sheriff under a warrant of attachment [and *semble*, or execution] against the property of the consignor. In *Goulet* v. *Asseler* (22 N. Y. 225), it was held that the mortgagee of chattels which have been sold under an execution against the mortgagor, who was in possession and entitled to the pos

session until default, cannot maintain an action in the nature of trespass or trover for the value of the goods. The facts that the sale was without notice of the rights of the mortgagee, that the property was such as to have no value except for actual consumption, that it was difficult or incapable of identification, and that it was distributed among various purchasers at most authorized damages to the plaintiff for the injury to his lien, and not as of course for the entire value.

a. After the debt secured by a chattel mortgage has become due, and a perfection has occurred by reason of the non-payment, the title of the mortgagee is absolute, and the mortgagor has no interest in the mortgaged property which is liable to be sold on execution against him. And this, notwithstanding, the property is suffered to remain in the possession of the mortgagor after forfeiture (*Champlin* v. *Johnson*, 39 Barb. 606).

b. It seems that a mortgagee of chattels may maintain an action for the damage to his reversionary interest caused by a sale of the mortgaged property in parcels under an execution against the mortgagor while he was in possession (*Manning* v. *Monaghan*, 23 N. Y. 539). Whether a purchaser of part of the chattels may be joined as defendant with the parties who made and directed the sale. Query (*id.*).

c. Chattels given to a married woman remaining in a house occupied by the husband and wife together are to be deemed in the possession of the wife, and are not liable to execution against the husband (*Allen* v. *Cowan*, 23 N. Y. 502).

d. Bills or other evidences of debt issued by any moneyed corporation, or by the government of the United States, and circulated as money, also current gold and silver coin, may be seized, but is not to be sold; and the exemption of fixtures does not extend to fixtures for the purposes of trade (10 Barb. 157, 596). On an execution against joint property, individual property cannot be taken (2 Hill, 204; as to remedy if it is, see *Fiero* v. *Betts*, 2 Barb. 633). On an execution against one of two partners, the sheriff may seize the entire partnership effects, and sell the interest therein of the judgment debtor (24 Wend. 389; 2 Hill, 47; 4 *ib.* 161; 3 Denio, 125); and the purchaser becomes a tenant in common with the other partner, subject to an accounting among the partners on a dissolution (*Hergman* v. *Dettlebach*, 11 How. 47). An execution on a judgment otherwise than by confession against the general partners of a firm in which there are special partners, binds all the partnership property (*Van Alstyne* v. *Cook*, 25 N. Y. 489). If on an execution against one partner the entire property is sold as his, it is an abuse of the process, which renders not only the officers but all who participate in it, liable as trespassers (*Waddell* v. *Cook*, 2 Hill, 49; *Walsh* v. *Adams*, 3 Denio, 125; *Bates* v. *James*, 3 Denio, 21). And a surety in an indemnity bond exacted by and executed to the sheriff to protect him against the consequences of a levy and sale, and to induce him to sell notwithstanding the claim of a third party, is liable as a participator in the levy and sale without any other interference (*Herring* v. *Hoppock*, 3 Duer, 21).

e. Where a sheriff receives money in gold or silver, in payment of an execution in his hands in favor of the plaintiff, he cannot make a direct and immediate application and payment of that money on an execution in his hands against the same plaintiff (*Muscott* v. *Woolworth*, 14 How. 477, reversing S. C. 13 How. 336; see *Wheeler* v. *Smith*, 11 Barb. 345; *Betts* v. *Hoyt*, 19 Barb. 412).

f. The attorney of the judgment creditor has no authority as such to direct the sheriff what property to levy upon on the execution (*Averill* v. *Williams*, 4 Denio, 295).

g The property of a married woman is not liable to levy for debt of husband (see *Burger* v. *White*, 2 Bosw. 92). But where, prior to the law of 1860, a married woman, living with her husband, purchased goods on credit and removed them to her residence where she carried on the millinery business in her own name, held that these goods were liable to seizure on execution against the property of the husband (*Lovett* v. *Robinson*, 7 How. 105; and see *Van Sickle* v. *Van Sickle*, 8 How. 265).

a. The sheriff can levy on the property only of the person described in the execution. On an execution against *Freeman* Hildreth he cannot sell the property of *Truman* Hildreth (*Farnham* v. *Hildreth*, 32 Barb. 277). A subsequent amendment of the execution will not retroact to make valid a sale under the execution before its amendment. (*Id.*)

b. Where B. with intent to defraud his creditor falsely held out that certain property in his possession belonged to M., held that after a creditor of M. had levied upon the property as M.'s, B. could not be permitted to allege that the property belonged to him, instead of M. (*Bigney* v. *Smith*, 39 Barb. 383).

c. **Levy, how made on personal property.**—To constitute a valid levy the goods must be in view of the sheriff, and subject to his immediate disposition and control (19 Wend. 495; 2 Hill, 666; *Barker* v. *Binninger*, 4 Kernan, 270; and see 9 Barb. 620; 16 *ib.* 585). The execution debtor need not acquiesce (*Artisan's B'k* v. *Treadwell*, 34 Barb. 553). Where it appeared that the sheriff called upon the defendant in the execution at his place of business and at his house, and informed him that he made a levy upon the personal property then visible, and it was understood between the defendant and the sheriff this should be considered a levy upon enough property real and personal to satisfy the execution, but the sheriff made no inventory or other levy, and the defendant requested him not to remove any property or disturb his family by any further levy, and promised the judgment should be settled,—*held*, that this was a sufficient levy upon the personal property of the defendant, but not sufficient to hold the real estate (*Mills* v. *Thursby*, 11 How. 121; and see *Watts* v. *Cleveland*, 3 E. D. Smith, 553). A levy upon sufficient personal property is not, *per se*, a satisfaction of the judgment (4 E. D. Smith, 378). An officer is not restricted as to the amount of property he shall take, nor is he required to levy upon all the property at the same time. He may, therefore, after having levied upon sufficient property to satisfy the execution levy upon other property at a different time and sell it without making himself liable as a trespasser (*Denvrey* v. *Fox*, 22 Barb. 523). Making an inventory is not necessary to constitute a valid levy (*Watts* v. *Cleveland*, 3 E. D. Smith, 553). Nor need the property be immediately removed (*Woodworth* v. *Woodworth*, 21 Barb. 343).

d. Where an execution debtor agrees with a deputy sheriff, that on the latter relinquishing specific property at the time actually levied upon, other property ordered by the debtor, on his receiving it, shall be substituted as the subject of the levy,—the agreement is void (*Shelton* v. *Westervelt*, 1 Duer, 109). Where such property is received by the debtor and substituted after the return day of the execution, the sheriff acquires no valid lien upon it, and a subsequent *bona-fide* mortgagee of it will acquire a title, good as against the sheriff. (*Ib.*) But where property is substituted before the return day of the execution and levied upon, the levy is good, although the previous agreement for substituting it is void. (*Ib.*)

e. A sheriff who has levied on goods is not the *owner* thereof, within 2 R. S. 231, providing for claims of property attached by a constable (*Pierce* v. *Kingswell*, 25 Barb. 631).

f. After the sheriff has levied upon goods as the property of the defendant in the execution he may on discovering that the goods levied on do not belong to the defendant, relinquish the levy (*Blivin* v. *Bleakley*, 23 How. 124).

g. A sheriff on being indemnified is bound to keep possession of the property, although a sheriff's jury may have found the title in a third person (*The People* v. *Schuyler*, 5 Barb. 166).

h. A sheriff is not required to exercise any greater diligence in taking care of property in his custody, than a bailee for hire (*Moore* v. *Westervelt*, 25 How. 277; 21 N. Y. 103).

i. A sheriff levied on goods, left them with a receiptor who claimed to be and was the owner, the receiptor not delivering the goods, the sheriff sued him and recovered judgment for their value. In an action by the plaintiff in the execution against the sheriff for returning the execution "no goods" held that the sheriff was estopped from setting up that the goods levied upon did not belong to the execution debtor (*The People* v. *Reeder*, 25 N. Y. 302).

a. Proceedings where receiver takes possession of goods levied on by the sheriff (*Re N. Amer. Gutta Percha Co.* 9 Abb. 79; 17 How. 549; *Rich* v. *Loutrel*, 18 How. 121).

b. **Sale of personal property.**—Within a reasonable time after the levy, the sheriff should sell the goods seized (5 Cow. 390; 2 *ib.* 130; 4 Wheat. 503). He must give six days' notice of sale, by fastening up written or printed notices thereon in three public places of the town where the sale is to be had. The omission to give notice, or giving an insufficient notice, does not affect the validity of any sale to a *bona-fide* purchaser without notice. The sale must be by auction, between the hours of 9 A. M. and sunset, at the place where the goods are situate; and a sale after sunset would be void (*Carnrick* v. *Meyers*, 14 Barb. 9). The property must be present, and within view of those attending the sale, and be specially designated (4 Barb. 484), and separated (*Stevens* v. *Eno*, 10 Barb. 95), and must be sold in such lots as are best calculated to bring the highest price; and real and personal estate must not be sold together. The sale may be postponed (17 Johns. 115; *ib.* 332; 15 *ib.* 430, *n;* 14 *ib.* 352; 21 Wend. 169; 18 *ib.* 611; 2 Cow, 139, 189, 190). The sheriff or his deputy cannot be purchasers, but a turnkey or assistant jailor may (4 Wend. 474); and so may the plaintiff. And where the plaintiff becomes the purchaser at an amount sufficient to cover his judgment, that satisfies his judgment (*Weaver* v. *Toogood*, 1 Barb. 238).

c. If the plaintiff becomes a purchaser the sheriff may deliver the goods to him without payment (21 Wend. 169; 17 Johns. 332; 15 *ib.* 430 *n;* and see 12 Wend. 74). Query, if the court will compel him to do so (*Williams* v. *Smith*, 6 Cal. 91; *The People* v. *Hays*, 5 Cal. 66).

d. A sheriff acts officially in selling the property of a stranger, as the property of the defendant in the execution. He may take an indemnity from the plaintiff for such an act, but cannot give an indemnity to the bidders at the sale. A sheriff while in the discharge of his official duty cannot divest himself of his official character (*Ball* v. *Pratt*, 36 Barb. 402).

e. A bond of indemnity given to the sheriff upon execution, is not invalidated by the fact that it was given after levy and sale (*Westervelt* v. *Frost*, 1 Abb. 74).

f. An innocent purchaser at a sheriff's sale of property not the property of the execution debtor, cannot be sued by the owner until after a notice to restore the property (*Millspaugh* v. *Mitchell*, 8 Barb. 333).

g. A sale may be set aside and a re-sale ordered (18 Wend. 611; 9 How. 525).

h. Objections to the regularity of a sale under an execution cannot be raised by strangers (*Smith* v. *McGowan*, 3 Barb. 405; *Kelsey* v. *Dunlap*, 7 Cal. 160); but a sale on execution may be set aside and a new execution issued on the motion of a purchaser at such sale, who was misled by a statement of the execution creditors' attorney (*Dwight's case*, 15 Abb. 259; *Ames* v. *Lockwood*, 13 How. 555).

i. The courts will not ordinarily restrain by injunction the sale of the interest of an execution debtor in partnership property (*Mowbray* v. *Lawrence*, 13 Abb. 317).

j. **Some miscellaneous points.**—Whereon an execution against property, no credit was given for a payment on account, held that a levy and sale for less than the amount actually due would not be set aside (*Peet* v. *Cowenhoven*, 14 Abb. 56).

k. A sheriff having levied an execution upon sufficient property, which is taken from his possession under a replevin in which he obtains judgment, it is his duty to prosecute the sureties in the undertaking of the plaintiff in replevin (*Swezey* v. *Lott*, 21 N. Y. 481).

l. The sheriff is not entitled to indemnity from the plaintiff in the execution as a condition of his prosecuting the undertaking. (*Id.*)

m. In an action against the sheriff for not returning the execution, no excuse for his not prosecuting the undertaking in replevin being shown except the absence of an indemnity for costs, the sheriff is liable for the amount of

the debt, and cannot sustain a counter-claim for expenses in the replevin suit, though within the terms of the bond to indemnify him (*id.*).

a. The levy on personal property for an unpaid tax does not defeat or take precedence of a prior levy on an execution (*Fuller* v. *Allen*, 7 Abb. 12; 16 How. 247).

b. The fact of a person in the employ of the defendants in the execution but not their general agent, pointing out property as the property of defendants, does not estop the owner from showing title (*N. Y. Car Oil Co.* v. *Richmond*, 19 How. 506).

c. Onus of proof in action of replevin against sheriff for goods taken on execution (*Merritt* v. *Lyon*, 3 Barb. 110).

d. Action for removing goods levied upon (*Marsh* v. *White*, 3 Barb. 518).

e. Liability of attorney in the action for a tortious levy of the execution (*Ford* v. *Williams*, 3 Kernan, 578).

f. **Levy on and sale of real estate.**—If the sale of the goods and chattels of a defendant does not realize sufficient to satisfy the execution, the sheriff may cause the deficiency to be made of the real estate of the execution debtor, owned by him at the time of docketing the judgment or at any time afterwards, in whose hands soever the same may be.

g. No portion of territory within another state can be levied upon or sold under a judgment of this state (*Bunk* v. *St. John*, 29 Barb. 585).

h. Where part of the judgment debtor's real estate has been conveyed to a *bona-fide* purchaser, and enough remains to satisfy the execution, the court will direct the execution to be levied on what remains (*Welch* v. *James*, 22 How. 474).

i. The objection that the real estate of one of two defendants cannot be sold on an execution while the co-defendant has sufficient personal property in the county to satisfy the execution, can only be raised by the party whose land is sold, if it can be urged by any one (*Smith* v. *McGowan*, 3 Barb. 404; *Neilson* v. *Neilson*, 5 Barb. 565).

k. An estate at will or by sufferance cannot be sold under an execution, nor an interest in a contract for leasing or purchasing land (*Bigelow* v. *Finch*, 17 Barb. 394; 11 *id.* 498; *Calvin* v. *Baker*, 2 *id.* 206; *Sage* v. *Cartwright*, 5 Selden, 49).

l. The sale of a mere equitable interest is a nullity (*Griffin* v. *Spencer*, 6 Hill, 525; and see 6 Barb. 116, 129; 10 Paige, 562; 2 Barb. Ch. 458; 3 Barb. 555; *Garfield* v. *Hatmaker*, 15 N. Y. 475; and see 3 Paige, 219; 31 Barb. 390; *Wright* v. *Douglass*, 3 Barb. 556). Property belonging to a trust estate cannot be levied on and sold on execution on a judgment against the trustee, merely describing him as such (*Mallory* v. *Clark*, 9 Abb. 358).

m. The mode of levying upon real estate is, to give notice of sale (5 Hill, 228; *Mills* v. *Thursby*, 11 How. 121). The notice must be advertised for six weeks successively, previous to the sale, as follows:

1. A written or printed notice of the sale must be fastened up in three public places in the town where such real estate is to be sold; and, if the sale be in a town different from that in which the premises to be sold are situated, such notice must also be fastened up in three public places of the town in which the premises are situated.

2. A copy of such notice must be printed once in each week, in a newspaper of the county, if there be one.

3. If there be no newspaper printed in such county, and the premises to be sold are not occupied by any person against whom the execution is issued, or by some person holding the same as tenant or purchaser under such person, then such notice must be published in the State paper once in each week. Sales in Hamilton County may be published in Fulton County (Laws 1860, ch. 297).

n. The execution creditor is not liable to the printer for advertisements ordered by the sheriff (*Raney* v. *Weed*, 3 Sand. 577).

a. The notice must describe the real estate with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there be any, and if there be none, by some other appropriate description. The penalty for taking down or defacing the notice (unless on satisfaction of the execution, or by consent of the parties), is $50.

b. Where a notice of sale was posted forty-three days previous to the day of sale, making six full weeks, but the notice published in the newspaper, although it received six separate insertions, once in each week for six successive weeks, was first published only thirty-nine days *previous* to the day of sale; it was held that the publication was sufficient (*Olcott* v. *Robinson*, 21 N. Y. 150; reversing, 20 Barb. 148; and in effect *Early* v. *Doe*, 16 How. U. S. Rep. 610; *The People* v. *Gray*, 10 Abb. 468; *Sheldon* v. *Wright*, 7 Barb. 39; and see *Howard* v. *Hatch*, 29 Barb. 297).

c. At the time and place designated in the notice of sale, the sheriff is to proceed to sell the premises at public auction, to the highest bidder; a mere levy being no satisfaction, until a sale is made (14 Wend. 260; 4 Hill, 619). The sale must be between the hour of 9 A. M. and sunset, and a sale after sunset would be void (*Carnrick* v. *Meyers*, 14 Barb. 9). If the real estate offered for sale consists of several known lots, or parcels, such lots, or parcels, must be separately exposed for sale; this is directory only (*Wood* v. *Monell*, 1 Johns. Ch. R. 503; *Cunningham* v. *Cassidy*, 7 Abb. 183). Disregarding the section is an irregularity only, and is waived by a delay in objecting to the sale on that account (*id.*); and if any person claiming to be the owner of any portion of such estate, or of such lots, tracts or parcels, or either of them, shall require such portion to be exposed for sale separately, the sheriff must expose the same for sale accordingly. A sheriff's sale of real estate will be set aside in favor of a judgment creditor, where it appears he has been misled by the conduct of the sheriff or his deputies who had the execution—especially where the property has been sacrificed (*Ames* v. *Lockwood*, 13 How. 555; *Dwight's case*, 15 Abb. 259).

d. The sheriff may sell under an execution against several defendants who are tenants in common of the premises bound by the judgment, the right and title of all the defendants together, unless some one claiming to be the owner of some portion of the estate, or claiming to be entitled by law to redeem any portion, shall require such portion to be exposed for sale, separately; in which latter case it must be sold separately. Where the sheriff sells the right and title of several defendants to certain premises, and a mortgage creditor of one of the defendants redeems the right and title of such defendant, the deed of the sheriff to such redeeming creditor conveys only the right and title of the defendant which is thus redeemed (*Neilson* v. *Neilson*, 5 Barb. 565).

e. No more of any real estate shall be exposed for sale than is necessary to satisfy the execution (6 Wend. 522). The equity of redemption of a mortgagor cannot be sold under an execution on a judgment recovered for a debt secured by the mortgage (6 Hill, 15).

f. A sale of a decedent's real estate at a judicial sale does not convert it into personalty (*Hoey* v. *Kinney*, 10 Abb. 400).

g. If the advertisement of a sale be upon one execution, the sheriff cannot sell under that and another execution coming subsequently into his hands (8 Cow. 334; *Husted* v. *Dakin*, 17 Abb. 149); nor can he sell real and personal property together without discrimination (17 Johns. 116).

h. One defendant in a judgment may become the purchaser at a sheriff's sale of the real estate of his co-defendant (*Neilson* v. *Neilson*, 5 Barb. 565). When the property of one judgment debtor is taken and sold to satisfy the judgment, such debtor has a remedy against his co-debtors for contribution. (*Id.*)

i. A creditor who purchases land at a sale by virtue of legal proceedings instituted to collect his debt, is a purchaser for a valuable consideration (*Wood* v. *Chapin*, 3 Kernan, 509).

j. Where a plaintiff's attorney bids off property at a sheriff's sale on execu-

tion, in his own name, and takes a certificate from the sheriff in his own name, the presumption is that the purchase was on his own account; and an action will lie against him by the sheriff, to recover the amount of his bid (*Chappell* v. *Dann*, 21 Barb. 17).

a, *Semble*, where a purchaser at sheriff's sale refuses to pay for the property struck off to him, the sheriff can sell again without notice (*Illingworth* v. *Millenberger*, 11 Mo. R. 80).

b. A purchaser of lands under mortgage buys subject to the mortgage (*Weaver* v. *Toogood*, 1 Barb. 238).

c. The title of a *bona fide* purchaser, without notice, will not be affected by any irregularities in the execution, if it authorizes the sheriff to sell, and is founded upon a subsisting judgment (1 Cow. 622; 4 Barb. 180; 4 Denio, 480; *Bryan* v. *Berry*, 8 Cal. 130; *Husted* v. *Dakin*, 17 Abb. 137). Thus, the neglect of the sheriff to levy until after the return-day of the writ (13 Johns. 97; 18 *ib.* 7); or to levy on personal property (*Neilson* v. *Neilson*, 5, Barb. 565); or the omission to give due notice of the sale, or the taking down or defacing of the notice, or omitting to file the certificate of sale (5 Cow. 269), will not prejudice the title of a purchaser in good faith without notice.

d. If a judgment is *satisfied* before sale, even a *bona fide* purchaser derives no title from the sale (*Neilson* v. *Neilson*, 5 Barb. 565; *Wood* v. *Colvin*, 2 Hill 566; *Jackson* v. *Moon*, 18 Johns. 441; *Jackson* v. *Anderson*, 4 Wend. 474; *Stafford* v. *Williams*, 12 Barb. 240; *Craft* v. *Merrill*, 4 Kernan, 456).

e. The sheriff cannot convey a title to the purchaser until the expiration of the time allowed by law for the redemption of the property. All that the purchaser receives as evidence of his title is an official certificate of the sale, subscribed by the sheriff, containing a particular description of the premises sold, the price bid for each distinct lot or parcel, the whole consideration money paid, and the time when the sale will become absolute, and the purchaser be entitled to a conveyance (9 Cow. 185).

f. A duplicate of this certificate must be filed and recorded in the office of the clerk of the county in which the sale was made, within ten days after the sale (Laws 1857, ch. 60).

g. The sheriff's certificate may be amended, on motion to the court (13 Wend. 29; *Richards* v. *Varnum*, 8 How. 79; *Smith* v. *Hudson*, 1 Cow. 430.)

h. The certificate may be a cloud on the title (*Lounsbury* v. *Purdy*, 18 N. Y. 515; *Cook* v. *Newman*, 8 How. 523).

i. In some cases the court, on application of the plaintiff, will set aside the sale, and order a re-sale of the property (12 Wend. 253; 2 *ib.* 260; 7 Cow. 367; 1 How. 122; 7 *id.* 329; 13 *id.* 555; 17 N. Y. 276; 4 Cow. 415; 19 Wend. 90; 18 *id.* 611.

j. **Leasehold.**—So much of title fifth, chapter sixth, part third, of the revised statutes, as relates to the sale and redemption of real estate, which shall be sold under execution, shall be applicable to the sale and right of redemption of leasehold property, where the lessee, or the assignee of the lessee, shall be possessed of at least five years' unexpired term of the lease, and also of any buildings that may be erected thereon (Laws 1837, p. 540).

k. **Redemption, when and how effected.**—Within one year from the sale, the person against whom the execution issued and whose right and title were sold, or his heir or devisee or grantee, may redeem the property sold by paying to the purchaser, his personal representatives, or assigness, or to the sheriff, the amount bid on the sale with interest at ten per cent. from the sale; upon which payment being made, the sale of the premises so redeemed, and the certificate thereof shall be null and void. (2 R. S. 370.)

l. The right of a judgment creditor to redeem cannot be defeated by the act of the purchaser in paying the judgment without his consent (*The People* v. *Beebe*, 1 Barb. 379); but a judgment debtor whose land has been sold on execution, subject to an antecedent mortgage, and whose equity of redemption has been subsequently cut off by foreclosure and sale has no right to redeem from the sale under the execution (*Husted* v. *Dakin*, 17 Abb. 137).

a. The effect of the redemption by a judgment debtor is to restore a junior judgment, to its lien (*Bodine* v. *Moore*, 18 N. Y. 347). And where lands sold on execution, and bid in by a third person for less than the amount of the judgment, were subsequently redeemed by the debtor, it was held that they might be re-sold on the same execution for the balance remaining due; though the return-day had passed before the redemption took place. And it was further held that the re-sale was regularly made by the sheriff who received the execution in the first instance, though he had gone out of office before the debtor redeemed (5 Hill, 228).

b. By a sale of land on a judgment the lien of the judgment and the right to redeem under it are extinguished (*Shepard* v. *O'Neil*, 4 Barb. 125; *Husted* v *Dakin*, 17 Abb. 137; and see 2 Wend. 297; 5 Hill, 228).

c. After the expiration of such period of one year (meaning 365 days) the right of the debtor, or his grantee, heir, or devisee, to redeem is gone (1 Wend. 46); but within three months thereafter, any creditor of the person against whom the execution was issued (4 Hill, 542), having in his own name, or as assignee, representative, trustee, or otherwise, a decree in chancery, or a judgment at law, rendered at any time before the expiration of fifteen months from such sale, or having a mortgage duly recorded, and which is a lien on the premises sold (3 Cow. 35; 4 Hill, 542), may acquire the title of the original purchaser, by paying the sum paid on the sale of the premises (1 How. 77), with seven per cent. interest from the time of sale. And in certain cases county superintendents and overseers of the poor may redeem (Laws 1862, ch. 473). *Semble*, to entitle a creditor by mortgage to redeem his mortgage must cover the whole of the premises sold (*The People* v. *Beebe*, 1 Barb. 379; see however *Neilson* v. *Neilson*, 5 Barb. 565). The fact that a junior judgment creditor has collateral security for his judgment does not take away his right to redeem (*Muir* v. *Leitch*, 7 Barb. 341). The redemption may be made at any time before the close of the last day allowed by law for that purpose; business hours are not regarded. (*Ib.*) If the last day falls on Sunday, Saturday is the last day to redeem (*People* v. *Luther*, 1 Wend. 42). A purchaser is not bound to accept the amount of his bid from a person who has no right to redeem, and may insist that the deed be executed to him, in pursuance of the sale; but if he accepts the money, though paid by a stranger, his right to a deed is gone (15 Wend. 248; see 7 Paige, 167; 1 Barb. 379).

d. After such creditor has acquired the title of the original purchaser, any other creditor, who might have acquired such title in the same way, may become a purchaser from the first creditor, by reimbursing to him the sum paid to acquire the title, together with seven per cent. interest from the time of such payment, and paying the amount due on such judgment or decree, if such judgment or decree be prior to the judgment or decree of the second creditor. But if the judgment or decree of the first creditor, at the time of his acquiring the title of the original purchaser, shall have ceased to be a lien as against the second creditor, it will not be necessary to pay the amount of it (4 Hill, 615, 589; 1 How. 77.)

e. In the same manner, any third or other creditor, who might according to the statute acquire the title of the original purchaser, may become a purchaser thereof from the second, third, or any other creditor, who may have become such purchaser from any other creditor, upon the same terms and conditions as those last above specified.

f. If the original purchaser be also a creditor of the party against whom the execution issued, and as such, might by law acquire the title of any purchaser, he may avail himself of his decree or judgment, in the same manner and on the same terms as are prescribed by the statute, to acquire the title which any creditor may have obtained.

g. The party, under whose execution any real estate has been sold, is not authorized to acquire the title of the original purchaser, or of any creditor, to the premises sold, by virtue of the decree or judgment, on which such execution issued; and this, though no part of the proceeds of the sale were realized upon his execution, but were wholly exhausted by other and prior executions, under which the property was sold at the same time (4 Hill, 544).

a. A senior judgment creditor may acquire the interest of the purchaser on a sale upon a junior judgment (*The People* v. *Fleming*, 4 Denio, 137).

b. A creditor having two judgments which are successive liens, may cause a sale to be made on the junior one, and is then entitled to acquire the right of the purchaser by virtue of his other judgment in preference to a creditor whose judgment is junior to both (*id.*).

c. A junior judgment creditor who pays the purchaser at a sale on an older judgment the amount of his bid, and takes an assignment of the sheriff's certificate, stands in the place of a purchaser, and the interest thus acquired may be purchased by another judgment creditor without paying any part of the judgment of the assignee of the certificate (*The People* v. *Ransom*, 4 Denio, 145).

d. Where the creditor sells, and becomes the purchaser himself, at a sum exceeding the amount of his debt, it is said that his judgment is satisfied, and the lien gone, so that he cannot afterwards redeem from a sale under an older judgment (2 Wend. 297; 5 Hill, 228; see 4 Barb. 125; *Weaver* v. *Toogood*, 1 Barb. 238).

e. A creditor by mortgage on real estate, his assignee or representative, where the mortgaged premises or any part thereof have been sold on execution, has the same right to acquire the interest of a purchaser as a judgment creditor, and is placed in other respects on the same footing. Where leasehold property, in which the lessee or his assignee has an unexpired term of at least five years, is sold under execution, the property may be redeemed; so also where the lessee or his assignee is possessed of any buildings erected on the demised premises (20 Wend. 416; 6 Hill, 149).

f. Redemption by one acquiring title subsequent to the sale (see *Chautauque Co. Bank* v. *Risley*, 19 N. Y. 370).

g. To entitle any creditor to acquire the title of the original purchaser, or to become a purchaser from any other creditor, he must present to and leave with such purchaser or creditor, or the sheriff, the following evidence of his right: (1) A copy of the docket of the judgment or decree under which he claims the right to purchase (19 Wend. 87; 20 *id.* 555), duly certified by the clerk of the court, or of the county in which the same is docketed (*The People* v. *Ransom*, 4 Denio, 145; *Woolsey* v. *Saunders*, 3 Barb. 301). (2) A true copy of all the assignments of such judgment or decree, which are necessary to establish his claim, verified by his affidavit or by the affidavit of some witness to such assignments (10 Barb. 167; 4 Denio, 137; 27 Barb. 55). The assignment must be filed (*The People* v. *Ransom*, 4 Denio, 145). (3) An affidavit by such creditor, or by his attorney or agent, of the true sum due on such judgment or decree, at the time of claiming such right to purchase (18 Wend. 598; 11 Barb. 341). An affidavit to redeem, stating the sum due "*as claimed by this deponent*," was held not sufficient. The sum due must be stated positively (*The People* v. *Becker*, 20 N. Y. 354). And a false statement of the amount due, although unintentional, defeats the right to redeem (*Smith* v. *Miller*, 25 N. Y. 619). An agent may make the affidavit, but he must swear that he is agent; a description, M. D., attorney of the above plaintiff, is not sufficient (*Ex pte. Shumway*, 4 Denio, 258). An assignment of a judgment is sufficient, if it state correctly the title of the suit, (*i. e.*, the names of the parties plaintiff and defendant), though the amount, the time when, and the court in which it is rendered, be omitted (*The People* v. *Fleming*, 4 Denio, 137); and further as to the requisites of the affidavit and assignment (see *Aylesworth* v. *Brown*, 10 Barb. 167). Where there is no subscribing witness to the assignment of a judgment on which the right of a purchaser of land on execution is sought to be acquired, the affidavit of its execution may be made by any person who saw it executed and delivered, such person is *a witness* to the *assignment* (*id.*). An assignment of a judgment by an administrator of the plaintiff is as effectual as though executed by the plaintiff while living (*The People* v. *Fleming*, 4 Denio, 137). The death of the intestate and the appointment of an administrator may be shown by an affidavit, presented with the other papers without producing the letters of administration (*id.*). Whether the actual existence of such facts

would not render the proceeding regular, without presenting any proof of them (*id.*). The clerk's certificate authenticating a copy of the docket of the judgment need not be under seal, nor state that it h s been compared with the original, &c., as directed with respect to certain documents by 2 R. S. 403, § 59 (*The People* v. *Ransom*, 4 Denio, 145).

a. A creditor need not wait till the expiration of a year from the sale, before furnishing the evidence of his right to redeem (2 Hill, 51). And his affidavit of the amount due on his judgment, though made five days before presenting the papers, is sufficient (4 Hill, 608). The requirements of the statute as to the evidence to be produced by the creditor, must be strictly complied with (20 Wend. 555; 19 *ib.* 87; 18 *ib.* 59, 8; 1 How. 75; 7 Paige, 168). Where land of M. had been sold under execution in favor of B. and bid off by H. One T. as the assignee and owner of a subsequent judgment against M. for the purpose of redeeming from said sale, left with the sheriff as evidence of his title to said judgment, his own affidavit that he was owner and assignee of said judgment, and a paper purporting to be the assignment of said judgment, which paper was in no wise verified, and was not identified in T.'s affidavit as the instrument under which he claimed, held there was not sufficient evidence of T.'s right to redeem (*Hall* v. *Thomas*, 27 Barb. 55). Although the production of the proper papers may be waived by the purchaser or other person whose right is sought to be acquired, so far as respects himself, yet such waiver will not affect any other creditors seeking to purchase the same premises (*The People* v. *Ransom*, 4 Denio, 145). The purchasing creditor must deliver the requisite papers to the same party to whom he pays the money, and he cannot make the payment to the purchaser, and afterwards deliver the proper papers to the sheriff. It is the official duty of the sheriff to preserve the papers left with him by a purchasing creditor, and to exhibit them, on request, to any third person having an interest in the matter (*id.*).

b. An error in the affidavit of the amount due on the judgment was disregarded (*Muir* v. *Leitch*, 7 Barb. 341). The title of a purchaser from a redeeming creditor where such purchaser has received a deed, is not prejudiced on account of an omission to prove and file the assignment of the redeeming creditor's right in the county clerk's office (*Chautauque Co. Bank* v. *Risley*, 4 Denio, 480).

c. The payment required to be made in order to acquire the title of the original purchaser, or to become a purchaser from any creditor, may be made to such purchaser or creditor, his representatives or assigns, or to the sheriff, for the use of the purchaser or creditor, or, if the sheriff be dead or removed from office, to the under-sheriff or clerk of the county. But the county clerk cannot, without a special deputation for that purpose, act in the sheriff's behalf in receiving money paid for the redemption of real estate from sale upon execution, although the sheriff has no other office than the county clerk's office (*The People* v. *Rathbun*, 15 N. Y. 528, and see *Griffin* v. *Chase*, 23 Barb. 278). The full sum required must be paid, or the redemption will be void (7 Cow. 540; 4 Hill, 618; 20 Wend. 602). An error of thirty cents was disregarded (*Hall* v. *Fisher*, 9 Barb. 17); and if the payment is made in current bank bills, and received without objection, it is sufficient. (*Id.*) In case of a mistake the court may give relief. (*Id.*) The party paying the money may immediately notify the sheriff not to pay it over (*Spraker* v. *Cook*, 16 N. Y. 568). Where the money to redeem is paid to the deputy sheriff, an action to recover it should be against the sheriff, not the deputy (*Colvin* v. *Holbrook*, 8 Barb. 475).

d. Upon the proper payment being made, the title of the original purchaser becomes thereby transferred to the creditor acquiring it, and from such creditor to any other creditor becoming a purchaser according to the statute.

e. In the redemption of lands sold under execution, a second or subsequent creditor, who redeems after a redemption already made, must present the evidences of his right to redeem, and pay the moneys necessary to be paid, to the last redeeming creditor, or to the sheriff. Payment to the original purchaser in such case, is not sufficient (20 Wend. 602).

f. To entitle a creditor by mortgage, his assignee or representative, to ac-

quire the title of the original purchaser, or to be substituted as a purchaser or any other creditor, he must present to and leave with such purchaser or creditor, or the sheriff, the following evidences of his title:—

1. A copy of the mortgage under which he claims the right to purchase, duly certified by the clerk of the county where it is registered or recorded (2 Hill, 51).

2. If the mortgage has been assigned, a copy of the assignment or assignments, verified by his affidavit, or the affidavit of some witness to such assignment.

3. An affidavit by such mortgage creditor, his assignee or representative, or by his attorney or agent, stating the true sum due or to become due on such mortgage, at the time of claiming such right to purchase, over and above all payments.

a. Where an executor or administrator applies to be substituted as a purchaser, a copy of the letters testamentary, or of administration, must also be furnished.

b. Where a creditor by mortgage became also the purchaser under a senior judgment, and within the proper time furnished the sheriff the requisite evidence of his right to redeem, it was held that a junior creditor, in order to entitle him to the sheriff's deed, must pay not only the sum bid, with interest, but the mortgage also (2 Hill, 51; *Titus* v. *Lewis*, 8 Barb. 70).

c. Where lands of a debtor are sold under execution, and a junior judgment creditor redeems them from the purchaser, such redemption is no bar to an action at law to enforce payment of the judgment; although the value of the lands redeemed far exceeds the amount of the judgment and the money paid on the redemption. The redemption is not an extinguishment of the judgment (20 Wend. 50; 7 Cow. 540; and see 7 Barb. 644).

d. The right and title of the person against whom the execution was issued, are not divested by the sale of the real estate until the expiration of fifteen months from the time of such sale (1 Cow. 501; 8 Johns. 520); nor until the sale has been consummated by the execution and delivery by the sheriff of a deed to the purchaser (*Smith* v. *Calvin*, 17 Barb. 157; *Farmers' Bank of Saratoga* v. *Merchant*, 13 How. 10). Until the expiration of one year from the sale, the defendant in the execution is entitled to the possession of the property and to the rents and profits (2 Wend. 507; 4 Barb. 159; 3 *ib.* 518). A seizure and sale of lands under execution, does not divest the estate of the debtor unless the purchase money is paid and a deed delivered. The deed when executed relates back to the time of sale and purchase (*Farmer's Bank of Saratoga* v. *Merchant*, 13 How. 10; 15 Johns. 309; 8 Cow. 75; *Schermerhorn* v. *Merrill*, 1 Barb. 512).

e. After the several periods allowed for redemption have expired, it is the sheriff's duty to complete the sale by conveying to the original purchaser all the right, title, and interest of the defendant in the property sold. This conveyance must be by deed (12 Johns. 73), and must describe the property with reasonable certainty (11 Johns. 365; S. C. 13 *ib.* 537; 10 *ib.* 581). What description held not sufficient (see *Peck* v. *Mallam*, 10 N. Y. 509). The deed may be executed by the deputy in the name of the sheriff, during the continuance of the latter in office (7 Cow. 739; 3 *ib.* 89; 9 *ib.* 233). In case of the death or removal of the sheriff before the conveyance is executed, it may be executed by the under-sheriff, or he may appoint a proper person to execute the same (10 Wend. 562).

f. If the person entitled to such conveyance die before its delivery, it must be executed to his executor or administrator, subject to the dower of his widow, if there be any; but may be sold for the payment of his debts by the order of the surrogate.

g. If the sheriff refuse to execute the deed, the remedy is a mandamus to compel him; and this is the proper mode of bringing up the question as to the right of redemption, where it is in dispute (7 Cow. 540; *The People* v. *Fleming*, 4 Denio, 137). *Semble*, the court will not compel a sheriff to deliver a deed to a purchaser who has not paid and refuses to pay the amount of his

bid on the ground that he is the oldest judgment creditor to an amount exceeding his bid (*Williams* v. *Smith*, 6 Cal. 913; *The People* v. *Hays*, 5 Cal. 66); nor will the court compel the sheriff to convey to one who claims as assignee, until the assignment under which the party claims has been filed (*The People* v. *Post*, 4 Denio, 145).

a. The sheriff's deed may be set aside for fraud (20 Johns. 51; 1 Wend. 56; 7 *ib.* 463; 1 Cow. 481).

b. It seems that after the sheriff has delivered the deed to the purchaser, he has no right, at the mere request of the purchaser, and without an order of the court, to alter the deed in a material part (*Clarke* v. *Miller*, 18 Barb. 269; and see *Laub* v. *Buckmiller*, 17 N. Y. 621).

c. Action to reform sheriff's deed see (*Bartlett* v. *Judd*, 21 N. Y. 200).

d. Construction of sheriff's deed see (*Mason* v. *White*, 11 Barb. 173; *Stafford* v. *Williams*, 12 Barb. 240).

e. The intent of the sheriff in making the deed cannot be shown by extrinsic evidence (*Mason* v. *White*, 11 Barb. 173; *Ryan* v. *Dox*, 25 *id.* 440).

f. The purchaser has no right to enter on the premises, unless they are vacant. In order to obtain actual possession, he must resort to his action of ejectment (13 Johns. 340; *Everson* v. *Sawyer*, 2 Wend, 507). Or proceed under the act to obtain possession of real property (2 R. S. 513).

g. All the provisions of the revised statutes extend to liens by mortgage, in the same manner as they extend to liens by judgment (Laws 1847, p. 508).

h. All redemptions by creditors are to be made at the sheriff's office who made the sale, and the sheriff is to attend at his office during the last day for making redemption, and during the time thereafter for which redemption may be made, for the purpose of making redemption; but in his absence, the redemption may be made by the under-sheriff or a deputy; and notice of the redemption must be forthwith filed by the sheriff with the county clerk (15 N. Y. 528; 23 Barb. 268).

i. The notice of redemption is to contain:

1. The title of the cause; or, if a mortgage, the parties to the mortgage.
2. The amount of the judgment, decree, or mortgage.
3. The assignee, representative, or trustee thereof, if any.
4. The amount paid to redeem.
5. The time when such redemption was made.
6. The sum claimed to be due on such judgment, decree, or mortgage, at the time of such redemption.

j. Any creditor having a right to redeem, may redeem within twenty-four hours after any preceding redemption, and no deed on any sale or redemption is to be executed until after the lapse of twenty-four hours after the last redemption.

k. Certificates of redemption are to be made and delivered to the creditor redeeming, which certificates, when proved and acknowledged, are to have the effect of deeds. The fee for making such certificates is the same as for making a certificate of sale.

l. The time to redeem may be extended by agreement among the parties interested (4 Coms. 554).

m. Recording the sheriff's deed is not notice thereof to a party who contracted with the judgment debtor to purchase the land and entered into possession prior to the recovery of the judgment (*Moyer* v. *Hinman*, 3 Kern. 181).

n. M. paid the sheriff the amount of an execution held by said sheriff against H. expecting that the plaintiff in the execution would assign the judgment to him, M. The sheriff gave M. a receipt stating that the money was "to apply on the judgment, which was not to be cancelled but by M's. order, if the plaintiff will assign the judgment." Plaintiff assigned the judgment to M.: held that the transaction was a purchase, not a payment of the judgment (*Smith* v *Miller*, 25 N. Y. 619).

a. See further as to redemptions (*Pennell* v. *Hinman*, 7 Barb. 644; *Ex parte Raymond*, 1 Denio, 270).

b. **Exempt property.**—The following property, when owned by any person being a householder (2 R. S. 367; 19 Wend. 475), and such articles thereof as are removable, are exempt, while the family of such person, or any of them may be removing from one place of residence to another:

1. All spinning-wheels, weaving-looms, and stoves put up or kept for use in any dwelling-house.

2. The family Bible, family pictures, and school-books used by or in the family of such person, and books not exceeding in value fifty dollars, which are kept and used as part of the family library.

3. A seat or pew occupied by such person or his family, in any house or place of public worship.

4. All sheep to the number of ten, with their fleeces, and the yarn or cloth manufactured from the same (11 Wend. 54; 21 *ib.* 68), one cow, two swine, the necessary food for them; all necessary pork, beef, fish, flour, and vegetables (25 Wend. 370), actually provided for family use, and necessary food for the use of the family for 60 days.

5. All necessary wearing apparel, beds, bedsteads and bedding, for such person and his family, arms and accoutrements required by law to be kept by such person, necessary cooking utensils, one table, six chairs, six knives and forks, six plates, six tea-cups and saucers, one sugar-dish, one milk-pot, one tea-pot, and six spoons, one crane and its appendages, one pair of andirons, and a shovel and tongs.

c. The tools and implements of any mechanic necessary to the carrying on of his trade, not exceeding twenty-five dollars in value.

d. One sewing machine and appurtenances (laws 1860, ch. 152).

e. The professional books necessary to a professional man who supports a family, for the practice of his profession, are exempt from execution, as a part of his family library. The surgical instruments of a physician are exempt, as his "tools" (Robinson's case, 2 Abb. 466).

f. Wool, or articles manufactured from it, not exceeding in quantity the fleeces of ten sheep, is exempt in the hands of a householder who does not own any sheep (11 Wend. 44; 21 *ib.* 68).

g. Necessary vegetables in any stage of obtaining them for family use are exempt (25 Wend. 370).

h. If a householder owns a cow and ten sheep, so much hay as will be necessary for their feed during the next foddering season, is exempt from levy and sale on execution (*Farrell* v. *Higley*, Lalor's Supp. to Hill and Denio, 87). That part of the statute which exempts necessary pork, beef, fish, &c., provided for family use, was intended to protect such a quantity of the specified articles as would be necessary for the family until the next annual period for laying up such provisions. The limitation of sixty days applies only to necessary *fuel*, for the use of the debtor's family. (*Id.*)

i. Necessary wearing apparel is exempt in all cases (*Bumpus* v. *Maynard*, 38 Barb. 626). The exemption is not limited to a householder or head of a family. *Contra* see 19 Wend. 475.

j. A watch or a clock may be exempt from execution, either as necessary household furniture, or as a working tool (*Bitting* v. *Vandenburg*, 17 How. 80).

k. Weapons, accoutrements and equipments and horses enrolled for service and belonging to a member of the first and fifth brigade of the New York State Militia (Laws 1855, p. 996, § 72).

l. A milch cow in possession of a widow living with and providing for her infant children is exempt (*Brigham* v. *Bush*, 33 Barb. 596). The widow taking a second husband will not toll this exemption. (*Id.*)

m. Oats for the team and tow line for the boat of a boatman (*Fields* v. *Moul*, 15 Abb. 6); but it has been held (5 Denio, 119) that necessary food for an exempt team is not exempt.

a. Land set apart for, and which has been actually used as, a burying-ground, not exceeding one fourth of an acre in extent, and on condition that the owner has recorded a description of the property (Laws 1847, p. 91).

b. A homestead to the value of $1,000, subject to certain conditions prescribed by the law granting the exemption (Laws 1850, p. 499). This exemption is not an incumbrance, claim, or lien on the premises (*Robinson* v. *Wiley*, 19 Barb. 157). This statute is founded on a public policy, which forbids refusing effect to the exemption against an execution in debt, although the defendant had obtained credit upon contracting such debt; by falsely representing that the premises were subject to sale on execution. Otherwise as against an execution upon a judgment recovered for fraud (*Robinson* v. *Wiley*, 15 N.Y. Rep. 489, reversing S. C. 19 Barb. 157). This right of exemption cannot be conveyed to another (*Allen* v. *Cook*, 26 Barb. 374; *Smith* v. *Brackett*, 36 Barb. 571). The statute does not exempt the property from being bound and charged by the judgment, but only from sale on execution. The exemption may be waived. A judgment has priority over a subsequent mortgage of the premises (*Smith* v. *Brackett*, 36 Barb. 571) A house is not a homestead until or unless it is the actual residence of the judgment debtor and his family (*Benedict* v. *Bunnell*, 7 Cal. 245; *Holden* v. *Pinney*, 6 *id.* 234).

c. The homestead exemption act does not contemplate the exemption of a homestead from sale on execution issued upon a judgment for a cause of action sounding in *tort*, nor on an execution issued in such action on a judgment for the defendant for costs (*Lathrop* v. *Singer*, 39 Barb. 396).

As to homestead exemption, see an article 1 Amer. Law Reg. N. S. 641.

d. Action for a breach of promise of marriage is not a debt recoverable out of defendant's premises under the homestead exemption act (*Cook* v. *Newman*, 8 How. 523). The act applies only to *debts* contracted after the passage of that law. A judgment for costs in an action of tort is not a judgment for a debt contracted (*Shouton* v. *Kilmer*, 8 How. 527).

e. Shares in a building-society to the value of $600, (Laws of 1851, cap. 122).

f. In addition to these exemptions it has been further provided that there shall be exempted from levy and sale, under execution, necessary household furniture and working tools, and team, owned by any person being a householder, or having a family for which he provides, to the value of not exceeding two hundred and fifty dollars, provided that such exemption shall not extend to any execution issued on a demand for the purchase-money of such furniture or tools, or team, or articles now enumerated by law (Laws 1859, ch. 134, § 1, amending Laws 1842, ch. 157, § 1), and the exemption is good as to all but the articles purchased. Uniting in one judgment a claim for the purchase-money of tools &c., with a claim for another cause of action is a waiver of the right to levy on such tools (*Hickox* v. *Fay*, 36 Barb. 9; but see *Craft* v. *Curtis*, 25 How. 163). A threshing machine is not exempt under the laws of 1842 (*Ford* v. *Johnson*, 34 Barb. 364). Where it appeared that the judgment on which the execution issued was in an action to recover for the purchase-money of a horse, and that the purchaser was not at the time of the purchase a householder, nor was he a householder at any time while he possessed such horse, and that before he became a householder he exchanged such horse for another, and then became a householder,—it was held, that the horse taken in exchange, if otherwise exempt from seizure on execution, was not rendered liable to seizure by the fact of having been so taken in exchange (*Hutchinson* v. *Chamberlin*, 11 N. Y. Leg. Obs. 251).

g. Property exempt prior to the law of 1842, is not liable on an execution on a demand for the purchase-money of articles exempted by the law of 1842 (*Cole* v. *Stevens*, 9 Barb. 676; 6 How. 425; overruling *Matthewson* v. *Weller*, 3 Denio, 52; and see *Cox* v. *Stafford*, 14 How. 520).

h. An execution issued on a judgment recovered in an action to recover damages for taking and converting personal property, is not an execution issued on a demand for the purchase-money of such property, so as to make such property liable to be seized, and within the proviso of the first section in the exemption law (*Hoyt* v. *Van Alstyne*, 15 Barb. 568).

a. A *surety* on a note given for the purchase-price of a horse, is entitled to the usual exemption under an execution issued upon a judgment recovered on the note (*Davis* v. *Peabody*, 10 Barb. 91). The head-note of that case is wrong.

b. The horse of a country physician, whose patients reside at too great a distance to admit of his visiting them on foot, is a "neccessary team," exempt from execution (*Wheeler* v. *Cropsey*, 5 How. 288). A buggy wagon used in his professional business by a practicing physician who is a householder, and has a family for which he provides, is exempt from levy and sale, by virtue of an execution issued upon a judgment recovered for the purchase-money (*Van Buren* v. *Loper*, 29 Barb. 388).

c. In *Harthouse* v. *Riker* (1 Duer, 606); it was held, that the "one-horse harness and cart" of a public cartman—a householder, having a family for whom he provided—was exempt from execution. In another case (*Hutchinson* v. *Chamberlin*, 11 N. Y. Leg. Obs. 250), held that a single horse and cart and harness were exempt from seizure on execution. See *Morse* v. *Keyes* (6 How. 18), where it was held that the one-horse wagon of a mason was not exempt. But that was disapproved of in *Davis* v. *Prosser* 32 Barb. 290), and it was there held that although a wagon is not exempt at law as such, yet when ordinarily used with a horse or horses, it might constitute part of a team, and be exempt under that head. A one-horse wagon of a practicing physician was held to be exempt (*Eastman* v. *Caswell*, 8 How 75; and see *Van Buren* v. *Loper*, 29 Barb. 389). Where a party claims the exemption of a wagon as part of a team he must show affirmatively that the team is not worth as a whole $250 (*Davis* v. *Prosser*, 32 Barb. 290). A single horse is a team (*Lockwood* v. *Younglove*, 27 Barb. 505). The part owner of a team is entitled to exemptiom, the same as if he were the sole owner (*Radcliffe* v. *Wood*, 25 Barb. 52).

d. Where a judgment debtor had three horses, worth together more than $150, and either two of them may constitute a team, and one of the horses was levied upon by a constable, by virtue of an execution,—held at general term, Balcom, J., dissenting, that the debtor might, at the time of the levy or within a reasonable time after notice thereof, elect to claim such horse as exempt property, and he failing to make such election, could not maintain replevin against the officer (*Seaman* v. *Luce*, 23 Barb. 240).

e. An article otherwise exempt is not the less so because it is new and has not been applied to its intended use (*Fields* v. *Moul*, 15 Abb. 6).

f. *Prima facie*, all the property of a judgment debtor is liable to levy and sale upon execution, if he would claim any exemption he must bring himself within some statute by proper proof (*Davis* v. *Prosser*, 32 Barb. 290). The exemption laws are entitled to a liberal construction (*Carpenter* v. *Harrington*, 25 Wend. 370; *Ford* v. *Johnson*, 34 Barb. 365; *Griffin* v. *Sutherland*, 14 Barb. 457; *Brown* v. *Witt*, 19 Wend. 475; contra, 5 Denio, 119). The party claiming exemption for an article as a necessary article, must show affirmatively that it is necessary, to entitle him to exemption (14 Johns. 434; *Griffin* v. *Sutherland*, 14 Barb. 456); and whether a particular article is necessary is a question of fact (1 Denio, 462). What is necessary furniture, it to be determined relatively, by reference to the circumstances of the case. The debtor may retain articles which he has had in common use in his family and which were reasonable and proper for him and them, in their station of life (*Dickerson* v. *Van Tine*, 1 Sand. 724; and see *Ogden* v. *Prentice*, 34 Barb. 364).

g. What is a tool within the exemption laws, see *Ford* v. *Johnson* (34 Barb. 366). A threshing machine is not (*id.*), nor is a printing press (*Buckingham* v. *Billings*, 13 Mass. 82), nor are printing type and forms (*Danforth* v. *Woodward*, 10 Pick., 423), nor a machine for spinning cloth, called a "Billy and Jenny" (*Kilburn* v. *Deming*, 2 Verm. 404), nor a mill saw (*Bachelder* v. *Shapleigh*, 1 Fairf. 135).

h. The exemption laws extend to non-residents (1 Code Rep. 71).

i. The act to extend the exemption of household furniture &c., passed April 11, 1842, does not apply to a judgment "for a demand accruing for work and labor performed in a family as a domestic. (Laws 1858, ch. 107).

a. **Waiving exemptions.**—The exemption of property from execution by statute has been held to be a personal privilege, of which the owner alone can take advantage (1 Cow. 114; 16 Wend. 562); and he may waive the exemption (*Crawford* v. *Lockwood*, 9 How. 547; see *Smith* v. *Hill*, 22 Barb. 656; *Harper* v. *Leal*, 10 How. 276; *Case* v. *Dunmore*, 23 Penn. (2 Harris) R. 93; *Carnrick* v. *Meyers*, 14 Barb. 9; *Kneettle* v. *Newcomb*, 31 Barb. 169; 22 N. Y. 249; *Smith* v. *Brackett*, 36 Barb. 571); and probably he waives it by mortgaging such exempt property (*Livor* v. *Orser*, 5 Duer, 501).

b. **Recovering proceeds of sale of exempt property.**—A claim to recover the proceeds of exempt property, wrongfully seized and sold upon execution, is converted into a debt, by a recovery of judgment for the value (*Mallory* v. *Norton*, 21 Barb. 425). A defendant whose exempt property is seized upon execution, may proceed under the provisions for claim and delivery (*Mallory* v. *Norton*, 21 Barb. 425).

c. **Who is a householder?**—One providing for a household is a householder (*Griffin* v. *Sutherland*, 14 Barb. 456); one who rents a house, and keeps boarders and servants, is a *householder* within the meaning of the exemption act of 1842, although he has at the time no wife or children for whom he provides (*Hutchinson* v. *Chamberlin*, 11 N. Y. Leg. Obs. 248; *Van Vechten* v. *Hull*, 14 How. 436).

d. In *Woodward* v. *Murray* (18 Johns. 400), it was held that M. though absent from the State, was to be deemed a householder while his family were removing from one house to another, several miles distant, and that his property was exempt from execution during such removal. [At that time the exemption act did not, as it does now, particularly provide for the exemption of property during the removal of the family from one place of residence to another; and the question was only whether the owner was a *householder* during such removal.]

e. The fact of a person being a *householder* cannot be proved by reputation, the fact being capable of direct proof (*Eastman* v. *Caswell*, 8 How. 75); and it undoubtedly devolves on the party claiming the exemption, to show affirmatively the facts which entitle him to the exemption claimed (14 Johns. 434; *Griffin* v. *Sutherland*, 14 Barb. 457; *Chambers* v. *Halstead*, Lalor's Supp. to Hill and Denio, 384; and see *R.* v. *Hale*, 6 B. & A. 123; 2 D. & R. 241; *R.* v. *Poynder*, 1 B. & Cr. 179; 2 D. & R. 258).

f. A defendant and his daughter, who live together, the wife and mother being dead, are a family (*Cox* v. *Stafford*, 14 How. 521, McKean, Co. Judge).

g. **Satisfaction of judgment.**—A levy upon sufficient personal property is not, *per se*, a satisfaction of the judgment (*Denvrey* v. *Fox*, 22 Barb. 522; see *Cuyler* v. *Moreland*, 6 Paige, 274). A satisfaction piece should be entitled in the cause, and state that satisfaction is acknowledged between the parties (for the amount of the judgment), and when the judgment was docketed. It should be signed by the judgment creditor, or his executor or administrator, and acknowledged by the party signing it before the clerk or some judge of the court in which the judgment was rendered, or some judge of a county court, or commissioner of deeds, who is required to certify that the party making the acknowledgment was known to him, or made known by competent proof.

h. After the satisfaction piece has been acknowledged, it is to be filed in the office of the clerk in which the judgment was docketed, who, on receiving it, is required to cancel the judgment on the record, by entering the satisfaction. If the judgment has been docketed in the office of the clerk of any county, the clerk with whom the satisfaction piece is filed will furnish a certificate of the fact that the judgment has been satisfied of record; and, on filing it in the office of the county clerk, the latter is required to discharge and cancel the docket.

i. Acknowledgment of satisfaction may also be made by the attorney on record of the party in whose favor the judgment was obtained, within two years after filing the judgment record, in the same manner and the like effect

as if made by the party himself. (2 R. S. 286). *Semble* the attorney has authority only to satisfy on payment in full (*Lewis* v. *Woodruff*, 15 How. 539). See *ante*, p. 529, *h*.

a. If the party in whose favor the judgment was rendered, reside out of this State, the satisfaction piece must be acknowledged before some one of the officers before whom conveyances of real estate may be acknowledged, or proved by persons residing or being out of this State.

b. If the satisfaction be acknowledged by virtue of a letter of attorney, or other instrument containing a power to acknowledge satisfaction, such letter or instrument must be acknowledged or proved before the clerk of the court in which the judgment has been rendered, or before either of the officers before whom conveyances of real estate may now be acknowledged or proved; and such letters of attorney or other instruments shall be filed with such clerk, with the satisfaction piece.

c. In order to extinguish the judgment, it is not sufficient that the satisfaction piece be filed, unless it be also actually entered on the record by the clerk; the satisfaction piece being regarded merely as an authority to enter the satisfaction (7 Wend 35).

d. If, after judgment has been satisfied, the plaintiff refuse to acknowledge satisfaction, the court will compel him to do so at his own expense and pay the costs of the motion (20 Johns. 294; 6 *id*. 132; 2 Caines R. 256; 3 *id*. 165), or they will grant a stay of execution (16 Johns. 4; 15 *id*. 395).

e. One fraudulently keeping a satisfied judgment on foot, and who threatens to use it to the prejudice of other judgment creditors, may be compelled to satisfy the judgment of record (*Shaw* v. *Dwight*, 16 Barb. 536).

f. The court will also direct satisfaction to be entered in the case of set-off of judgment, on payment of the balance to the party in whose favor, after set-off, it is found (1 Cow. 208; 1 M. & S. 696; 1 D. & R. 201).

g. Where there are two suits for the same cause, both of which proceed to judgment and execution, a satisfaction of either judgment is a discharge of the other (9 *Johns*. 221; 4 *id*. 469). But where an action is brought upon a judgment, and judgment is recovered thereon, it is no satisfaction of the original judgment, both being debts of equal degree (1 Cow. 178).

h. If satisfaction has been fraudulently entered, the court will order it to be vacated; and, in doing so, they will regard the equitable rights of third persons who have an interest in the judgment; as where the plaintiff, after he had assigned a judgment to a third person, and given notice to the defendant of such assignment, entered satisfaction on the record, it was ordered to be vacated (2 *Johns*. Cas. 121, 258; 1 *Johns*. 529; 15 *id*. 405).

i. If the amount of the judgment be collected under the execution, and the writ is returned "*satisfied*," it is not necessary to procure an acknowledgment of satisfaction; it being provided by statute that, on such return being made, the clerk shall enter in the docket of the judgment the fact that the amount stated in such return to have been levied, has been collected, which shall be deemed a satisfaction of the judgment to the extent of such amount, unless the return be vacated by the court (2 R. S. 286).

j. Where satisfaction of a judgment was produced by sale under execution of real estate supposed to belong to the judgment debtor, and it was afterwards discovered that he had no title to such real estate, and that none was obtained by the purchaser, an order of the supreme court, vacating the satisfaction and authorizing a new execution, was affirmed (*Suydam* v. *Holden*, Court of Appeals, Oct., 1853; and see *Field* v. *Paulding*, 3 Abb 139).

k. A defendant in an execution, from whose property the sheriff has collected money sufficient for the payment of it, is not liable for interest on the judgment while the money is staid in the sheriff's hands at the instance of a creditor of the defendant (*Gray* v. *Griswold*, 7 How. 44).

l. Whenever any judgment or decree shall be reversed, vacated, or satisfied of record, the certificate of the clerk of the court with whom said judg-

ment was rendered or decree was entered, of that fact, under his seal of office, shall be sufficient authority, on being filed with the clerk of any county, with whom such judgment or decree may have been duly docketed, to discharge and cancel such docket thereof; for which certificate the officer furnishing the same shall be entitled to charge 12½ cents (Laws of 1844, p. 91, § 5).

a. Satisfaction of judgment by acceptance of bond and mortgage, see *Lafarge* v. *Harter* (4 Barb. 364), satisfaction otherwise, see *Van Wagenen* v. *LaFarge* (13 How. 16).

b. Upon the payment to the sheriff of a county of the amount due upon any execution in his hands, issued upon a judgment obtained in any other county, such sheriff shall, on demand, deliver to the person paying the same, a copy of such execution, and of his indorsement of satisfaction thereon, and shall certify the same to be a copy, and shall be entitled to receive twenty-five cents therefor; and upon filing such certified copy with the clerk of the first mentioned county, such clerk shall enter satisfaction of the said judgment upon the docket, in the same manner and with the like effect as if the said judgment had been obtained in such county and the original execution had been returned satisfied; but nothing herein contained shall exempt the sheriff from returning the original execution to the clerk of the county in which the judgment was obtained (Laws 1860, ch. 6, § 1).

c. Satisfaction of such judgment may also be entered by the clerk of any county where the same shall have been docketed, upon producing to and filing with such clerk the certificate of the clerk with whom the copy of the execution and endorsement of satisfaction was filed, as aforesaid, stating that such copy has been filed and such judgment discharged (*id.* § 2).

d. **Setting off judgments.**—A set-off of one judgment against another may be obtained either (1) by an action instituted for the purpose, or (2) by a motion to the court in which the judgments or either of them were or was rendered. A set-off may be obtained by an action in many cases in which it cannot be obtained on a motion, and much of the apparent confusion in the decisions on motions to set-off judgments arises from not keeping in mind the fact that the refusal to allow the set-off is frequently based on the ground that relief cannot be had on motion (*Purchase* v. *Bellows*, 16 Abb. 108).

e. An action may be maintained to enforce a set-off of judgments, although a remedy exists by motion, but the courts will discourage such actions (*Gridley* v. *Garrison*, 4 Paige, 647; *Ainslie* v. *Boynton*, 2 Barb. 258).

f. In an action to set off judgments, the statute of set-offs controls, and the right of set-off is paramount to the attorney's lien (*Roberts* v. *Carter*, 24 How. 44; 9 Abb. 366, *note*).

g. To warrant a set-off in any case, each party must have a judgment (6 Cow. 598; 10 Wend. 615; 5 Barb. 105; and see 3 E. D. Smith, 66; 11 Barb. 481; 4 Sand. 696; 1 Johns. Cas. 102; 14 Johns. 63; 8 *id.* 357; 1 *id.* 144; 4 Hill, 559; 5 *id.* 568, 7 *id.* 186; 3 Wend. 331; 8 Cow, 126; 3 *id.* 353; 7 *id.* 469, 480; 10 Paige, 370).

h. A judgment in an action at law may be set off against a judgment in a foreclosure action (*Holden* v. *Gilbert*, 7 How. 208).

i. Set-off not usually allowed to prejudice of attorney's lien (*Ainslie* v. *Boynton*, 2 Barb. 268; *Gridley* v. *Garrison*, 4 Paige, 647; *Ely* v. *Cook*, 9 Abb. 366), but an attorney's lien is no bar to an action to obtain a set off (*Brooks* v. *Hanford*, 15 Abb. 342; and see *Noxon* v. *Gregory*, 5 How. 339); attorney's lien for costs in note to § 303, *post*.

j. Pending an action against an insolvent defendant, he agreed with his attorneys that the costs in the action should belong to them; subsequently he obtained a judgment for costs &c., assigned it to his said attorneys, held that this judgment was not the subject of a set-off against a previous judgment of the same plaintiff against the same defendant (*Ely* v. *Cook*, 2 Hilton, 406).

k. Where the judgments to be set off are in different courts the motion

should be made in the court in which the judgment against the moving party was tendered (*Cooke* v. *Smith*, 7 Hill, 168; *Ross* v. *Hicks*, 11 Barb. 480).

a. A motion to set off judgments obtained in a justice's court, transcript of one or both of which have been filed with the county clerk, should be made in the county court (*Ross* v. *Hicks*, 11 Barb. 481).

b. On a motion to set-off judgments, the papers should be entitled in both actions (*Alcott* v. *Davison*, 2 How. 44).

c. Motions to set-off are addressed to the discretion of the court and will be allowed to prevent injustice (*Baker* v. *Hoag*, 6 How. 201; *Purchase* v. *Bellows*, 16 Abb. 105).

d. As to setting off costs against recovery where one party recovers and the other is entitled to costs, see § 370, *post*.

e. To deprive a party of his right to set-off, the assignment must be *bona-fide* (*Butler* v. *Niles*, 26 How. 61).

f. Where plaintiff purchased a judgment against his creditors, and actually paid for it, before the transfer of their demand against him to a third person, but the written assignment of the judgment to him was not executed till after that time, held he was entitled to offset such judgment (*Barber* v. *Spencer*, 11 Paige, 517; and see *Terry* v. *Roberts*, 15 How. 65; rev'd 17 How. 341); set-off against assignee with notice allowed (*Noxon* v. *Gregory*, 5 Barb. 339; *Baker* v. *Hoag*, 6 How. 201).

g. On this subject, see *Ely* v. *Cook* (9 Abb. 366); *Crocker* v *Claughly* (2 Duer, 684); *Betts* v. *Garr* (1 Hilton, 411).

h. Set-off not allowed (*Harris* v. *Palmer*, 5 Barb. 105; *Smith* v. *Briggs*, 9 Barb 252; *Ross* v. *Hicks*, 11 Barb. 481; *Nash* v. *Hamilton*, 8 Abb. 351; *Ely* v *Cook*, 9 Abb. 366).

CHAPTER II.

*Proceedings Supplementary to the Execution.**

SECTION 292. Order for discovery of property, examination of judgment debtor, &c.
293. Any debtor to execution debtor may pay his debt to the sheriff.
294. Examination of debtors of judgment debtor, or of those having property belonging to him.
295. Witness required to testify.
296. Compelling party or witnesses to attend.
297. What property may be ordered to be applied to the execution.
298. Judge may appoint receiver and prohibit transfer of property.
299. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.
300. Reference by judge.
301. Costs of proceeding.
302. Disobedience of order, how punished.

* § 292. [247.] (Am'd 1849, 1851, 1858, 1859, 1863.) *Existing suits. Order for discovery of property, examination of judgment debtor, &c.*

(1.) When an execution against property of the judgment debtor, or of any one of the several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or, if he do not reside in the state, to the sheriff of the county where a judgment roll, or a transcript of a justice's judgment for twenty-five dollars or upwards, exclusive of costs, is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return

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* **Corporations.**—This chapter (except perhaps § 294, see in note to that section), was held not to apply to judgments against corporations (*Hinds* v. *Canandaigua R. R. Co.* 10 How. 487; *Sherwood* v. *Buffalo R. R. Co.* 12 *id.* 136); nor to corporations which are *insolvent* (*Hammond* v. *Hudson River Iron Co.* 11 *id.* 29). But it applies to judgments against stockholders in banking corporations (Laws 1863, ch. 372, § 4).

On a judgment against a domestic corporation, and an execution returned unsatisfied, on the petition of the judgment creditor the supreme court may sequestrate the stock, property, &c. of such corporation and appoint a receiver (2 R. S. 463, § 36); such receiver acts for all the creditors, but the receiver may be discharged on satisfying the plaintiff's claim, it not appearing that any other creditor has sought to avail himself of the receivership (*Angell* v. *Silsbury*, 19 How. 48). As to the sequestration of the property of corporations *Corning* v. *Mohawk Valley Ins. Co.* 11 How. 190; *Halliday* v. *Noble*, 1 Barb. 137).

**Amended—See Appendix.*

made, is entitled to an order from a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the court of common pleas for the city and county of New York, when the execution was issued to such city and county, requiring such judgment debtor to appear and answer concerning his property, before such judge at a time and place specified in the order, within the county to which the execution was issued. (2.) After the issuing of an execution against property, and upon proof by affidavit, of a party or otherwise, to the satisfaction of the court, or a judge thereof, or county judge, or any judge of the court of common pleas for the city and county of New York, that any judgment debtor residing in the county where such judge or officer resides, has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution.

Whenever it shall satisfactorily appear, by affidavit, to a justice of the supreme court, that such county judge, or judge of said court of common pleas, is incapacitated from acting in any of the proceedings whatever, herein authorized, from any cause or causes whatsoever, such justice of the supreme court shall have the same powers and authority, in all cases whatever, as are herein conferred upon him as to cases of judgments in the supreme court. (3) On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness. (4.) Instead of the order requiring the attendance of the judgment debtor, the judge may, upon proof by affidavit or otherwise, to his satisfaction, that there is danger of the debtor's leaving the State, or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge. Upon being brought before the judge, he may be examined on oath, and, if it then appears that there is danger of the debtor's leaving the State, and that he has property which he has unjustly refused

to apply to such judgment, ordered to enter into an undertaking, with one or more sureties, that he will from time to time attend before the judge as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the judge, as for a contempt. (5.) No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceedings or prosecution. Nor shall he be excused from answering any question on the ground that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution."

a. **Nature of the proceeding.**—A proceeding under this section is a proceeding in the action, not a special proceeding (*Dresser* v. *Van Pelt*, 15 How. 19; *Bk. of Genesee* v. *Spencer*, *id.* 412; *contra*, *Davis* v. *Turner*, 4 How. 190); it is in the nature of a new suit (2 Duer, 658; *Driggs* v. *Williams*, 15 Abb. 477; *contra*, *Holstein* v. *Rice*, 15 Abb. 307; 24 How. 135). It is a substitute [to some extent] for the former creditors' bill, and the rules settled in reference to the proceedings under these bills, may, with propriety, be regarded as controlling, when not altered by the code or the practice under it (Orr's case, 2 Abb. 458; citing *Griffin* v. *Dominguez*, (2 Duer, 658); *Davis* v. *Turner*, (4 How. 190); and see Myers' case (2 Abb. 476); *Sale* v. *Lawson*, (4 Sand. 718); *Lilliendahl* v. *Fellerman*, 11 How. 528; 2 Abb. 152; *Driggs* v. *Williams*, 15 Abb. 477). It is a proceeding before a *judge*, not *the court*. (*Miller* v. *Rossman*, 15 How. 10; *Bitting* v. *Vandenburg*, 17 *id.* 80). There seems to be no impropriety in styling the parties *plaintiff* and *defendant* (*Davis* v. *Turner*, 4 How. 190).

b. **Jurisdiction.**—The power given by this section being a mere statute authority, unless the facts necessary to bring the case within the section are proved, the judge has no jurisdiction; the mere appearance of the judgment debtor and his examination without objection does not confer jurisdiction (*Sacket* v. *Newton*, 10 How. 561). But jurisdiction once acquired, it continues until the proceedings are terminated (*Webber* v. *Hobbie*, 13 How. 383).

c. **To what cases this section applies.**—This section applies to actions against joint debtors, where one only was served with process, and judgment was entered before the code, but execution issued since the code went into effect (*Jones* v. *Lawlin*, 1 Code Rep. 94; 1 Sand. 722; and § 294, *post*); and as well to executions issued before the code took effect as to those issued since *Dickerson* v. *Cook*, 16 Barb. 509; *Emery* v. *Emery*, 9 How. 131). It also applies to justices' judgments of which transcripts have been filed with the county clerk (*Conway* v. *Hitchins*, 9 Barb. 378; *Hough* v. *Kohlin*, 1 Code Rep. N. S., 232). It does not apply to the case of a foreign consul who has permitted judgment to be taken against him by default (*Griffin* v. *Dominguez*, 2 Duer, 658); nor after an arrest on an execution against the person (*Logan* v. *Ferris*, Daly, J., not reported, Sept., 1852); except in cases after a discharge of the execution debtor within the law of 1857 (see *Charging in execution*, *ante*, p. 530, *i.*) But it is no objection to the proceeding under this section, that after making

the order, the judgment creditor has issued another execution against the property of the judgment debtor, and that such execution has been levied, unless it is clear that such levy will be effectual to satisfy the judgment (*Sale* v. *Lawson*, 4 Sand. 718; *Farquharson* v. *Kimball*, 9 Abb. 385 note; 18 How. 33; *Lilliendahl* v. *Fellerman*, 11 How. 528; 2 Abb. 155; *Thomas* v. *Ewen*, 11 Paige, 135). Nor is it any reason for staying the examination upon an order obtained under this section, to show that after the making and before service of such order, the judgment creditor has issued an attachment against the judgment debtor as a non-resident debtor. (*Hanson* v. *Tripler*, 1 Code Rep. N. S. 154). As the object of these proceedings differs entirely from the object of an action to set aside an assignment made by the debtor, therefore if, pending a proceeding under this section, the creditor institutes an action to set aside an assignment made by the debtor, the court will not compel him to elect between his action and the proceeding under this section (*Taylor* v. *Perree*, 15 How. 417).

a. Where, on a judgment for $600, an execution was returned *wholly unsatisfied*, and afterwards, on the defendant's motion, the judgment was reduced and the judgment roll and execution amended,—held that such amendment did not render it necessary to issue another execution, to entitle the judgment creditor to an order under this section (*Sluyter* v. *Smith*, Superior C't, Feb. 1858).

b. These proceedings can be taken on a judgment against a married woman (*Thompson* v. *Sargeant*, 15 Abb. 452); it was held otherwise prior to the law of 1860 (*Williams* v. *Carroll*, 2 Hilton, 438).

c. The payment of the amount of the judgment without interest, is no answer to an order to examine the debtor; these proceedings may be taken to collect the interest (*Johnson* v. *Tuttle*, 17 Abb. 315).

d. These proceedings cannot be had on a justice's judgment for less than $25. (*Butts* v. *Dickinson*, 20 How. 230; 12 Abb. 60; *Vulte* v. *Whitehead*, 2 Hilton, 596; *Anon.*, 32 Barb. 201, overruling *Candee* v. *Gundelsheimer*, 8 Abb. 435).

e. Where subsequent to obtaining the judgment the judgment debtor has received his discharge in insolvency, the judgment creditor cannot have an order under this section. The validity of the discharge can be tried only in an action (*Smith* v. *Paul*, 20 How. 97, and see *Rich* v. *Salinger*, 11 Abb. 344; *Stuart* v. *Salinger*, 14 Abb. 291, and see *Dresser* v. *Shufeldt*, 7 How. 85).

f. Whether these proceedings can be instituted on a judgment obtained on a service by publication? (*Barker* v. *Johnson*, 4 Abb. 435.)

f. To entitle the judgment creditor to the remedy here provided, the execution must issue to the county in which the judgment debtor resided at the time the execution issued (*Bingham* v. *Disbrow*, 14 Abb. 251); or had *a* place of business (*Belknap* v. *Hasbrouck*, 13 Abb. 418, note); it need not be his principal place of business (*McEwen* v. *Burgess*, 15 Abb. 473; 25 How. 92).

g. **Assignee may obtain order.**—An assignee of a judgment may institute proceedings under this section (*Lindsay* v. *Sherman*, 1 Code Rep. N. S. 25; 5 How. 308; *Hough* v. *Kohlin*, 1 Code Rep. N. S. 232), although the judgment was not assigned to him until after the execution was returned unsatisfied (*Orr's case*, 2 Abb. 457). And such assignee may institute proceedings supplementary to the execution, in the name of the party to the action (*Ross* v. *Clussman*, 1 Code Rep. N. S. 91; 3 Sand. 767).

h. **When an order for the examination of the judgment debtor may be applied for.**—Before the execution creditor is entitled to pursue this remedy, his remedy on the execution should be *really* exhausted. Therefore, if it appear that the execution has been returned unsatisfied *at the request* of the execution creditor, and not by the sheriff upon his official responsibility, the order will not be granted, or if granted will be revoked (*Nagle* v. *James*, 7 Abb. 234; *Pudney* v. *Griffith*, 6 Abb. 211; 15 How. 410; *Spencer* v. *Cuyler*, 9 Abb. 382; 17 How. 157; *Farquaharson* v. *Kimball*, 9 Abb. 385, *note*). If however, the sheriff has returned the execution unsatisfied, upon his official responsibility, without any fraud or collusion, then, although the period of time allowed

for the return has not yet expired, or the sheriff had notice of property belonging to the defendant, yet the order may be granted (*Stoors* v. *Kelsey*, 2 Paige, 418; *Messenger* v. *Fisk*, 1 Code Rep. 106; *Simpkins* v. *Paige*, id. 107; *Engle* v. *Bonneau*, 2 Sand. 679; 3 Code Rep. 205; *Livingston* v. *Cleaveland*, 5 How. 396; 1 Code Rep. N. S. 53; *Utica City Bank* v. *Buel*, 9 Abb. 385; 17 How. 498; *Tyler* v. *Whitney*, 12 Abb. 465; *Fenton* v. *Flagg*, 24 How. 499). The courts now hold that an execution may be returned at any time after it is issued (*Forbes* v. *Walter*, 25 How. 166; 25 N. Y. 440. and see in note to § 142, *Creditor's Bill*); and that it is immaterial whether the return was at the creditor's request or not. The courts will not go behind, the return except on a motion to set aside the return (*Sperling* v. *Levy*, 10 Abb. 426; *Tyler* v. *Whitney*, 12 Abb. 465). The order cannot be made until after the execution has been actually returned unsatisfied (*Engle* v. *Bonneau*, supra; and *Sackett* v. *Newton*, 10 How. 560). Yet where the judgment creditor made an affidavit and procured an order under this section, about two hours before the return of *nulla bona* on the execution was actually filed in the clerk's office, having at the time reason to suppose that the return was actually filed,—held that the fraction of the day would be disregarded; and the order was held to be valid. (*Jones* v. *Porter*, 6 *id.* 286; and see 5 How. 200).

b. Where an execution has been returned unsatisfied within five years after the entry of judgment, an order under § 292 may be issued after the expiration of five years from the entry of the judgment (*Miller* v. *Rossman*, 15 How. 10). The case of *Currie* v. *Noyes*, (1 Code Rep. N. S. 198), in which it was held otherwise, is not to be extended beyond the peculiar circumstances of that case. (*Id.*)

c. The return of an execution unsatisfied, is the only condition imposed, to entitle a judgment creditor to an order under this section. The right is unqualified, and cannot be taken away by lapse of time. Nor have the court, after one execution has been duly returned unsatisfied, the right to say that by reason of lapse of time, the creditor must issue another execution and wait its return before he can have the order (*Owen* v. *Dupignac*, 9 Abb. 184). Thus, where ten years intervened the return of the execution unsatisfied and the application for the order, held that the application must be granted. (*Id.*) [In 17 How. 512, the dissenting opinion of Judge Brady in *Owen* v. *Dupignac*, is published as the opinion of the court.—*Ed.*]

d. The relief provided by the second part of this section, may be had before the return of the execution; and if, after the execution has been issued, and before it is returned, the creditor can prove to the satisfaction of the judge that the debtor has property not subject to levy, or which is so kept by the debtor that it cannot be clearly identified and with ordinary diligence reached by execution, the creditor may have the same order upon which the same proceedings may be had as are given on the return of the execution. But where it appears that a defendant in an execution not returned, is in possession and occupation of a farm of land, with stock and farming implements thereon, which he claims belong to his wife, the creditor has no authority to institute these summary proceedings (*Sackett* v. *Newton*, 10 How. 560).

e. **Who may make the order.**—On a judgment in the supreme court any justice may make the order, without regard to his residence or location, but the debtor must be directed to appear in the county of his residence or place of business (*Bingham* v. *Disbrow*, 14 Abb. 251). The order to examine the debtor may be made at chambers (*Hulsaver* v. *Wiles*, 11 *id.* 446); and the warrant to arrest the debtor (part 4) may be made by a judge at chambers, residing in the same judicial district, although not in the same county, as the debtor (*Wilson* v. *Andrews*, 9 *id.* 39). As a matter of expediency, however, this power should not be exercised in a case where the judgment debtor resides in a distant county, unless to prevent a failure of justice. (*Id.*) The court cannot make an order in these proceedings (*Miller* v. *Roonan*, 15 How. 10; *Billing* v. *Vandenburg*, 17 *id.* 80). Entitling the order at special term, if it is in fact made by a judge in an interval of a trial at special term does not make the order void (*Dresser* v. *Van Pelt*, 15 How. 19).

a. The city judge of Brooklyn has not jurisdiction of supplementary proceedings, on execution out of supreme court (*Cushman* v. *Johnson*, 13 How. 496). But the recorder of Troy may make the order (*Hayner* v. *James*, 17 N. Y. 316).

b. Where judgment had been obtained in a justice's court, and a transcript filed with the clerk of Albany county, and execution thereon returned unsatisfied, held that a judge of the supreme court had no power to issue an order for the examination of the judgment debtor under this section (*Straight* v. *Vose*, 1 Code Rep. N. S. 79, *n.*); and the same was held where the judgment was rendered in a county court (*Blake* v. *Locy*, 6 How. 108).

c. Where the judge, at chambers, at Saratoga Springs, made an order for the examination of the judgment debtor who resided in the county of Essex (and where the execution had been issued), under § 292 of the code, and an order forbidding a transfer, or other disposition of his property not exempt from execution under § 298, also issued a warrant under the 3d sub. of § 292, and the orders and warrant were served, and the defendant brought before a judge,—held that although the order under § 292 for the examination of the defendant was irregular and was therefore set aside, yet that did not affect the order forbidding the transfer of property; that still remained in force; nor did it affect the warrant. And the judge had a right to appoint a referee who might reside out of the county of the judgment debtor (§§ 295, 300). Also a receiver might be appointed based upon the facts disclosed on the examination of the debtor brought up on the warrant. (*Ib.*)

d. **Requisites of affidavit to obtain order.**—Supplementary proceedings cannot be maintained on an affidavit which does not truly describe the judgment (*Kennedy* v. *Weed*, 10 Abb. 62). Where the affidavit stated a judgment against Ira Weed and *Mary* Weed, and the transcript docketed was as of a judgment against Ira Weed and *Mrs.* Weed held that supplementary proceedings founded upon such docketed judgment, must be dismissed. (*Id.*) Such an objection goes to the jurisdiction of the judge granting the order, and cannot be cured by amendment nor waived by the parties, but is available at any stage of the proceedings. (*Id.*) The defendants will not be punished for contempt for disobeying an order founded on such an erroneous affidavit. (*Id.*)

e. It is not necessary to state in the affidavit that the defendant has property (*Hatch* v. *Weyburn*, 8 How. 165). The affidavit should describe the execution returned unsatisfied, as an execution "against property" (*McArthur* v. *Lansburg*, 1 Code Rep. N. S., 211: and see *The People* v. *Hulbert*, 1 Code Rep N. S. 75; 5 How. 446; to the contrary are not followed).

f. Where the judgment was recovered in a justice's court it should appear on the face of the proceedings that the judgment is for twenty-five dollars exclusive of costs: but where the affidavit stated the recovery of two judgments, one in a district court for $33 12, and the other in the marine court for $511 56, but did not state in terms that either judgment was for $25 exclusive of costs, on objection taken for this reason, the court held it sufficiently appeared that each judgment was for $25 exclusive of costs because in the district court the costs could not exceed $5, and in the marine court no costs are allowed unless upon a recovery of $50 (*Whitlock's Case*, 1 Abb. 320).

g. Where the assignee of a judgment makes an affidavit to obtain an order under this section, it should appear on the face of the affidavit by what right he moves in the matter; and if it does not, and an order be obtained on it, the order will be irregular (*Lindsay* v. *Sherman*, 1 Code Rep. N. S. 25; 5 How. 308; *Hough* v. *Kohlin*, 1 Code Rep. N. S. 232; *Frederick* v. *Decker*, 18 How. 96).

h. Where the judgment on which proceedings are had, is one rendered in a justice's court, the affidavit on which the proceedings are founded need not allege that the justice by whom the judgment was rendered had jurisdiction. It is sufficient if it shows the facts conferring jurisdiction, and that the judgment was correctly given (*Conway* v. *Hitchins*, 9 Barb. 378)

a. The affidavit of the judgment creditor is sufficient *proof* of the return of the execution unsatisfied. (*Id.*)

b. **The order—The person, place and time before and at which the debtor may be required to appear.**—The order should require the judgment debtor to appear before *such judge, i. e.*, the judge making the order (*Hatch* v. *Weyburn*, 8 How. 165); or a referee appointed in the order (*Hulsaver* v. *Wiles*, 11 How. 446; see § 300).

c. Where the defendant was required to appear in the first judicial district before a justice, naming him, *or one of the other justices of the said supreme court*, and he appeared before the justice first named on the return day and made no objection to the regularity of the order, and the proceeding was referred,—held, that assuming the clause, "or one of the other justices," &c., rendered the order irregular, yet such irregularity had been waived (*Dresser* v. *Van Pelt*, 15 How. 19; *Viburt* v. *Frost*, 3 Abb. 120; 5 Duer, 672; *Ammidon* v. *Wolcott*, 15 Abb. 314).

d. The place at which the debtor is required to appear must be within the county "to which the execution issued;" he cannot be compelled to appear in any other county (*Hersenheim* v. *Hooper*, 1 Duer 594; *Wilson* v. *Andrews*, 9 How. 39; see *Bingham* v. *Disbrow*, 14 Abb. 251). And the execution must unless the debtor is a non-resident issue to the county in which he resides or has a place of business.

e. A weigher in the New York City Custom House has not as such a place of business in the City of New York (*Belknap* v. *Hasbranch*, 13 Abb. 418 note). And cannot be ordered to appear in the City of New York.

f. The order must not be returnable on a Sunday. An order so returnable would be a nullity, and may be disregarded (*Arctic Ins. Co.*, v. *Hicks*, 7 Abb. 204; *Gould* v. *Spenser*, 5 Paige, 541).

g. When the proof will warrant it, the order may combine the purposes to be attained, by sections 292, 294 and 296 (*Hulsaver* v. *Wiles*, 11 How. 446).

h. **Service of the order.**—There is no provision as to the time and manner of serving the order. Personal service is sufficient (*The People* v. *Hulbert*, 1 Code R. N. S. 79; 5 How. 446). It is not necessary, although proper, to serve a copy of the affidavit on which the order is made (*Green* v. *Bullard*, 8 How. 315; see, however, *Arctic Ins. Co.* v. *Hicks*, 7 Abb. 204; *Utica City Bank* v. *Buel*, 9 Abb. 385; 17 How. 428; *Farquahason* v. *Kimball*, 9 Abb. 385 *note*; 18 How. 33). The original should be exhibited to the party served. An irregularity in the service would be waived by an appearance and submitting to an examination without objection. (*Id.*) *Semble*, a party attending as a witness is not on that account exempt from service of this order (*Paige* v. *Randall*, 6 Cal. 32). Perhaps what is said, *ante*, p. 166 *c*, as to the service of a summons, may apply to the service of this order.

i. Where the debtor after being duly served with the order moved to vacate it, and on such motion an order was made denying the motion and ordering the debtor to appear and be examined on a day named in such last mentioned order, it was held that said last mentioned order need not be served personally (*Johnson* v. *Tuttle*, 17 Abb. 315).

j. **Proof of service of order.**—The sheriff's certificate is not proof of service of an order in supplementary proceedings (*Utica City Bank* v. *Buel*, 9 Abb. 386; 17 How. 498).

k. An appearance merely to ask an adjournment, is a waiver of all objection to the proof of service. (*Id.*)

l. **Objecting to order.**—A party on whom the order is served is not justified in disobeying it because it is erroneous or irregular. He must appear and make his objection (*Arctic Ins. Co.* v. *Hicks*, 7 Abb. 204). What is said, *ante*, p. 399, *g*, may apply. The order may be vacated or modified *ex parte* by the judge who made it (§ 324); and if he refuse, the party may appeal (*Blake* v. *Locy*, 6 How 108); or a motion on notice may be made to modify or set aside the order (*Lindsay* v. *Sherman*, 5 How. 308; 1 Code Rep. N. S. 25; *Conway* v. *Hitchins*, 9 Barb. 378; *Bank of Genesee* v. *Spencer*, 15 How. 14; *Courtois*

v. *Harrison*, 1 Hilton, 109). *Semble*, the motion must be to a judge, it cannot be made at general term (*Conway* v. *Hitchins*, 9 Barb. 378). And of course at the return of the order the objections to it may be urged. If these objections are allowed, the order may be vacated (*Courtois* v. *Harrison*, 3 Abb. 96). If the objections are overruled, *semble* the debtor may appeal to the general term (*Conway* v. *Hitchins*, 9 Barb. 378; *O'Neil* v. *Martin*, 1 E. D. Smith, 404). If the objections are allowed and the proceeding dismissed, the creeditor may appeal. (*Id.*) *Semble*, an appeal by the debtor does not stay the proceedings on the order nor justify his refusing to be examined (*Sluyter* v. *Smith*, Superior Court, Feb. 1858).

a. The validity of the judgment cannot be inquired into in a proceeding under this chapter (*O'Neil* v. *Martin*, 1 E. D. Smith, 405; *Saunders* v. *Hall*, 2 Abb. 418; *Courtois* v. *Harrison*, 1 Hilton, 109); or execution (*Sandford* v. *Sinclair*, 8 Paige, 373). But on a proper case being presented, the proceedings may be stayed to enable the debtor to apply to set aside the judgment or execution. (*Id.*)

b. **Effect of order as a lien.**—*Semble*, the obtaining an order under this section does not create a lien on the equitable assets of the debtor, and that after the order obtained another creditor commencing a suit in the nature of a creditor's bill to reach such assets, would have a priority to the creditor who obtained the order (*Voorhees* v. *Seymour*, 26 Barb. 569; see, however, *Porter* v. *Williams*, 1 Code Rep. N. S. 145; 5 How. 441; *Conger* v. *Sands*, 19 How. 8). If a creditor having resorted to this proceeding abandons it and commences an action in the nature of a creditor's bill, the lien acquired by such action does not relate to the supplementary proceeding (*Edmonston* v. *McLoud*, 16 N. Y. 543; see 25 Barb. 662).

c. **Proceedings on return of order. Adjournments.**—Where on the return of the order the judge is not present, it is the duty of the judgment debtor to wait a reasonable time for his arrival (*Reynolds* v. *McElhone*, 20 How. 454).

d. Where the referee was absent at the time appointed for the judgment debtor to appear before him, *semble*, the referee might have appointed another time for the hearing, or the judge who appointed the referee might have revoked the appointment and appointed another referee (*Allen* v. *Starring*, 26 How. 57; see *Mason* v. *Lee*, 23 How. 466).

e. Where the examination is before a referee, an adjournment of the proceedings before the referee should not be made by a judge, but by the referee (*Mason* v. *Lee*, 23 How. 466; and see *Allen* v. *Starring*, 26 How. 57).

f. Where the proceedings are before a county judge, he has no power to adjourn the examination except by consent (*The People* v. *Hulbert*, 1 Code Rep. N. S. 75; 5 How. 446).

g. Unless the proceedings are regularly continued from day to day, jurisdiction is lost of them, but the error is waived and jurisdiction restored by the subsequent appearance of the judgment debtor without objection (*Ammidon* v. *Wolcott*, 15 Abb. 314).

h. Where the proceedings are before a referee and the examination is closed, it cannot be opened except by order of a judge (*Orr's case*, 2 Abb. 457).

i. **Examination upon order.**—Upon an examination under this section, a general denial of any property except his necessary wearing apparel, is not sufficient; the debtor must give a particular account and value of such wearing apparel, for the court to judge whether it is within the exemption (*Brown* v. *Morgan*, 3 Edw. Ch. R. 278).

j. The object of the examination of the judgment debtor, in proceedings under this section, the kind of questions which may be put to him, and the manner in which he may answer, were considered in *Leroy* v. *Halsey*, 1 Code Rep. N. S. 275; 1 Duer, 589; *Sandford* v. *Carr*, 2 Abb. 464. In the former case the debtor was asked, "Are you a housekeeper?" to which he answered, "My wife has a lease of the premises on which I reside, and owns the furniture, and I reside with her—she having a separate estate." The answer was objected

to; but the judge held the defendant was not bound to answer *yes* or *no*, but might explain his position.

a. The debtor cannot be required to answer any questions which do not tend to show whether he is possessed of, or entitled to any property which might be ordered to be applied towards satisfaction of the judgment (*Hunt* v. *Enoch*, 6 Abb. 212).

b. Where the question to the debtor was as to the amount of incumbrances on his property at a certain date, some six months previous to the examination; his answer was that he was unable to give the information—held that admitting the question was proper, the answer would not be deemed evasive (*Wicker* v. *Dresser*, 14 How. 465).

c. The wife of the debtor cannot be examined as a witness for the purpose of discovering his property (*Copous* v. *Kauffman*, 8 Paige, 588; *Andrews* v. *Nelson*, 7 Abb. 3, *note*); the contrary was held by Clerk, J., *Lockwood* v. *Worstell*, 15 Abb. 430, *note*.

d. It is at the creditor's option whether or not he will examine the debtor (*Webber* v. *Hobis*, 13 How. 383; 12 How. 33).

e. A witness examined as to the property of the debtor, cannot stop the examination by stating that he owns the property (*Sandford* v. *Carr*, 2 Abb. 462).

f. Where it appears that the debtor has sold portions of property at its full value, an inquiry as to the name of the purchaser is immaterial, otherwise where the property is sold for less than its value, with a proviso for repurchase (*Williams* v. *Carroll*, 2 Hilton, 438).

g. "The judgment creditor may be examined in the same manner as a witness," and has the right to be examined by his own counsel (*Le Roy* v. *Halsey*, 1 Duer, 589; 1 Code Rep. N. S. 275).

h. As the examination is taken orally, great liberality should be allowed in correcting mistakes; which should be done by supplemental statements, leaving the original unaltered (*Corning* v. *Tooker*, 5 How. 16).

i. A person not a party to the proceedings, upon examination, should not be allowed to appear by counsel (*Ib.*; see § 295; and 2 Abb. 463).

j. A commision cannot issue to take the deposition of a witness out of the State, to be used in a proceeding under this section (*Graham* v. *Colburn*, 14 How. 52).

k. **Proceedings, how discontinued.**—The proceeding may be terminated as absolutely by the creditor's abandonment of it, as by an order of the judge before whom it is pending (*Squire* v. *Young*, 1 Bosw. 690). The creditor *designedly* omitting to attend on any day to which the proceedings stand adjourned, will be deemed an abandonment. (*Id.*)

l. An appeal from a judgment with the requisite security to effect a stay of proceedings, perfected after proceedings supplementary to the execution have been instituted, suspends such proceedings but does not authorize a dismissal of them. The creditor is entitled to his lien obtained thereby, its enforcement only is delayed (*Cowdrey* v. *Carpenter*, 17 Abb. 107).

m. The presumption of the payment of a judgment after a lapse of twenty years, does not operate to abate supplementary proceedings commenced before the expiration of twenty years from the entry of the judgment (*Driggs* v. *Williams*, 15 Abb. 477; and see *Van Tassel* v. *Van Tassel*, 31 Barb. 439).

n. Supplementary proceedings pending before a county judge do not abate upon the expiration of his term of office and may be continued before his successor in office (*Holstein* v. *Rice*, 15 Abb. 307; 24 How. 135).

o. **Appeal.**—No appeal lies from an order made by a county judge in a proceeding under this section (§ 292), in an action originating in a justice's or county court. It is only in actions in the Supreme Court, where proceedings are had before the county judge, that an appeal is authorized (*Smith* v. *Hart*, 11 How. 203).

p. An appeal from an order in supplemental proceedings can be heard only

at the general term in the district in which the judgment-roll is filed (*Mallory* v. *Gulick*, 15 Abb. 307 note; *Gould* v. *Torrance*, 19 How. 560).

a. **Second order**—A second order will be granted *ex parte*. The affidavit should mention the first order, and allege the reason for requiring a second examination (*Goodall* v. *Demarest*, 2 Hilton, 534; see *Orr's case*, 2 Abb. 457).

§ 293. [248.] (Am'd 1849.) *Existing suits. Any debtor may pay execution against his creditor.*

After the issuing of execution against property, any person indebted to the judgment debtor, may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

b. **This section is permissive merely.**—Where it appeared that the action was to recover damages for the conversion of bank bills, that after the trial and verdict for the plaintiff, but before judgment, the plaintiff assigned his right to the judgment to his attorney in the action; the judgment was perfected August 10, 1849; and on the next day the defendant, without any notice of the assignment, paid the amount of the judgment against him to the sheriff of Steuben county, on two executions on judgments against the plaintiff, and then in the hands of the said sheriff for collection. An execution subsequently issued on the judgment, and a motion to set that execution aside was denied, and the order denying the motion affirmed on appeal (*Robinson* v. *Weeks*, 1 Code Rep. N. S. 311; and see *Lyman* v. *Cartwright*, 3 E. D. Smith, 117; *Richardson* v. *Ainsworth*, 20 How. 521).

c. On a motion to set aside an execution, or for a perpetual stay thereof it appeared that on the 5th October, 1848, the plaintiff obtained a verdict, in an action for trespass, for $60, and on the same day made an assignment of, his interest under the verdict to his attorney (Lake). On the 17th of October 1848, the judgment was perfected, and on the 17th of November, an execution against the defendant's goods, directed to the sheriff of Herkimer county, endorsed to levy $103 67. It appeared that, prior to and on the 5th and on the 7th of October, 1848, the sheriff of Herkimer had in his hands an execution against the goods of the plaintiff, issued at the suit of one Adams, and endorsed to levy $224 83. It also appeared that the defendant, on the 7th of October, 1848, paid to the sheriff of Herkimer $60 for the amount of the verdict, and $30, the estimated amount of costs, and took his receipt for the same, to be applied in part satisfaction of the execution issued by Adams. After the 17th of October, and before the 17th of November, 1848, the defendant tendered to the plaintiff's attorney $13 67, in discharge of the judgment, which he refused to receive. This sum of $13 67 was the difference between the amount of the judgment and the amount paid to the sheriff. Lake denied any knowledge of Adams' execution at the time he took the assignment of the verdict. Enough also appeared to charge the defendant with notice of the assignment to Lake, before he made the payment to the sheriff. Upon this state of facts it was held that nothing was disclosed which entitled the defendant to be relieved from the execution (*Countryman* v. *Boyer*, 3 How. 386; 2 Code Rep. 4).

d. The amount of a verdict rendered in an action of assault and battery, cannot be paid to the sheriff, on an execution against the party who recovered the verdict under this section. A verdict in tort must be consummated by judgment before it can be treated as an indebtedness (*Davenport* v. *Ludlow*, 3 Code Rep. 66). Thus, where in an action for an assault and battery the plaintiff had a verdict for $30, on April 18, 1850, and judgment was perfected on

the 26th of April for the amount of the verdict, and $30 costs, the defendant, before the judgment was perfected, and on the 22d of April, paid to the sheriff $60 on an execution in his hands against the plaintiff, in favor of one Herrick. The plaintiff afterwards assigned the judgment to his attorneys in the action, and they issued execution on the judgment. A motion to set aside such execution, on the ground that the judgment had been satisfied, was denied with costs. (*Id.*)

a. After judgment, a recovery in an action for a tort becomes *a debt*, and the amount may be paid to the sheriff by any person indebted to the judgment debtor, and a claim for the recovery of the proceeds of exempt property, wrongfully seized and sold upon execution, is converted into a debt, by the recovery of a judgment for its value: as such it is not exempt from execution (*Mallory* v. *Norton*, 21 Barb. 424).

b. A payment under this section is not a payment to the creditor. It can only be regarded as money paid to the use of the judgment debtor (*Oalkins* v. *Packer*, 21 Barb. 283); and may be set up as a counterclaim, as money paid to his use. (*Id.*)

c. Where a person indebted to a judgment debtor pays the amount of his debt to a sheriff holding an execution against the judgment debtor, and takes the sheriff's receipt as authorized by § 293 of the code, if an action is afterwards brought against him to recover the amount so paid, and he sets up such payment as a defence, be is bound to prove the judgment on which the execution issued to the sheriff to whom he paid the money; and it will not be sufficient for him to produce a certified copy of the transcript of a justice's judgment filed in the clerk's office of a different county from that in which the judgment was docketed (*Handly* v. *Greene*, 15 Barb. 601).

§ 294. [249.] (Am'd 1849, 1863.) *Existing suits. Examination of debtors, of judgment debtor, or of those having property belonging to him. Joint debtors.*

After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon an affidavit that any person or coporation has property of such judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party to the action, in such manner as may seem to him proper.

The proceedings mentioned in this section, and in section two hundred and ninety-two, may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which said action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors, to obtain satisfaction of judgments out of the property of joint debtors, are maintainable in the like manner and to the like effect. These

provisions shall apply to all proceedings and actions now pending, and not actually terminated by any final judgment or decree.

a. **Order to examine debtor to judgment debtor.**—To warrant the issuing of an order for the examination of a party alleged to have in his possession property of a judgment debtor, it is not necessary that the execution should issue to the county where such debtor resides (*People* v. *Norton*, 4 Sand. 640). It suffices that the execution is to the county where the property is expected to be found, and where the person resides who is charged with having it in his possession. (*Ib.*)

b. Where an execution was issued to the county of Queens, where the judgment debtor resided, and returned unsatisfied, held that a judge of the supreme court, in the city of New York, had jurisdiction to make an order compelling a debtor to the judgment debtor, residing in the city of New York, on examination, to apply the property of the judgment debtor in his hand, or make payment of the debt to the judgment creditor, upon his judgment (*Foster* v. *Prince*, 18 How. 258; 8 Abb. 407).

c. Persons holding property supposed to belong to the judgment debtor may be examined as to the manner in which they acquired said property (*Clapp* v. *Lathrop*, 23 How. 423).

d. An order staying the proceedings of the judgment creditor on an execution issued by him, does not prohibit him from instituting proceedings under this section (*Lowber* v. *The Mayor &c.*, 5 Abb. 268).

e. In an order under this section the judge may enjoin the person to whom the order is directed from disposing of the property until further order (*Seeley* v. *Garrison*, 10 Abb. 460).

f. "The order provided for by section 294 is a proceeding in aid of the principal proceeding (*i. e.* a proceeding under section 292), and must be had in connection with it, and cannot be resorted to independently of any proceeding against such judgment debtor" (*Hinds* v. *Canandaigua R. R. Co.*, 10 How. 489; *Sherwood* v. *Buffalo & N. Y. City R. R. Co.*, 12 *id.*, 137; *Lord* v. *Ford*, 15 Abb. 409, *note*). We believe, however, that the practice is, at least in the first district, to allow a proceeding under section 294, independently of and without any resort to a proceeding under section 292. Whether or not notice shall be given to the judgment debtor is in the discretion of the judge making the order (*Ward* v. *Beebe*, 17 Abb. 1; 15 Abb. 373; *Seeley* v. *Garrison*, 10 Abb. 460), he should have notice (*Gibson* v. *Haggerty*, 15 Abb. 406; 23 How. 260).

g. A stranger to the action, who has a lien on the fund sought to be reached by the supplementary proceeding, is not entitled to be made a party to the proceeding nor to have notice of its progress (*Corning* v. *Glenville Woollen Co.*, 14 Abb. 339).

h. The title of an assignee of a judgment debtor's property cannot be affected by an order under this section, made without notice to him (*Gibson* v. *Haggerty*, 15 Abb. 406; 23 How. 260).

i. "The reasons assigned by the court why proceedings cannot be taken under section 292 against a corporation, have no application to section 294" (*Courtois* v. *Harrison*, 1 Hilton, 110; 3 Abb. 99; 12 How. 359). But in *Sherwood* v. *Buffalo & N. Y. City R. R. Co.* (12 How. 136), decided at a general term of the supreme court, Bowen, Mullett, and Greene, JJ., it was said that the principle on which it was held that section 292 does not apply to corporations, "is applicable alike to all proceedings under the code." [This, at most, can only mean that proceedings under section 294 cannot be had upon a judgment against a corporation]. An execution creditor of a *municipal* corporation may have an order under this section to examine a person indebted to or having funds of the defendant. And an officer of such corporation having its funds in his hands officially, *e. g.* as chamberlain may be examined (*Lowber* v *Mayor of N. Y.*, 5 Abb. 261, and 7 *id.* 248); and so the order may be had by

the execution creditor of a *foreign* corporation (*McBride* v. *Farmer's Branch B'k*, 7 *id.* 347; 28 Barb. 476).

a. When a joint-stock association is sued in the name of its president or treasurer, under the act of 1849, that does not make him a defendant. He is nevertheless subject to be examined under section 294, on showing him to be indebted to the association in a sum exceeding $10 (*Courtois* v. *Harrison*, 3 Abb. 96; 12 How. 359; 1 Hilton, 110).

b. **Requisites of affidavit to obtain order.**—An affidavit which follows the alternative wording of this section, that the party "*has property of the judgment debtor, or is indebted to him*," is not sufficient (*Lee* v. *Heirberger*, 1 Code Rep. 38). For form of affidavit and order see *Seeley* v. *Garrison* (10 Abb. 460).

c. **Proceedings on order.**—When the party alleged to be indebted to the judgment debtor, denied such indebtedness, and thereupon the judge proceeded to try the question of indebtedness by the examination of witnesses, &c., and then decided that the party alleged to be indebted was in fact indebted, the supreme court, per Johnson, J., said, "All this part of the proceeding was wholly unauthorized and void; the judge had no right to try this disputed claim in this way, or to make any determination in regard to it" (*The People* v. *Hulbert*, 1 Code Rep. N. S. 77; 5 How. 446; and to the like effect is *Sherwood* v. *Buffalo & N. Y. City R. R. Co.*, 12 How. 139; *Catlin* v. *Doughty*, id. 459). The inquiry is limited to the property which the judgment debtor *owns*, and to the relief that may be obtained under such proceedings (*Van Wyck* v. *Bradley*, 3 Code Rep. 157; *Town* v. *Safeguard Ins. Co.*, 4 Bosw. 683). The *claim* alone of a person alleged to have property of the judgment debtor, terminates the right to relief as against him under these proceedings, and no examination can be had for the purpose of defeating such claim. The claimant may be required to state the *measure*, but not the *nature* of his title. (*Ib.* see *Tompkins Co. B'k* v. *Trapp*, 21 How. 17).

d. Section 294 requires no notice to the judgment debtor. The proceeding may be commenced and conducted to its conclusion without his knowledge (*Sherwood* v. *Buffalo & N. Y. City R. R. Co.*, 12 How. 138; *Foster* v. *Prince*, 8 Abb. 407; 18 How. 258). And the New York Common Pleas held at a general term that an order can be made under this section before the return of the execution (*Seeley* v. *Garrison*, 10 Abb. 460). And considered as a question of power only, it seems the latter cases hold that an order under this section may be made independently of any order under section 292 (see *Holmes* v. *Jordan*, and *Parker*, in *note*, 15 Abb. 410; *Gibson* v. *Haggerty*, 15 Abb. 406).

e. The proceedings cannot be continued *after the death* of a sole defendant, until his representatives are brought in as parties. If the orders made previous to the defendant's death have given a *lien*, that lien will probably be saved in an action to bring in the representatives (*Hazewell* v. *Penman*, 13 How. 114; 2 Abb. 230).

f. An order under this section directing a third person in general terms to pay the judgment creditors towards the satisfaction of the judgment whatever money is or may become due to the judgment debtor from such third person, and also requiring him specifically to give a note for a sum certain, which appeared to the judge making the order to be the amount actually due, is no bar to an action by the judgment debtor against such third person to recover so much of the latter's indebtedness to the former as was not included in the said note, or paid under the said order (*Hauptman* v. *Catlin*, 1 E. D. Smith, 730).

g. **In what case this section does not apply.**—The clerk or chamberlain is an "officer of the court," and not a "person or corporation" within the meaning of this section (*Anon.* 1 Code Rep N. S. 211). Where, in a foreclosure suit, there were surplus moneys in the hands of the clerk or chamberlain, and subsequently in another action, judgment was obtained against one of the parties entitled to such surplus, the judgment creditor applied for an order on the chamberlain to appear and answer under this section. His application was refused. (*Ib.*)

§ 295. [250.] *Existing suits. Witnesses required to testify.*

Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

a. A person examined as a witness is entitled to witness's fees as upon the trial of an issue (*Davis* v. *Turner*, 4 How. 190. See note to § 301). He has the same remedy for his fees, and is not bound to testify until his fees are paid. (*Id.*)

b. A person examined as a witness under this section may be examined fully (*Tompkins Co. B'k.* v. *Trapp*, 21 How. 17).

See note to § 292.

§ 296. [251.] (Am'd 1849.) *Existing suits. Compelling party or witnesses to attend.*

The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge; if before a referee, the examination shall be taken by the referee, and certified to the judge. All examinations and answers before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers the answer shall be on the oath of an officer thereof.

c. When the debtor has once been sworn, it is not necessary or proper to swear him a second time upon an adjourned examination, but the plaintiff should proceed to examine him on the oath already taken (*Hudson* v. *Piets*, 11 Paige, 180).

§ 297. [252.] (Am'd 1851.) *Existing suits. What property may be ordered to be applied to the execution.*

The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it is made to appear by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

d. A non-resident judgment debtor may be compelled to convey, but not to deliver, property that he has out of the State (*Bunn* v. *Fonda*, 2 Code Rep. 71; *Bailey* v. *Ryder*, 10 N. Y. 363; *Jenner* v. *Sanborn*, 37 Barb. 610). And a non-resident debtor is entitled to the same benefit of the exemption laws as to his property out of the State, as if he were a resident, and the property were within the State. (*Ib.*)

a. This section applies only to moneys actually due to a judgment debtor, and not to moneys to become due on a contingency, or on an executory contract (*McCormick* v. *Kehoe*, 7 N. Y. Legal Obs. 184; *Stewart* v. *Foster*, 1 Hilton, 505). Or to the interest of the debtor in a trust fund, being the annual profits of a principal sum invested (*Campbell* v. *Foster*, 16 How. 275).

b. A judge should not by a summary order require trustees who hold a trust fund of the debtor, to apply future income accruing therefrom to the payment of the judgment. When a trust fund is disclosed, the judge should appoint a receiver to bring an action against the debtor and the trustee, to compel the application of any accruing income to the payment of the judgment, and should enjoin the trustees from paying over any of the moneys arising from the fund to the *cestui que trust*, for a time sufficient to enable the receiver to bring such an action (*Stewart* v. *Foster*, 1 Hilton, 505; and see *Genet* v. *Foster*, 12 How. 50).

c. Supplementary proceedings are limited to reaching property of the debtor, in his possession or in the possession of others, and conceded to be his; also, money due the debtor when the order is obtained and served (*Stewart* v. *Foster*, 1 Hilton, 505). But when property or money appearing to belong to him is in the hands of others who make claim thereto, it should be reached through a receiver or be taken on execution (*Id.*; *Hall* v. *McMahon*, 10 Abb. 108; *The People* v. *King*, 9 How. 97; *Rodman* v. *Henry*, 17 N. Y. 484; *Teller* v. *Rondall*, 40 Barb. 242).

d. Supplementary proceedings only reach property in the possession of the defendant at the time of the service upon him of the order for his examination. It does not affect property subsequently acquired, or a debt which afterwards arises. To reach either of these, new proceedings are necessary (*Sands* v. *Roberts*, 8 Abb. 343). Thus, where at the time of serving the order for examination and appointment of a receiver, the judgment debtor had furniture exempt from execution, and which was insured. Subsequently the furniture was destroyed by fire; held, the receiver had no interest in the insurance money. (*Id.*)

e. Where it appears the judgment creditor has property in the hands of himself or others, the judge may either order it to be applied to satisfy the judgment or may appoint a receiver (*Corning* v. *Tooker*, 5 How. 16). But to warrant an order that the debtor apply property in satisfaction of the judgment, it should clearly appear that the property is in the hands of the debtor, or under his control, and that beyond reasonable doubt the debtor has the ability to comply with the order when made (*Sandford* v. *Meehier*, 13 How. 137). And where the examination of the debtor showed the receipt by him of various sums of money, and also the payment by him of various sums, and also stated that other payments had been made which he could not recollect, but that he had paid out all the money he had received, the court said, "The account given of the disposition of the money is not satisfactory in all respects: but we think the evidence is not so clear that he has money in his hands, or within his control," as to sustain an order on him to deliver up any part of the money admitted to have been received.

f. Form of order to pay over moneys, or stand committed, held sufficient, see *Reynolds* v. *McElhone*, 20 How. 454; *Kearney's case*, 13 Abb. 459).

g. Sections 297 and 301, together authorize the judge before whom the proceedings are pending, to order the payment of the costs of the proceedings, if the property be found in the hands of the debtor sufficient for the purpose (*Kearney's case*, 13 Abb. 459).

h. The proof of the debtor having sufficient funds to pay must be very conclusive (*Peters* v. *Kerr*, 22 How. 3).

i. An order on the judgment debtor to pay a certain sum of money to the judgment creditor does not entitle the creditor to maintain an action to return such sum of money (*Patten* v. *Connah*, 13 Abb. 418).

j. Creditors are entitled to a debtor's earnings, for the satisfaction of their demands (*Tripp* v. *Childs*, 14 Barb. 85). The period of sixty days for which

the earnings of the debtor are excepted, counts from the time when the motion is made for the application of the property to the judgment (*Rush* v. *White*, 12 Abb. 21). And where it appeared the judgment debtor had a family which he swore was dependent upon him for support, but it did not appear that he contributed to the support of his family, it was held that his earnings were not exempt (*Martin* v. *Sheridan*, 2 Hilton, 586).

a. The judgment debtor kept house and had boarders but was unmarried, his earnings for personal services were ordered to be applied towards satisfaction of the judgment, although he represented that they were necessary for the support of his concubine and her children, who resided with him (*Van Vechten* v. *Hull*, 14 How. 436).

b. An *order* "enjoining the debtor from making any transfer or other disposition of his property, not exempt by law from execution, or from any interference therewith" (and section 298 allows of no other or different order), does not affect the right of the debtor to what he earns *after* the granting of the order. And where a defendant is ordered to show cause why he should not be punished as for a contempt in disobeying such an order, the affidavits must satisfy the court and show affirmatively beyond a reasonable doubt, that the money or property the defendant has received and paid out, &c., or any part of it was due him or earned by him *prior* to the date of the order (*Potter* v. *Low*, 16 How. 549).

c. It seems a right of action upon contract to recover damages, which will be the subject of computation only, is property within the meaning of this section; but that a right of action to recover damages for a tort is not (*Ten Broeck* v. *Sloo*, 2 Abb. 234; 13 How. 28; and see *Davenport* v. *Ludlow*, 3 Code Rep. 66; *Hudson* v. *Plets*, 11 Paige, 180).

d. A creditor cannot, by a proceeding supplementary to his execution returned unsatisfied, reach movables which the debtor assigned for the benefit of his creditors while the execution was in life in the sheriff's hands (*Watrous* v. *Lathrop*, 4 Sand. 700).

e. Where it appeared upon a reference that a judgment debtor had the use of furniture, that the same had been sold under a judgment against him, and bought in by one Perkins, a relation of the judgment debtor, who had left the same in the possession of the mother of the judgment debtor and with whom the judgment debtor resided, and who had the use of the furniture, the court would not, without notice to and hearing Perkins, direct the delivery of the furniture to a receiver (*Robeson* v. *Ford*, 3 Edw. Ch. R. 441).

f. Money earned, though not payable presently, might be reached by a creditor's bill (3 Edw. Ch. R. 457; 4 *ib.* 653).

g. "Under a creditor's bill in the late court of chancery. the plaintiff could not reach the effects of the debtor which he had earned or acquired after the filing of the bill (*Browning* v. *Bettis*, 8 Paige, 568; 2 Barb. Ch. Pr. 153; *McCam* v. *Dornheimer*, 1 Clark, 144; see *Ireland* v. *Smith*, 1 Barb. 419); nor can he by proceedings under this section (*Caton* v. *Southwell*, 13 Barb. 335). A dower right may be reached by a proceeding under this chapter (*Stewart* v. *McMartin*, 5 Barb. 438; *Moak* v. *Coates*, 33 Barb. 498).

h. Where the funds are in the hands of the defendant, and there is no dispute as to the ownership, and it appeared clearly that the funds belong to the defendant, it is proper to make an order to pay the money, or apply it directly in satisfaction of the judgment. But where the title to the funds in the hands of the defendant, is in dispute—claimed by persons other than the defendant—such an order is improper; the judge has no right to try and determine in this summary manner these conflicting claims (*The People* v. *King*, 9 How. 97, *Hull* v. *McMahon*, 10 Abb. 103; *Stewart* v. *Foster*, 1 Hilton, 505; *Gasper* v. *Bennett*, 12 How. 307; *Corning* v. *Tooker*, 5 How. 16; *Rodman* v. *Henry*, 17 N. Y. 484; *Stewart* v. *Foster*, 1 Hilton, 505; *Clapp* v. *Lathrop*, 23 How. 423; *Joyce* v. *Holbrook*, 2 Hilton, 95; 7 Abb. 338; *Teller* v. *Randall*, 26 How. 155). An order for the sequestration of the property of a judgment debtor is not necessary (*West* v. *Frazer*, 5 Sand. 653).

a. When a debtor disobeys an order for the payment of money, the precept may issue to commit directly. In other cases he has an opportunity to be heard defore the precept issues (*The People* v. *King*, 9 How. 97). The imprisonment for a contempt is not limited to thirty days (*Re Pester*, 2 Code R. 69). An order under this section directing the application of property, or punishing, or refusing to punish for a contempt is discretionary and not appealable (*Joyce* v. *Holbrook*, 7 Abb. 338; 2 Hilton, 94; see *Rodman* v. *Henry*, 17 N. Y. 484; *The People* v. *King*, 9 How. 97; see however, *Holstein* v. *Rice*, 15 Abb. 307; 24 How. 135; and contra, *Livingston* v. *Swift*, 23 How. 1).

See note to § 292, and section 302.

§ 298. [253.] (Am'd 1849, 1851, 1862, 1863.) *Existing suits. Judge may appoint receiver, and prohibit transfer, &c. of property. Order appointing receiver to be filed. Receiver subject to control of the court.*

The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment was made by the court, according to § 244. But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed.

The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt from execution, and any interference therewith.

Whenever the judge shall grant an order for the appointment of a receiver of the property of the judgment debtor, the same shall be filed in the office of the clerk of the county where the judgment-roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the said clerk shall record the order in a book to be kept for that purpose in his office, to be called "book of orders appointing receivers of judgment debtors," and shall note the time of the filing of said order therein. A certified copy of said order shall be delivered to the receiver named therein, and he shall be vested with the property and effects of the judgment debtor from the time of the filing and recording of the order as aforesaid. The receiver of the judgment debtor

shall be subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded; or if the judgment is upon a transcript from justice's court, filed in county clerk's office, then he shall be subject to the direction and control of the county court.

But before he shall be vested with any real property of such judgment debtor, a certified copy of said order shall also be filed and recorded in the office of the clerk of the county in which any real estate of such judgment debtor sought to be affected by such order is situated, and also in the office of the clerk of the county in which such judgment debtor resides.

a. **Appointment of receiver.**—"To authorize the appointment of a receiver under this section, the proceeding should be against the debtor, to reach his property generally, and the motion to have a receiver appointed should be on notice to the debtor" (*Kemp* v. *Harding*, 4 How. 178; *Dorr* v. *Noxon*, 5 id. 29; *Corning* v. *Tooker*, id. 16); personally (*Barker* v. *Johnson*, 4 Abb. 435). "The appointment 'in the same manner' only relates to the mode or form of the appointment. The cases or circumstances which authorize it are found in § 292" (*Porter* v. *Williams*, 5 Selden, 142; 1 Code Rep. N. S. 144; 5 How. 441; 12 id. 107). The appointment of a receiver should (except in the first district) be by the same judge who ordered a reference to examine as to the property of the judgment debtor. No other judge has the power, and this applies to county judges who make such orders (*Smith* v. *Johnson*, 7 How. 39; *Hatch* v. *Weyburn*, 8 ib. 165). *Sed*, query? In a proceeding under this section a receiver cannot be appointed until after the return of the execution unsatisfied (*Darrow* v. *Lee*, 16 Abb. 315).

b. Where other creditors have commenced proceedings, they are entitled to notice of application for a receiver, but not to service of a copy of the examination on which it is founded (*Todd* v. *Crook*, 1 Code Rep. N. S. 324: 4 Sand. 694). The proceeding is summary, and in theory it follows directly on the close of the debtor's examination, he being present, and no notice being necessary. Where other creditors are proceeding, they must have notice; and so must the debtor, when his examination has been taken before a referee. (*Id.*)

c. The notice required to be given to the judgment creditor in a supplementary proceeding, of a motion for a receiver by another judgment creditor, need not be a notice of eight days; a less notice is sufficient (*Leggett* v. *Sloan*, 24 How. 479).

d. The receiver's appointment is not complete until his bond is filed (*Voorhies* v. *Seymour*, 26 Barb. 570; *Conger* v. *Sands*, 19 How. 8).

e. It is no answer to an application for the appointment of a receiver, that the examination has not shown the debtor to be the owner of any property. The creditor proceeds at the peril of costs, if there is no property; and if there is nothing for the receiver to take, the debtor cannot be injured by the appointment (*Myres' case*, 2 Abb. 476). Nor is it any objection to the appointment of a receiver that the debtor has no other property than an equity of redemption which he is willing to have sold under execution (*Bailey* v. *Lane*, 15 Abb. 373, *note*).

f. Where the receiver has given ample security on his first appointment, he need not give further security on being appointed, pending his first appointment, receiver of the same estate in another action (*Banks* v. *Potter*, 21 How. 469).

g. An order for appointing a receiver founded on the *voluntary* appearance and examination of the judgment debtor is valid. It will not be affected by

any irregularity in the order for the judgment debtor's appearance (*Bingham* v. *Disbrow*, 14 Abb. 251). The regularity of the appointment of the receiver cannot be questioned collaterally, as in an action by the receiver (*Tyler* v. *Whitney*, 12 Abb. 465).

a. Where the plaintiff shows a judgment perfected, and an execution issued thereon, and return unsatisfied in due form of law, it is a matter of course, on his application to reach the equitable property of the defendant, to appoint a receiver. And a plaintiff should always make such an application when he has obtained an injunction against the judgment debtor, to protect the property and effectuate his lien. On such an application, the court cannot go behind the judgment and execution, to consider the merits of the judgment, in any respect (*Lent* v. *McQueen*, 15 How. 313).

b. Where, upon examination upon supplementary proceedings, the debtor discloses the possession of choses in action, or the existence of a relation—*e. g.* partnership—which renders it probable that he may have assets, a receiver should be appointed, even though the debtor deny that the property disclosed is of any value. *It seems*, that in all cases where the creditor enjoins the debtor from disposing of or interfering with his property, a receiver should be appointed, irrespective of the question whether there is such property or not (*Webb* v. *Overmann*, 6 Abb. 92).

c. Where on the examination, property, such as is liable to seizure on an execution, is disclosed to be in the possession of the debtor, but is claimed by a third party, the court will appoint a receiver to bring a suit for the recovery of such property; and it is no answer to an application for the appointment of a receiver, that the creditor can issue another execution, under which the property can be seized, and the creditor try the title with the claimant (*Todd* v. *Crooke*, 4 Sand. 695; 1 Code Rep. N. S. 324). This was held where it appeared that the judgment debtor had formerly possessed, using as his own, certain vessels, but which he alleged were all bought for or owned by his sisters, and that the vessels were where they might be levied upon by a new execution. (*Id.*)

d. Where it is uncertain who is the debtor to the judgment debtor—the party alleged to be so or another—a receiver should be appointed (*Corning* v. *Tooker*, 5 How. 16).

e. **Vesting of property in receiver—his powers and duties.**—The appointment of a receiver vests in him the title to the debtor's personal property. But the title to the debtor's real estate is transferred only by the debtor's own conveyance, which the court can compel him to execute (*Chautauque Co. Bank* v. *Risley*, 19 N. Y. 370; *Moak* v. *Coates*, 33 Barb. 498; *The People* v. *Hulbert*, 1 Code Rep. N. S. 75; 5 How. 446; *Porter* v. *Williams*, 1 Code Rep. N. S. 144; 5 How. 441; 12 id. 107; 5 Selden, 142). Nor is a receiver, by mere force of his appointment, vested with a title to the interest of the judgment debtor, as *cestui que trust*, in the income of a fund inalienable by such *cestui que trust* (*Genet* v. *Foster*, 18 How. 50).

f. The property vested in the receiver is only such as the debtor owned at the time of the granting the order for his examination (*Campbell* v. *Genet*, 2 Hilton, 290). Not to any subsequently acquired (*Graff* v. *Bonnett*, 25 How. 470).

g. It has been held that the judge cannot require any assignment, but can only appoint the receiver, and leave him then to sue under the title derived from his office merely (*Ten Broeck* v. *Sloo*, 2 Abb. 236; 13 How. 31; see *The People* v. *Hulbert*, 1 Code Rep. N. S. 75; 5 How. 446; *Hulsaver* v. *Wiles*, 11 How. 446; see 2 Abb. 477).

h. A receiver in supplementary proceedings is not trustee alone for the parties at whose instance he was appointed, but for all the creditors of the judgment debtor (*Bostwick* v. *Beizer*, 10 Abb. 197). He does not stand merely in the place of the debtor but represents the creditors (*Seymour* v. *Wilson*, 15 How. 355). He is to administer the property vested in him under the direction of the court for the benefit of all the creditors, first discharging those

debts which have asquired an equitable priority (*Bostwick* v. *Beizer*, 10 Abb. 197); may maintain an action to set aside an assignment of real and personal property made by the debtor in fraud of his creditors. (*Seymour* v. *Wilson*, 15 How. 355; *Bostwick* v. *Beizer*, 10 Abb. 197).

a. Where a receiver succeeds in an action to set aside an assignment made by a debtor for the benefit of his creditors, the judgment in such action should provide for indemnity to the trustees in such assignment (*Bostwick* v. *Beizer*, 10 Abb 197).

b. Where a receiver succeeds in setting aside an assignment made for the benefit of creditors he may sell such assigned property under the direction of the court and apply the proceeds in satisfaction of the debts of the fraudulent assignor (*Porter* v. *Williams*, 5 Selden, 142; 12 How. 107; overruling on this point, *Seymour* v. *Wilson*, 16 Barb. 294; 15 How. 355; *Hainer* v. *Fowler*, 16 Barb. 300; *Goodyear* v. *Betts*, 7 *id.* 189; *Dorr* v. *Noxon*, 5 *id.* 29; *Gasper* v. *Bennett*, 12 *id.* 309).

c. A receiver may sell lands under a decree in a creditor's suit, directing such sale, notwithstanding he has sufficient personal property in his hands to pay the sum due to the plaintiffs on such decree, where there are similar decrees in favor of other parties, and the decree under which the sale is made directs the application of the proceeds of the sale in payment of *all* the decrees (*Chautauque Co. Bank* v. *White*, 2 Selden, 237).

d. A receiver may maintain an action against the judgment debtor, of whose property he is receiver, for a conversion thereof, where the debtor has converted the same after the title of the receiver accrued (*Gardner* v. *Smith*, 29 Barb. 68). Where a judgment debtor, at the time of the appointment of a receiver of his property, is in possession of personal property on which he has given a mortgage to the former owner, to secure the purchase money, which mortgage remains in force, but the receiver neglects to pay it off when it becomes due, and suffers the right of the mortgagee to become absolute, he cannot, after a demand of possession of the debtor and refusal, maintain an action against the latter for a conversion. (*Id.*)

e. Where a receiver demands the delivery to him of personal property, as being the property of the judgment debtor, if the demand is sufficient in other respects, the objection cannot be taken at the trial that he did not exhibit, at the time of such demand, the evidence of his appoinment as receiver, if the refusal to deliver was not placed on that ground (*Livingston* v. *Stassel*, 8 Bosw. 19).

f. A receiver is entitled to recover from a creditor by judgment recovered subsequent to that in which such proceedings were had, but prior to his appointment, the value of property afterwards levied upon by such creditor's direction under such subsequent judgment, and sold (*Fessenden* v. *Woods*, 8 Bosw. 550).

g. Where the title to personal property in the possession of the judgment debtor is vested in the receiver, his leaving it in the possession of the judgment debtor for ten months, and down to the time of its being levied upon by a subsequent judgment creditor, does not warrant such subsequent judgment creditor in treating the supplementary proceedings as fraudulent and void as against him, when it is not shown the property was left in the debtor's possession by collusion with or consent of the creditor at whose instance the receiver was appointed. (*Id.*)

h. The debtor cannot be punished as for a contempt, for refusing to deliver his property to the receiver, when the order appointing the receiver does not cantain a direction for the delivery of the property, and no subsequent order to that effect has been made (*Watson* v. *Fitzsimmons*, 5 Duer, 629).

a. Where a receiver was appointed upon a creditor's bill, and the defendant was directed to deliver over his property to such receiver, the defendant was bound to answer every question which was relevant to the subject of such property (*Gihon* v. *Albert*, 7 Paige, 278).

b. **Receiver subject to the control of the court.**—The receiver is subject to the order of the judge. He may be required to account for the property which may come to his hands; and the jurisdiction of the judge must necessarily continue until the judgment creditor is paid, or all the funds or property in the hands of the receiver applied on the judgment, or are exhausted (*Webber* v. *Hobbie*, 13 How. 384).

c. Where a receiver. having, without specific direction by the referee, taken goods apparently in the debtor's possession, but which were claimed by one not a party to the suit, he was ordered to restore them on the claimant's undertaking to hold them subject to the order of the court, and a reference as to the title was directed (*Dickerson* v. *Van Tine*, 1 Sand. 724).

d. The court will not enjoin a receiver by injunction in a separate action from taking possession of the execution debtor's property (*Van Rensselaer* v. *Emery*, 9 How. 136). A receiver had the supposed value of $60,000 of property in his power, and the amount which was likely to be required to satisfy the demand in suit was only about $1,000: the court restrained him from making sale by auction of the whole property in his hands (*Wardell* v. *Leavenworth*, 3 Edw. Ch. R. 244). No order will be made on the motion of a receiver to sell the estate of the debtor, consisting of his interest as *cestui que trust* under a will (*Scott* v. *Nevius*, 6 Duer, 672).

e. **Order forbidding transfer of property.**—The forbidding a transfer of the defendant's property under this section, is a different proceeding from an injunction granted in an action as a provisional remedy. There should, no doubt, be some reason appearing in the affidavit, before the judge should forbid a transfer or other disposition of the property of a judgment debtor (*Green* v. *Bullard*, 8 How. 316).

f. *Semble*, that after service of an order forbidding a judgment debtor to interfere with his property, it would be a contempt for him to collect money previously earned and apply it to debts for family supplies (*Taggard* v. *Talcott*, 2 Edw. Ch. R. 628).

g. To put a judgment debtor in contempt for interfering with his property, it must be affirmatively shown that the property in question was acquired prior to the granting of the order. The order does not affect after acquired property (*Potter* v. *Low*, 16 How. 549).

h. The debtor proceeding to judgment in a suit pending at the time of service of an order restraining interference with his property is not a violation of such order (*Parker* v. *Wakeman*, 10 Paige, 485;) nor is confessing a judgment (*McCredie* v. *Senior*, 4 Paige, 378; see however *Lansing* v. *Easton*, 7 Paige, 364; *Ross* v. *Clausman*, 3 Sand. 676). Nor is merely carrying into effect, by procuring novation, a previous assignment of a right of action (*Richardson* v. *Rust*, 9 Paige, 243; see *Ireland* v. *Smith*, 3 How. 244; 1 Barb. 419).

§ 299. [254.] (Am'd 1849.) *Existing suits. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.*

If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or coporation by the receiver; but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity be given to the receiver to commence the action, and prosecute the same to judg-

ment and execution; but such order may be modified or dissolved by the judge granting the same, at any time, on such security as he shall direct.

a. "This provision must be held applicable to *all cases* where the validity of a claim, or the title to property sought to be applied to the payment of the judgment, is disputed. It could not have been intended * * * * that questions of this character (claims against an alleged debtor to the judgment debtor) should be decided * * in any other proceeding than an action," by a receiver (*Sherwood* v. *Buffalo R. R. Co.* 12 How. 189; *Catlin* v. *Doughty*, 2 *id.* 459; *Goodyear* v. *Betts*, 7 *id.* 187; *The People* v. *King*, 9 *id.* 97; *Rodman* v. *Henry*, 17 N. Y. 484).

b. Section 299 applies only to actions between third persons, not to those between the judgment creditor and judgment debtor only (*Catlin* v. *Doughty*, 12 How. 459). It should be confined to cases where proceedings have been instituted under § 292 (*Goodyear* v. *Betts*, 7 How. 188).

c. An action to recover a debt due to the judgment debtor from a third person, or to reach property in his possession alleged to belong to the judgment debtor, can only be brought by the *receiver* appointed under these provisions of the code. It cannot be instituted by the judgment creditor himself (*Edmonston* v. *McLoud*, 19 Barb. 357).

d. On a motion to restrain F, a third person, from disposing of property of the debtor, the motion was denied because the affidavit on which the motion was founded did not show that any order had been made under § 294, requiring F to appear and answer, and per Bosworth, J. "This seems to be necessary in order to make him a party to the proceedings (5 How. 16), and to enable the court to properly enjoin him under § 299. Section 294 seems to prescribe the proceedings to be taken to authorize an order under § 299." (*King* v. *Tuska*, 1 Duer, 635).

See note to §§ 294, 298, and 244.

§ 300. [255.] (Am'd 1849, 1857.) *Existing suits. Reference by judge.*

The judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts, and may in his discretion, appoint such referee in the first order, or at any time.

a. In *Hollister* v. *Shafford* (1 Code Rep. N. S. 120), Campbell, J. announced the practice of the superior court under this section to be as follows:

"The practice we have adopted, when judgment debtors, or persons alleged to have their property, are brought up for examination on an order of one of the justices, is now stated, that it may be more fully understood.

"As a general rule, we will not order a reference for this purpose against the wishes of either party. The examination must proceed at the chambers of the court, where the justice in attendance at chambers, or holding the special term, can see that no injustice is done to examinants attending without counsel, and can dispose of the legal questions arising, to the great saving of trouble and expense to the parties.

"As such examinations are usually conducted, his actual attention to them will be required only occasionally, and they will not interfere materially with his other duties.

"Whenever the parties agree to a reference, it will be ordered of course. So, when it becomes apparent that a difficult or a protracted investigation must ensue, and the examinants have counsel, a reference will be directed."

a. A referee to take the examination may be appointed in the first instance and *ex parte* (*Conway* v. *Hitchins*, 9 Barb. 379; *Green* v. *Bullard*, 8 How. 313).

b. In the New York common pleas, it is the settled practice in cases where a transcript has been filed from the marine or a district court, to order the debtor to appear and be examined before a referee, and the referee is named and appointed in the order in the first instance.

c. The referee has no right to adjourn the examination indefinitely, without the consent of the defendant, and to summon the defendant again before him at a future day. But he should require the plaintiff to proceed with all reasonable diligence (*Hudson* v. *Plets*, 11 Paige, 180). He may, in his discretion, allow corrections or explanations to be made by any party to the examination, after the same has been concluded and signed (*Corning* v. *Tooker*, 5 How. 16). If appointed to report the facts, he is not at liberty to report the evidence at large (*Dorr* v. *Noxon*, 5 How. 29). He should decide what effects are to be delivered to the receiver, and specify the same particularly (*Dickerson* v. *Van Tine*, 1 Sand. 724). If the articles are ponderous, the referee should designate a time for the debtor to attend at the place where they are situate, and deliver the same to the receiver. (*Ib.*) When the debtor is entitled to exemption, the referee should, in his direction for the delivery of the debtor's household furniture, specify and except, or otherwise designate, the furniture which is to be left with the debtor, as being exempt. (*Ib.*) And per Sandford, J.: "The object of the examination of the judgment debtor in these cases and the other proceedings before the master or referee, subsequent to the debtor's assignment to the receiver, is to ascertain specifically what effects the debtor has in his possession or under his control, to the end that the same may be delivered to the receiver. It never was the design to permit the receiver under a general direction to take possession of the debtor's property and effects,—to go and seize such as he, acting on his own judgment, should deem to fall within the scope of the order."

d. The referee must certify the examination or report the evidence or the facts, to *the judge* who made the order and no other (*Smith* v. *Johnson*, 7 How. 40; *Hatch* v. *Weyburn*, 8 *ib.* 163).

e. The referee has no control over the person of the defendant. He cannot compel an appearance, nor punish him for a disobedience of orders. He must report to the judge who appointed him (*Green* v. *Bullard*, 8 How. 318).

f. Where the defendant has been summoned to attend before the referee under an order of reference to appoint a receiver, and has delivered over his property to such receiver on oath, and been examined on oath as to the same, the power of the referee is spent, and he has no right to compel the defendant again to appear before him for a further examination, without a new order of the court (*Hudson* v. *Plets*, 11 Paige, 180; *Orr's case*, 2 Abb. 457). If the plaintiff desires a further examination, he must apply to the court, upon proper affidavits and notice to the adverse party, for an order authorizing the same (*Orr's case*, supra).

§ 301. [256.] (Am'd 1849.) *Existing suits. Costs of proceeding.*

The judge may allow to the judgment creditor, or to any party so examined, whether a party to the action or not, witnesses' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs.

g. The application for costs under this section, cannot be made until the proceedings have been terminated, and in favor of the party applying (*Davis* v. *Turner*, 4 How. 190).

h. This section does not apply to cases where no examination of the judg-

ment debtor has taken place; thus, where the judgment debtor procured the order to be set aside as irregular, before any examination under such order, the court said this section did not give the defendant costs unless he has been examined (*Eagle* v. *Bonneau*, 2 Sand. 679; 3 Code Rep. 205).

a. The fees of witnesses are "Fifty cents for each day while attending any court or officer; and if the witness resides more than three miles from the place of attendance, traveling fees at the rate of four cents per mile, going and returning" (2 R. S. 643, § 16; and see *Muscott* v. *Runge*, 27 How. 85, and note to § 311, *post*).

b. All the judges of the superior court held, that if on the examination of the debtor, no property or effects applicable to the judgment should be discovered, the creditor would be ordered to pay costs to the debtor, unless the creditor can show some good reason for having required the debtor to submit to the examination (*Anon.*, 1 Code Rep. N. S. 113); and so in the case of the examination of a third party (*Anon.*, 11 Abb. 108).

c. Where the order was, that the plaintiff pay $30 for counsel-fee and $4 witnesses' fees, instead of saying "for costs," and it was objected to for that reason; it was nevertheless upheld (*Hulsaver* v. *Wiles*, 11 How. 448).

d. Until the judge makes the final order for the application of the funds in the hands of the receiver, he has power to make the allowance under this section (*Webber* v. *Hobbie*, 13 How. 384).

§ 302. [257.] (Am'd 1849, 1851.) *Existing suits. Disobedience of order, how punished.*

If any person, party, or witness, disobey an order of the judge or referee, duly served, such person, party, or witness may be punished by the judge, as for a contempt. And in all cases of commitment under this chapter, or the act to abolish imprisonment for debt, the person commited may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment, by the court or judge committing him, or the court in which the judgment was rendered, on such terms as may be just.

a. This section does not deprive *the court* of its general power to punish for disobedience of its orders (*Kearney's case*, 13 Abb. 459). Under this section a judge has power to punish, as for contempt, all disobedience of orders made by him in "proceedings supplementary to the execution." An attachment issued by him for such contempt may, therefore, properly be made returnable before him at his office (*Re Smethurst*, 3 Code Rep. 55; 2 Sand. 724).

f. Although the code gives to the judge the power of punishing disobedience to his orders, reference must be had to the revised statutes as to the mode in which that power is to be exercised. A judge, upon due proof, may in his discretion, issue an attachment in the first instance, against the party accused, to appear and answer, or he may grant an order to show cause. In either case, copies of the affidavits upon which the application is founded, should be served with the attachment or order. It is not necessary that the party accused should first have an opportunity of being heard upon an order to show cause, before an attachment can issue. The attachment is not used in such instances, for the purposes of punishment, after a final adjudication. It is only a mode of bringing the party before the court (2 R. S. 535). *It seems*, that in the first district, the ordinary practice is, to give notice of motion for an attachment, or obtain an order to show cause. (*Ib.*) The papers on a motion for an attachment for contempt may be entitled either in the action (4 Paige, 360; 7 id. 325; 1 Barb. 227); or as *The People, &c.*, on the relation of A. (the plaintiff), against B. (the defendant) (7 Paige, 325).

a. Where the incipient proceeding to punish for contempt is an order to show cause and the contempt is not denied, no interrogatories need be filed (*Watson* v. *Fitzsimmons*, 5 Duer, 629).

b. On service of an attachment for contempt, if the party served gives a bond for his appearance on the return day, it is not absolutely necessary that he should be called on the first or return day (*The People* v. *Munro*, 15 How. 494). A bond from a prisoner under attachment for contempt with one surety only is void (*Morton* v. *Campbell*, 14 Abb. 410).

c. On the application for the attachment, the debtor will be heard by way of appeal from the decision of the referee ordering the delivery (*Dickerson* v. *Van Tine*, 1 Sand. 724).

d. In *Shepherd* v. *Dean* (13 How. 174; 3 Abb. 424), it was held by Daly, J., that the power to punish for the disobedience of an order in proceedings supplementary to the execution, "is with the judge who made the order disobeyed, and not with the court;" and that the attachment must be returnable "before the judge who made the order" disobeyed, as he alone can exercise the power; and in that case he discharged out of custody a defendant arrested on an attachment for disobeying an order issued by and returnable before the court, not the judge, and see *Kelly* v. *McCormick* (2 E. D. Smith, 503); *Wicker* v. *Dresser* (14 How. 464). In the supreme court it has been held (*Wicker* v. *Dresser*, 13 How. 331; 4 Abb. 93), that where supplementary proceedings have been commenced before a judge, and the order for the examination of the judgment debtor disobeyed, the special term might grant an attachment for such disobedience. [This decision was affirmed at general term. See *Dresser* v. *Van Pelt* (15 How. 19), and *The People* v. *Kelly* (22 How. 309).]

e. Whether, when a county judge adjourns the hearing upon on order to show cause why a judgment debtor previously brought before him upon an injunction order for his examination, should not be punished for a contempt in disobeying the order, and nothing is done upon the adjourned day, owing to the absence of the judge,—the judge loses jurisdiction so that he cannot afterwards make an order to punish for the contempt, *query?* Where the proofs upon the question of contempt are closed, but no order of committal is made for the reason that the papers do not show the amount of the plaintiff's judgment, and time is given to the plaintiff until a set day to put in proof of the amount of the judgment, this is not such an adjournment as that the judge loses jurisdiction if no further proceedings are had on the set day. A party committed for a contempt will not be discharged for a mere irregularity in the proceedings in the course of which his committal was made, if the officer had jurisdiction. Where in the course of supplementary proceedings an order is made requiring the judgment debtor to show cause why he should not be punished for contempt in violating the order for his examination, the jurisdiction to commit is derived from the original order in which the proceedings are founded, not from the order to show cause why the party should not be punished (*Myers* v. *Janes*, 3 Abb. 301; *Reynolds* v. *McElhone*, 20 How. 454).

f. The non-imprisonment act does not apply to a judgment debtor in supplementary proceedings, in contempt for not complying with an order to pay the judgment and costs (*The People* v. *Kelly*, 22 How. 309).

g. Where a party disobeys an order for the payment of money, the precept to commit issues directly (*The People* v. *King*, 9 How. 97).

h. An order to pay a sum in satisfaction of the judgment, is an order to pay to the judgment creditor (*id*).

i. Whether an order discharging a party from an attachment for contempt is appealable (*id*). Query.

j. In Kings county must the commitment be to the penitentiary or the county jail? (*Re Cavanagh*, 10 How. 27).

k. Liability of sheriff for escape of prisoner committed until a fine is paid *Loosey* v. *Orser*, 4 Bosw. 391).

l. An order adjudging a party in contempt must be entered before an appeal can be taken from it (*Marshall* v. *Francisco*, 10 How. 147).

See note to § 297.

TITLE X.

Of the costs in Civil Actions.

SECTION 303. Existing statutes regulating costs repealed.
304. Costs, when allowed of course to the plaintiff, costs where several actions brought on one instrument.
305. Costs, when allowed of course to the defendant.
306. Costs, when allowed to either party, in the discretion of the court.
307. Amount of costs allowed.
308. Allowance in addition to costs.
309. Allowance, how computed. Difficult and extraordinary cases.
310. Interest on verdict or report, when allowed.
311. Costs, how to be inserted in judgment. Adjustment of interlocutory costs.
312. Clerk's fees.
313. Referee's fees.
314. Costs on postponement of trial.
315. Costs on a motion.
316. Costs against an infant plaintiff.
317. Costs in an action by or against an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue. Security for costs.
318. Costs on review of a decision of an inferior court in a special proceeding.
319. Costs in actions by the people.
320. The like.
321. Costs against assignee of cause of action, after action brought.
322. Costs on a settlement.

§ 303. [258.] *Fee bill abolished.*

All statutes establishing or regulating the costs or fees of attorneys, solicitors, and counsel in civil actions, and all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor, or counsel, for his compensation, are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties. But there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity, for his expenses in the action; which allowances are in this act termed costs.

a. **Former rules as to costs abrogated.**—The code has established rules regulating costs, which supersede all former rules upon the subject, and these provisions apply as well to appeals as to original suits (*Montgomery Co. B'k.* v. *Albany City B'k*, 3 Selden, 465). This provision has not repealed (2 R. S. 613, § 3), as to costs in action on trespass on land (*Utter* v. *Gifford*, 25 How. 289).

b. **Costs, when a debt.**—Costs do not become a debt against a party to an action until judgment (*Warfield* v. *Watkins*, 30 Barb. 396).

c. **Costs in actions &c. against Mayor &c. of New York.**—In actions or special proceedings against the Mayor, Alderman and Commonalty of the City of New York, if the plaintiff recover judgment, "he shall recover full taxable costs, without regard to the amount of judgment" (Laws 1860, ch. 379, § 2).

d. **Surrogates' courts.**—These provisions did not apply to costs in Surrogates' Courts until the amendment of section 318 in 1862 (*Devin* v. *Patchin*, 25 How. 5; 26 N. Y. 441;) nor to costs on appeal from surrogate's decree (*Brockway* v. *Jewett*, 16 Barb. 590; see now, § 318, and in note to Sup'me Court Rule 44).

e. **Costs in federal courts.**—This section does not affect the question of costs in the federal courts. See 1 Blatch. C. C. R., 647, 650.

f. **Costs as between attorney and client.**—Costs as adjusted under the code are not the measure of compensation for the services of the attorney, in an action between himself and his client to recover compensation for such services. In such an action, the attorney must prove the value of his services (*Garr* v. *Mairet*, 1 Hilton, 498).

g. The taxable costs are *prima facie* the measure of the attorney's compensation (*Keenan* v. *Dorflinger*, 19 How. 153; 12 Abb. 327, *note*). Where the attorney and client differ as to the amount of compensation agreed to be paid, or as to the value of the services rendered, a compulsory reference cannot be ordered (*Fox* v. *Fox*, 24 How. 409). See *Attorney's lien* and note to § 271, *Compulsory reference.*

h. **Agreements as to compensation to attorneys.**—This section is supposed to have so far repealed the provisions of the revised statutes, prohibiting an attorney buying causes of action to sue thereon, as to make it lawful for a party to agree with an attorney to give him a portion of a demand, if and when recovered, in consideration of his bringing suit for the recovery of such demand (*Satterlee* v. *Frazer*, 2 Sand. 141; *Benedict* v. *Stuart*, 23 Barb. 420). In *Barry* v. *Whitney* (1 Code Rep. N. S. 101; 3 Sand. 696), the superior court said, "We do not think the court is deprived of the power of looking into arrangements between attorney and client;" and a reference was ordered to inquire if the amount received by the attorney was excessive, and on the referee reporting that it was, the attorney was ordered to refund a portion of the amount received; and see *Easton* v. *Smith* (1 E. D. Smith, 318); *Wilde* v. *Joel* (15 How. 329); *Stow* v. *Hamlin* (11 *id.* 452).

i. **Substitution of attorney.**—See *Rule* 12, *post.* The court in the absence of any agreement as to the amount of costs, will not order a substitution of an attorney on payment of the taxed costs only, but will allow the attorney such further compensation as under the circumstances is proper (*Cregier* v. *Cheesbrough*, 25 How. 200). On the substitution of an attorney where the attorney alleges that subsequent to the judgment, his client assigned it, with a view to defeat the attorney's lien, the attorney may have a reference to ascertain his lien on the judgment for taxed costs, without prejudice to his right as against the assignee (*Richardson* v. *Brooklyn Railroad*, 24 How. 321; and note at page 480; 15 Abb. 342 *note*).

j. **Costs in certain actions, where damages claimed do not exceed $500.**—The marine court of the city of New York has jurisdiction "of actions of assault and battery, false imprisonment, malicious prosecution, libel and slander, where the damages claimed do not exceed $500; and the costs of all such actions when prosecuted in any other court of the city of New York, are limited to the amount which would have been recovered in said marine court, if prosecuted therein, but in no such action shall the costs exceed the

damages recovered" (*Laws of* 1853, p. 1165, § 1). But if the damages *claimed* exceed $500, and the plaintiff recover, his right to costs will be regulated by the code (*Murray* v. *DeGross*, 3 Duer, 668; 12 N. Y. Leg. Obs. 311). In an action for assault, the place of trial was Dutchess county, where the plaintiff resided, the damages claimed being $1000. Afterwards the place of trial was changed to the city of New York. The cause was twice tried. On the first trial the plaintiff had a verdict for $450, and on the second trial a verdict for $75; held that it was not a case within the act, and that the plaintiff's costs were not limited to the amount of his recovery (*Sleight* v. *Hancox*, 4 Abb. 245).

a. **Opening streets, &c.**—The act of April 1, 1854 (Laws of 1854, p. 281), governs as to the taxation of the costs and expense of street improvements in the city of New York. Consequently all bills of the corporation counsel, for services rendered, or of proceedings pending previous to the first of January, 1855, are to be taxed at the rates allowed previous to the passage of the bill of 1854 (*In the matter of The Bowery*, 19 Barb. 589). The rules adopted at a general term of the supreme court in the first district, in March, 1854, relative to the taxation of costs of opening and improving streets in the city of New York, are void. (*Id.*) An appeal from the taxation of costs in such cases must be taken before the report is confirmed, it cannot be taken afterwards (*Re Sixty-Fifth Street*, 26 How. 256).

b. **Costs of one of several issues.**—The provision of the revised statutes, that where there are two or more distinct causes of action in separate counts, the plaintiff shall recover costs on the issues found for him, and the defendant on those found in his favor, is not abrogated by the code (*Dresser* v. *Wickes*, 2 Abb. 460).

c. **Costs in special proceedings.**—See note to § 318, *post*. The legislature has made no provision for costs in a special proceeding on an original application to the court. Therefore in an original application in a special proceeding, motion costs only can be allowed (*Re Pierce*, 12 How. 532). No costs will be allowed for the argument of a demurrer not authorized by law, as, for example, a demurrer to an answer not amounting to a counter-claim, at a time when the law did not authorize such a demurrer (*Sleight* v. *Hancox*, 4 Abb. 247).

d. The provisions of that part of the code which relates to costs upon appeal, are applicable to appeals in special proceedings, as well as to those taken in civil actions, strictly so called (*The People* v. *Sturtevant*, 3 Duer, 616; *The People* v. *Robinson*, 25 How. 345).

e. **Costs in proceedings on forfeited recognizances in New York city.**—In no case whatsoever upon proceedings upon forfeited recognizances shall any fees or costs be chargable to the mayor, commonalty, aldermen, or supervisors of the city and county of New York, by the officer prosecuting the same (*Laws* 1855, ch. 202, § 3).

f. **Attorney's lien.**—The code has not affected the lien of the attorney upon the judgment for his costs (*Ward* v. *Wordsworth*, 1 E. D. Smith, 598; *Rooney* v. *Second Ave. R. R. Co.*, 18 N. Y. 368; *Sherwood* v. *Buffalo and N. Y. City Railroad Co.*, 12 How. 136; *Robbins* v. *Alexander*, 11 *id.*, 100; *Wilkins* v. *Batterman*, 4 Barb. 47; *Creighton* v. *Ingersoll*, 20 *id.*, 541; *Haight* v. *Holcomb*, 16 How. 173, 160; 7 Abb. 210; *Ex parte Kyle*, 1 Cal. 331; and see 3 E. D. Smith, 66). But the lien is lost by an assignment of the attorney's claim to a third person (*Chappell* v. *Dunn*, 21 Barb. 17).

g. As between the parties to an action, an attorney, as such, has no lien upon the subject of the action, and the parties may settle and discharge it before judgment without consulting him, if there is no collusion to deprive him of costs (*McDowell* v. *Second Av. R. R. Co.*, 4 Bosw. 670; see *Benedict* v. *Harlow*, 5 How. 347; *Brown* v. *Comstock*, 10 Barb. 67; *Platt* v. *Jerome*, 19 How. U. S. Rep. 384; *Harrison* v. *Wilcox*, 11 Ire. Law Rep. 500; *Davenport* v. *Ludlow*, 4 How. 337; *Shank* v. *Shoemaker*, 18 N. Y. 489).

h. In such a case the attorney cannot after the settlement proceed with the action to enforce payment of his costs. (*Id.*) But where the parties compromise an action behind the back of the plaintiff's attorney, and with a view to deprive him of his costs, the court will allow the attorney to proceed in the

action to recover his costs (*Rasquin* v. *Knickerbocker Stage Co.*, 21 How. 293; 12 Abb. 324; *Robins* v. *Alexander*, 11 How. 100; *Murquat* v. *Mulcy*, 9 How. 460; see, however, *McKenzie* v. *McKenzie*, 21 How. 467; *McKenzie* v. *Rhodes*, 13 Abb. 337; *Carpenter* v. *Sixth Av. R. R. Co.*, 1 Amer. Law Reg. N. S. 410; *Ackerman* v. *Ackerman*, 14 Abb. 229; *Owen* v. *Mason*, 18 How. 156; *Goodridge* v. *New*, 18 How. 189).

a. As against his client, an attorney has the right to collect a judgment and apply the proceeds towards satisfaction of his claim for services (*Sherwood* v. *Buffalo R. R. Co.*, 12 How. 136); and to enforce his lien he may, without the consent of his client, sue in the client's name on the undertaking of bail, and the client cannot release the action to the prejudice of the attorney's lien (*Shackleton* v. *Hart*, 20 How. 39; 12 Abb. 325, *note*).

b. The attorney cannot issue an execution on the judgment for the amount of his lien after the judgment has been satisfied by the client (*Ackerman* v. *Ackerman*, 14 Abb. 229; rev'g 11 Abb. 256). Nor can he where the judgment has been paid after an execution has been returned unsatisfied, enforce his lien by a proceeding supplementary to the execution. The court will not investigate the attorney's lien on a motion for an attachment in supplementary proceedings, and proof that the judgment has been satisfied, is an answer to such a motion (*De Graw* v. *Boardman*, 13 Abb. 337, *note*).

c. A motion made seven years after a judgment has been satisfied, to vacate the satisfaction to enforce the attorney's lien denied (*Winans* v. *Mason*, 21 How. 153; 33 Barb. 522).

d. The attorney cannot be deprived of his lien by a payment under section 293 of the Code (*East River Bank* v. *Kidd*, 13 Abb. 337, *note*; and see note to § 293, *ante*), but he may be by a *bona fide* payment to the judgment creditor, without notice of any lien (*Ackerman* v. *Ackerman*, 14 Abb. 229; and see *Fox* v. *Fox*, 24 How. 409).

e. The attorney's lien to the extent of his costs extends not only to the judgment obtained by him, costs and damages (*Ackerman* v. *Ackerman*, 14 Abb. 229); but also to all the incidents of the judgment or securities for its payment, including the undertaking of bail (*Shackleton* v. *Hart*, 20 How. 39; 12 Abb. 325, *note*; *Fox* v. *Fox*, 24 How. 409). The lien attaches to the subject matter of the action from the commencement of the action (*Keenan* v. *Dorflinger*, 19 How. 153; 12 Abb. 327, *note*). But *semble*, not to the damages until they are received, or unless by virtue of some special contract (*Benedict* v. *Harlow*, 5 How 347).

f. Where an action is brought for the purpose of setting off a judgment owned by the plaintiff against a judgment for costs in favor of the defendant against the plaintiff, the attorney's lien for costs on the latter judgment cannot be let in to obstruct the set-off. *It is otherwise on a motion to set off the judgments* (*Martin* v. *Kanouse*, 17 How. 146; see *Hayden* v. *McDermot*, 9 Abb 14; *Ely* v. *Cook*, 9 Abb. 366; *Roberts* v. *Carter*, 9 Abb. 366, *note*; 17 How. 341). The attorney's lien was on motion held superior to the right of set-off (*Gridley* v. *Garrison*, 4 Paige, 647; *Ainslee* v. *Boynton*, 2 Barb. 258; contra, *Ferguson* v. *Bassett*, 4 How. 168; *Noxon* v. *Gregory*, 4 How. 339).

g. Effect of assignment of cause of action pending the action, on the attorney's lien for costs (*Creighton* v. *Ingersoll*, 20 Barb. 541). An assignment of the judgment to the attorney in the action to secure his costs, is allowed a preference over the adverse parties' claim of set-off (*Van Pelt* v. *Boyer*, 8 How. 319; and see *Ferguson* v. *Bassett*, 4 How. 168; and note to § 293, *ante*).

h. Query: Whether an attorney can acquire a lien on a judgment in the New York Marine Court (*Hayden* v. *McDermott*, 9 Abb. 14).

i. Semble, the attorney's lien as against the opposite party, may extend to a sum agreed by his client, to be paid in addition to the taxable costs (*Richardson* v. *Brooklyn R. R.*, 15 Abb. 342, *note*; 24 How. 321, 480; *Ackerman* v. *Ackerman*, 11 Abb. 256; 14 Abb. 229; *Fox* v. *Fox*, 24 How. 409; *Ward* v. *Syme*, 9 How. 16; *Rooney* v. *Second Avenue R. R. Co.*, 18 N. Y. 368; *Hall* v. *Ayer*, 9 Abb. 220; *Carpenter* v. *Sixth Avenue R. R. Co.*, 1 Amer. Law Reg.

N. S. 410; 19 How. 92; questioning *Haight* v. *Holcomb*, 16 How. 173; 7 Abb. 210).

a. The existence and extent of the lien may be determined in a summary way, as by a reference. The client cannot claim a right to a trial by jury (*Ackerman* v. *Ackerman*, 14 Abb. 230).

b. An attorney was ordered to give up papers, on security being given for his alleged lien (*Cunningham* v. *Widing*, 5 Abb. 413).

c. **Staying proceedings till costs of previous action paid.**—As a general rule a court of record will stay the prosecution of an action, where the defendant's costs in a former action by the same plaintiff for the same cause, remain unpaid, until such costs are paid (*Youle* v. *Brotherton*, 10 Johns. 363; *Edwards* v. *Ninth Ave. R. R. Co.*, 22 How. 444; *Julio* v. *Ingalls*, 15 Abb. 429); but a justice of the peace has no power to stay an action on such a ground (*Youle* v. *Brotherton*, 10 Johns. 363). A stay will not be ordered where the first action was in a court of a foreign state or county (*Julio* v. *Ingalls*, 15 Abb. 429); and where the plaintiff brought an action in the superior court for legal relief. His complaint was dismissed with costs, but without prejudice to an action for equitable relief. Without paying the costs of that suit, he brought the action for equitable relief. Held that the court would not as a matter of course, stay the proceedings in the second action until the costs of the first were paid (*Davis* v. *Duffie*, 5 Duer, 688; 3 Abb. 263)

d. The motion should be made before judgment in the second action; it cannot be made after judgment (*Salters* v. *Ralph*, 15 Abb. 273; and see 2 Cow. 503; 3 id. 57; id. 380; 1 Johns. Cas. 247); but *semble*, the motion may be embraced in a motion to set aside the judgment in the second action for irregularity. (*Id.*) The motion is addressed to the discretion of the court (*McMahon* v. *Mut. Ben. Ins. Co.* 12 Abb. 28). And the order is not ordinarily appealable, but an appeal will be allowed in certain cases. (*Id.*)

e. Where such a stay is ordered, and the costs of the first action are not paid within a reasonable time, the court may make a further order that the complaint be dismissed, unless the costs are paid within a certain time (*Jackson* v. *Edwards*, 1 Cow. 596).

Further as to staying proceedings until the costs of a previous action are paid, see 2 Bos. & Pul. 337; 3 id. 23, *note a*; 3 Dowl. & R. 53; 6 Taunt. 74; 2 T. R. 114; 3 Wils. 149; 19 Johns. 196, 237; 2 Cow. 22, 580; 1 id. 140; 9 Wend. 429; 6 Hill, 372; 4 Wend. 203, 216; 2 id. 623.

f. In an action for the conversion of personal property (trover) by an assignee of the claim, the plaintiff's proceedings will be *stayed on motion*, until payment of a judgment for costs on a dismissal of the complaint in a former action for the same cause by the plaintiff's assignor (*Richardson* v. *White*, 27 How. 155). The rule in actions to recover real property applies to all actions. (*Id.*)

g. **Costs in existing suits.**—Costs in suits, both at law and in equity, pending 1st July, 1848, except the costs of motions therein, are to be regulated by the old fee-bill (*Truscott* v. *King*, 4 How. 173; *Doty* v. *Brown*, ib. 429; 3 Code Rep. 119). Where an action was commenced under the code of 1848, and decided after the code of 1849 went into effect, it was held that the costs must be regulated by the code of 1849 (*Holmes* v. *St. John*, 2 Code Rep. 46). The old chancery fee-bill is not repealed by the code. It is still in force, but it is only applicable to proceedings had prior to July, 1851, in equity suits commenced prior to July, 1848; and in such suits the costs prior to July, 1851, are those allowed by the chancery fee-bill, and since July, 1851, those allowed by the code (*Curtis* v. *Leavitt*, 1 Abb. 118). In actions at law pending on 1 July, 1848, and tried afterwards, the right to and amount of costs are governed by the former system. Costs of proceedings subsequent to the verdict, and to review the decision made at the trial, taken in the mode prescribed by the code, are governed by the code (*McMasters* v. *Vernon*, 1 Abb. 179; 4 Duer, 625). Suits commenced before the code, are exempted from the repeal of all former statutes in relation to costs. In such suits the right to costs and the

amount to be recovered, depend upon the statutory provisions in force when the code was enacted—except in relation to those subsequent proceedings to which the code may apply (*Rich* v. *Husson*, 1 Duer, 617). In an equity suit commenced before the code, and continued after it took effect, costs are to be taxed under the rules which prevailed before the code, as to all proceedings except appeals (*Traver* v. *Kipp*, 4 Abb. 358; but see note to § 311).

a. **Double costs.**—This section has not abolished the right to double costs given by the revised statutes (*Bartle* v. *Gilman*, 17 How. 1; 18 N. Y. 260). Double costs are allowed only in cases of verdict, demurrer, nonsuit, non pros., or discontinuance; and a report of referees is not within the statute (19 Wend. 225; *Calkins* v. *Williams*, 1 Code Rep. N. S. 53; *Calkins* v. *Brand*, (*ib.*); *contra*, *Tillou* v. *Sparks*, 9 How. 465). What defendants entitled to double costs (*Van-Bergen* v. *Ackles*, 21 How. 314). A public officer proceeded against by mandamus is entitled to double costs, if he succeeds (*The People* v. *Colborne*, 20 How. 378). The provisions of the revised statutes as to double costs do not apply to actions of an equitable character (*Taaks* v. *Schmidt*, 25 How. 340). Where judgment is obtained against a defendant sued as a public officer in a justice's court, and on appeal to the county court the judgment is reversed, and the judgment of the county court is affirmed in the supreme court, held the defendant was entitled to double costs in the supreme court, but not in the county court (*Wheelock* v. *Hotchkiss*, 18 How. 468).

b. A public officer, otherwise entitled to double costs, waives his right to such costs by uniting in a defence with a party not entitled to such costs (*Bradley* v. *Fay*, 18 How. 481).

d. **Treble costs**—(see *Walker* v. *Burnham*, 7 How. 55).

c. **Double costs on appeal**—(see *Dexter* v. *Adams*, 4 How. 367; 2 Denio, 646).

d. **Married woman.**—If a married woman who is plaintiff in an action for a divorce discontinues it, or is defeated, her husband is not liable to her attorneys for the costs of the action (*Phillips* v. *Simmons*, 11 Abb. 287). As to collecting costs against a married woman prior to the recent statutory enactments, on the subject, see *Thomas* v. *Thomas*, (18 Barb. 149); *Valentine* v. *Middleton* (11 Ir. Eq. R. 280).

e. **Insolvent and dissolved insurance companies.**—Costs under law of 1862, p. 743, to facilitate the closing up of insolvent and dissolved mutual insurance companies (*Bangs* v. *Barto*, 24 How. 487).

f. **No jurisdiction.**—On dismissing an action for want of jurisdiction the court may render a judgment for costs (*McMahon* v. *Mut. Ben. Ins. Co.*, 3 Bosw. 644; 8 Abb. 297; 12 *id.* 28; *King* v. *Poole*, 36 Barb. 242; *Cumberland Coal Co.*, v. *Hoffman Steam Coal Co.*, 39 Barb. 16; 30 *id.* 159; 20 How. 62; 15 Abb. 78; *contra*, *Harriott* v. *N. J. R. R.*, 8 Abb. 284; *Strader* v. *Graham*, 18 How. U. S. Rep. 602; and see *Gormly* v. *McIntosh*, 22 Barb. 271).

g. **Common pleas costs.**—The distinction which formerly existed between the rate of costs in certain cases in the New York common pleas and the Supreme Court is abolished by the Code (*Smith* v. *Keeler*, 8 How. 55).

h. **Malicious trespass.**—The section of the revised statutes which provides for costs in actions of trespass certified to have been malicious is repealed (*Smith* v. *Keeler*, 8 How. 55; see *Utter* v. *Gifford*, 25 How. 289; *Ashley* v. *Marshall*, 19 How. 110).

i. **Forcible entry.**—Costs in proceedings for forcible entry, &c. may be regulated by the supreme court (*The People* v. *Townsend*, 6 How. 178).

j. **Security for costs.**—The provisions of the revised statutes (2 R. S. 620) are still in force (2 Sand. 632; 16 Abb. 259) and are as follow:

§ 1. When a suit shall be commenced in any court—

1. For a plaintiff not residing within the jurisdiction of such court; or for several plaintiffs, who are all non-residents; or,

2. For or in the name of the trustees of any debtor; or,

3. For or in the name of any person being insolvent, who shall have been

discharged from his debts, or whose person shall have been exonerated from imprisonment, pursuant to any law, for the collection of any debt contracted before the assignment of his estate; or,

4. For or in the name of any person committed in execution for a crime; or,

5. In the name of any infant whose next friend has not given security for costs,—

The defendant may require such plaintiff to file security for the payment of the costs that may be incurred by the defendant, in such suit or proceeding.

§ 2. If, after the commencement of a suit, the plaintiff shall become a non-resident, or all the plaintiffs shall become non-resident or insolvent, and be discharged or exonerated as aforesaid, or be sentenced to state-prison for any term less than for life, the defendant may also require such security to be filed.

§ 3. The order to file such security, and that all proceedings on the part of the plaintiff be stayed until such security be filed and the sureties shall justify if excepted to, may be made by the court in which the action is pending, or by any judge thereof in vacation, upon due proof, by affidavit, of the facts entitling such defendant thereto. [The power here given to a judge out of court is not restricted by § 401, subd. 6. of the Code (*Washburne* v. *Langley*, 16 Abb. 259; *Sisson* v. *Lawrence*, 16 Abb. 259, *note*).]

§ 4. Such security shall be given in the form of a bond, in a penalty of at least two hundred and fifty dollars, with one or more sufficient sureties, to the defendant, conditioned to pay, on demand, all costs that may be awarded to the defendant in such suit.

§ 5. It shall be filed with a clerk of the court, and notice thereof be given to the defendant or his attorney. Within twenty days after the service of such notice, the defendant may except to the sufficiency of the sureties, by giving notice of such exception to the plaintiff's attorney.

§ 6. Within twenty days after such notice of exception, the sureties shall justify, by an affidavit, that they are worth double the penalty of such bond, over and above all debts; of which affidavit, a copy shall be served on the defendant or his attorney. Such justification shall operate to discharge the order to stay proceedings.

§ 7. In the cases in which, according to the provisions of this title, a defendant at the commencement of a suit shall be entitled to require security for costs, the attorney for the plaintiff shall be liable for such costs, to an amount not exceeding one hundred dollars, until security therefor be filed, as herein provided, whether such security shall have been required by the defendant or not.

§ 8. Such attorney may relieve himself from such liability, by filing security, and the sureties therein justifying, if excepted to, as herein provided, without being required to do so by the defendant, and by giving notice thereof to such defendant, or his attorney.

a. These provisions of the revised statutes, apply only to courts of record and are not applicable to justices' courts (*Payne* v. *Hathaway*, 4 N. Y. Leg. Obs. 21).

Practice on applying for security.—The practice as to ordering and filing security for costs is unchanged by the code (*Cadwell* v. *Manning*, 24 How. 38; *Colt* v. *Wheeler*, 12 Abb. 389). The practice to be pursued when it is desired to obtain security for costs is either (1) to obtain a chamber order *ex parte*, directing security to be filed within twenty days, or that cause be shown on a day after the expiration of [or during, 12 Abb. 389] said twenty days, why such security should not be filed, and staying proceedings in the mean time, or (2) to move for security on notice to the opposite party (*Cadwell* v. *Manning*, 15 Abb. 271; 24 How. 38; *Bronson* v. *Freeman*, 8 How. 493, and *Colt* v. *Wheeler*, 12 Abb. 388, stating the practice in the New York common pleas as differing from the practice in some respects in the supreme court).

a. The defendants cannot appear separately and each require security. The statute requires only one bond and that should run to and is for the benefit of all the defendants (*Leftwick* v. *Clinton*, 26 How. 26).

b. Where a defendant, after serving a notice of motion for security for costs, and before the day on which he proposes to move, receives notice that security has been filed, with a copy of the sureties' affidavit of justification, he should countermand his notice; if he persists in moving, he will be charged with costs (*Micklethwaite* v. *Rhodes*, 4 Sand. Ch. R. 434).

c. **When security will be ordered.**—It is not imperative on the court to grant an order for security for costs under all circumstances (*Robinson* v. *Sinclair*, 1 Denio, 628; *Florence* v. *Bulkley*, 1 Duer, 706; *Fearn* v. *Gelpcke*, 13 Abb. 473). The plaintiff cannot be required to file security for costs when permitted to prosecute in *forma pauperis*, nor be permitted so to prosecute if required to file security for costs (*Florence* v. *Bulkley*, 1 Duer, 706).

d. Where there are several plaintiffs, the defendant has a right to security for costs only where all of them are non-residents. If only one of the plaintiffs is a resident, the defendant is not entitled to such security, although it appears such resident plaintiff is irresponsible (*Ten Broeck* v. *Reynolds*, 13 How. 462).

e. A plaintiff who resides out of the city of New York, suing in the superior court of that city, may be required to give security for costs (*Ashbahs* v. *Coussin*, 2 Sand. 632; *Blossom* v. *Adams*, 2 Code Rep. 59; *Hicks* v. *Payson*, 7 Abb. 326). And where the plaintiff, in an action in the superior court, who resided in the county of Cayuga at the commencement of the action, subsequently assigned the demand in suit to a resident of the city of New York, and this fact was set up in opposition to a motion for security for costs, Campbell, J., decided that security for costs must be given (*Phœnix* v. *Townshend*, 1 Sand. 644, in note; 2 Code Rep. 2). It has been since held that a resident of the state who is plaintiff in an action in the court of common pleas for the city and county of New York, cannot be required to give security on the ground that he is not a resident of the city and county of New York (*Robb* v. *Macdonald*, 12 Abb. 213).

f. A plaintiff who was a non-resident at the time of commencing his action, is not excused from filing security for costs by the fact that he afterwards becomes a resident (*Ambler* v. *Ambler*, 8 Abb. 340).

g. As to requiring security where the plaintiff enlists during the action and goes out of the state (*Garwood* v. *Bradburn*, 9 Dowl. Pra. Cas. 103).

h. A non-resident plaintiff, necessarily prosecuting in the right of her intestate must give security for costs (*Murphy* v. *Darlington*, 1 Code Rep. 85).

i. A temporary absence of the plaintiff will not entitle the defendant to security for costs (2 Wend. 258; 4 *ib.* 602; 8 *ib.* 134). But an absence of a year is not temporary (2 Wend. 258; and see 4 Sand. 198).

j. A non-resident plaintiff, in an action for chattels, took proceedings for claim and delivery, and gave the usual undertaking; the defendants obtained a return of the goods,—held that the plaintiff might be required to give security (*Gelch* v. *Barnaby*, 7 Abb. 19; 1 Bosw. 657; *Boucher* v. *Pia*, 14 Abb. 1; contra, see *Wisconsin Ins. Co. Bank* v. *Hobbs*, 22 How. 494).

k. A suit must be commenced in the name of an infant—sole plaintiff—to entitle the defendant to security for costs (*Hulbert* v. *Newell*, 2 Code Rep. 54; 4 How. 93). And where a husband and infant wife brought a suit jointly, the defendant was held not entitled to security for costs, although the husband was appointed and named in the proceedings as next friend of the wife. (*Ib.*) But in a subsequent case it was held that a non-resident guardian of an infant plaintiff suing with other plaintiffs of full age, whether such guardian be a responsible person or not, may be required to give security for costs (*Ten Broeck* v. *Reynolds*, 13 How. 462). "It is a regulation of practice, entirely the creature of the court and under its control, whether a next friend shall give security or not. When appointed for an infant defendant, it is never required unless when the statute makes it necessary; when for an infant plain-

tiff, it would be required or not, according to the circumstances of the case" (*Thomas* v. *Thomas*, 18 Barb. 150). A substituted next friend must give security for costs (*Colden* v. *Haskins*, 3 Edw. Ch. R. 311).

a. Where the plaintiff recovered judgment on demurrer, and the defendant appealed to the general term pursuant to section 348, without giving security, and afterwards, and pending the appeal, removed from the State,—the plaintiff, the respondent, moved that the defendant, the appellant, give security for costs; for by the appeal he became plaintiff in error, and was a non-resident. Shankland, J., denied the motion (*Johnson* v. *Yeomans*, 8 How. 140).

b. A foreign government, suing in a court of this State, may be required to give security for costs (*Republic of Mexico* v. *Arrangois*, 3 Abb. 470).

c. **Foreign Corporation.**—A foreign corporation, before commencing an action, should file security for costs (2 R. S. 457, § 1; still in force, 10 How. 1). Omitting to do so is an irregularity only, which can at any time be cured by filing security (*Bank of Michigan* v. *Jessup*, 19 Wend. 10; *Perse & Brooks Paper Works* v. *Willett*, 14 Abb. 119). In that case security was filed after notice of motion to set aside the proceedings for irregularity. The court held it to be in time, and denied the motion. Whether a receiver of an insolvent corporation who is plaintiff shall give security for costs, is within the discretion of the court (*Briggs* v. *Vandenburgh*, 22 N. Y. 467).

d. An order at special term denying a motion to dismiss the complaint on the ground that the plaintiffs, a foreign corporation, had omitted to file security for costs, is not appealable (*Tyrone and Lock Haven R. R. Co.* v. *Schenck*, 18 How. 275).

e. Where the appellants, a foreign corporation, gave notice of appeal under section 326, without giving security or obtaining any order on the subject, the respondents moved for an order that the appellants (the plaintiffs) file security for the costs. The motion was denied (*Steam Navigation Co.* v. *Weed*, 8 How. 49).

f. A judgment by default in favor of a foreign corporation will not be set aside for a failure to file security for costs before commencing, or during the pendency of the action (*Merchants' Bank* v. *Mills*, 3 E. D. Smith, 210).

g. Where, in a suit by a foreign corporation, the plaintiffs have once put in the security for costs required by statute, they cannot be ordered to file new security, although the sureties on the original undertaking become insolvent (*Hartford Quarry Co.* v. *Pendleton*, 4 Abb. 460; *Slater Bank* v. *Sturdy*, 13 Abb. 224; 21 How. 436; *Boucher* v. *Pia*, 14 Abb. 1; see, however, *Bridges* v. *Canfield*, 2 Edw. Ch. R. 208).

h. **Security, when to be demanded.**—It has been supposed that the defendant may demand security at any time before judgment (1 Edw. Ch. R. 450); and such appears to be the view taken in the supreme court (*Boyce* v. *Bates*, 8 How. 495; *Abbott* v. *Smith*, *ib.* 463; *Butler* v. *Wood*, 10 *ib.* 314); but in the superior court a different rule prevails. Thus, in *Florence* v. *Bulkley* (1 Duer, 705), decided by Bosworth, J. and approved on consultation with the other judges, the motion was not made until after the cause had been referred and noticed for hearing; and it did not appear that there was any reason for making the motion other than such as existed and was known to the defendant at the time of the commencement of the action: it was held that the motion had been unreasonably delayed, and it was denied. And when the motion was not made until after the cause had been several times noticed for trial by the defendant himself, it was held the defendant had waived his right to demand security for costs (*Swan* v. *Matthews*, 3 Duer, 613). Whenever such a motion has been unreasonably delayed, the granting it rests in the sound discretion of the judge (*Ib.* See *Fearn* v. *Gelpcke*, 13 Abb. 437; *Boucher* v. *Pia*, 14 Abb. 1).

i. In a previous case in the superior court, where there had been a default and judgment, and the latter stood as security, the defendant, after being let in to defend, moved for security for costs, and the motion was granted (*Gardner* v. *Kelly*, 1 Code Rep. 120; 2 Sand. 633); and in that court it was held that a non-resident plaintiff, assignee for the benefit of creditors, may be ordered to

give security for costs, after judgment against him and after he has appealed from such judgment (*Ranney* v. *Stringer*, 4 Bosw. 663).

a. It was held by Mitchell, J. in *Abbott* v. *Smith* (8 How. 463); that an order for security for costs might be made after defendant's time to answer had expired but before judgment was entered.

c. After a decision overruling a demurrer to the complaint with leave to the defendant to answer on payment of costs, the defendant is not in a condition, at least until by payment of costs he has put himself in a position to be permitted to answer, to require the plaintiff to file security for costs (*Butler* v. *Wood*, 10 How. 314).

d. The motion should be made so as not to improperly delay the plaintiff in the prosecution of his action, or the motion will be denied with costs (6 Hill, 234).

e. **Form of the order.**—When the application is to a judge at chambers, the order should be in the alternative, requiring security to be filed in twenty days, or that the plaintiff show cause why such security should not be filed, at the next special term thereafter, with a stay of proceedings in the mean time; if made otherwise it might be irregular (*Bronson* v. *Freeman*, 8 How. 293; *Cadwell* v. *Manning*, 12 Abb. 271; 24 How. 88; *Colt* v. *Wheeler*, 12 Abb. 388).

f. **Effect of the order.**—An order requiring plaintiff to file security for costs, and staying his proceedings until the security shall be filed, and the sureties justify, does not operate as an extension of the time to answer (*White* v. *Smith*, 16 Abb. 102, *note*).

g. After an order to file security, or show cause, with a stay of proceedings in the mean time, the defendant cannot move to dismiss the complaint for want of prosecution of the action, because plaintiff did not, pending the stay, notice the cause for trial (*Mills* v. *Chapman*, 1 How. 102).

h. When a non-resident plaintiff gives notice of an application to the court (as for the appointment of a receiver), and before the time for making the motion the defendant obtains an order staying plaintiff's proceedings until security for costs is filed, the motion cannot be made until such security is given (*Price* v. *Betts*, 6 Paige, 44).

i. **The bond—sureties.**—The bond for security for costs need not follow the precise words of the statute, but it will be sufficient if equally favorable to the defendant (*Smith* v. *Norval*, 2 Code Rep. 14). It may be executed by the sureties alone, without the plaintiff (1 How. 191). One surety is sufficient, and the plaintiff's attorney may be the surety (4 Sand. Ch. R. 434).

j. The penalty of the bond is to be at least $250, and may be required in such larger sum as the court or judge may deem proper (*Leftwick* v. *Clinton*, 26 How. 26). But as a general rule, the defendant will not be allowed to have the security increased over $250 (1 How. 146; *Leftwick* v. *Clinton*, 26 How. 26). And when a bond is given in the lowest sum the statute prescribes, and the defendant does not object to it within twenty days, the court will not entertain a motion to increase the amount of security (*Castellanos* v. *Jones*, 4 Sand. 679). The bond must be proved or acknowledged in like manner as a deed of real estate (Rule 6) (*Colt* v. *Wheeler*, 12 Abb. 388). If the sureties are excepted to, they must justify, although they may have made an affidavit of sufficiency, a copy of which has been served with the bond (*Id. Re Faulkner*, 4 Hill, 30; *Bronson* v. *Freeman*, 8 How. 493). If the bond is executed by two sureties, and the sureties are excepted to, it is sufficient for one to justify (*Riggins* v. *Williams*, 2 Duer, 678). This applies to all cases of an order requiring security to be filed, if the order does not specifically require more than one surety. (*Ib*).

k. In *Bronson* v. *Freeman*, (8 How. 493), the summons was served January 10. On January 27, the defendant obtained [*ex parte*] and served an order of a county judge, requiring the plaintiff to file security for costs within twenty days. On January 31, the defendant obtained from the same judge, and

served, an order that the defendant have time to answer until ten days after the plaintiff has filed securities for costs, and the sureties, if excepted to, have justified and the notice of such justification given. On April 18, the plaintiff filed a bond as security for costs, with an affidavit of justification, and served a copy of the bond and affidavit on the defendant's attorney. On April 22, the defendant served notice of excepting to the sureties. No notice of justification was subsequently served, and on May 17 the plaintiff entered judgment as for want of an answer. The defendant moved to set aside the judgment for irrregularity. The court held that both parties had been irregular, and ordered the judgment set aside. The defendant was irregular in not taking the order to file security in the alternative. But the order, although irregular, could not be disregarded; and the plaintiff, not having moved to set it aside, ought to have complied with it; and this he did not do. "He should have obtained a new affidavit from the surety, after receiving notice of the exception, and have served a copy of that affidavit on the defendant's attorney. Until that was done the ten days, allowed by the order of January 31st, did not commence to run."

a. If the surety becomes insolvent, the plaintiff cannot be required to substitute another in his place (see *ante*, p. 588 *g*).

b. *Query*, whether where one of several defendants appeared and procured a bond to be filed, any other defendant can except to the sureties, or move to enlarge the penalty of the bond (*Leftwick* v. *Clinton*, 26 How. 26).

c. **Effect of omitting to file security.**—If the plaintiff neglect for an unreasonable time to file security after an order for him to do so, the defendant may move for judgment for a dismissal of the complaint (12 Wend. 295; 19 *ib.* 10; 4 *id.* 209; *Boyce* v. *Bates*, 8 How. 496).

d. **Waiver of order.**—The defendant waives an order for staying the proceedings until security for costs are given, by putting the cause on the calendar (2 Edw. Ch. R. 494; *Boyce* v. *Bates*, 8 How. 496).

e. **Liability of attorney for costs.**—In *Boyce* v. *Bates* (8 How. 495), the plaintiff was a non-resident at the time of the commencement of the action; after issue joined and after the county of trial had been changed, an order was made on the defendant's motion requiring the plaintiff to file security for costs within forty days, and staying his proceedings in the action until such security was filed. No security was filed, and after the expiration of the forty days limited by the said order, the defendant noticed the cause for trial; and the plaintiff not appearing when the cause was called, the defendant moved to dismiss the complaint. The motion was granted, and judgment entered for the defendant. The defendant demanded payment of the plaintiff's attorney of the amount of the judgment, $81 60, and $10 costs adjudged against the plaintiff on a motion in the action. The costs not being paid, the defendant moved for process against the plaintiff's attorney to compel payment. The court made an order that the plaintiff's attorney should pay the amount of the judgment and interest, the $10 awarded on the previous motion, and $10 for the costs of the motion then before the court, not exceeding in the whole $100.

f. The attorney for a non-resident plaintiff is only liable for the costs in cases where the plaintiff is a non-resident at the time of the commencement of the action and not where he becomes a non-resident pending the action. And therefore in order to compel payment of costs by the attorney it must be made to appear *affirmatively* that the plaintiff was a non-resident at the time the action was commenced (*Moir* v. *Brown*, 9 How. 270); and the plaintiff's attorney by continuing the action after the plaintiff becomes a non-resident, does not render himself liable for the costs incurred subsequent to the time when the plaintiff became such non-resident (*Long* v. *Hall*, 1 Code Rep. N. S. 115; 3 Sand. 729).

g. **Action on bond.**—If the plaintiff fail in his action, and the defendant's costs are not paid according to the condition of the bond, the defendant may commence an action on the bond as a matter of course, and without applying to the court for leave (*Higley* v. *Robin*, 7 Wend. 482). But before commencing

an action on the bond, a demand of the costs, of the plaintiff or his sureties, is necessary (5 Hill, 37: 1 How. 100; *ib.* 191; see 1 Caines R. 139).

a. A non-resident plaintiff gave security for costs and had judgment against him, from which judgment he appealed. Pending the appeal the defendant commenced an action on the bond given to secure the costs: held that in such a case the course for the plaintiff in the first action and his sureties to pursue was to move to stay the proceedings in the action on the bond, pending the appeal (*Van Vleck* v. *Clark*, 24 How. 190; 38 Barb. 316).

See the concluding sentence of § 317, and note.

b. **Municipal corporations.**—No costs, fees, disbursements or allowance shall be recovered or inserted in any judgment against municipal corporations, unless the claim upon which such judgment is founded shall have been presented for payment to the chief fiscal officer of said corporation, before the commencement of an action thereon (Laws 1859, ch. 262, § 2). This statute applies as well to claims for damages on account of the negligence or misconduct of the city authorities as to demands upon contract (*Hart* v. *City of Brooklyn*, 36 Barb. 226).

§ 304. [259.] (Am'd 1849, 1862.) *When allowed of course to the plaintiff. Costs of several actions on one instrument.*

Costs shall be allowed of course to the plaintiff upon a recovery, in the following cases:—

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial;

2. In an action to recover the possession of personal property;

3. In the actions of which a court of justice of the peace has no jurisdiction;

4. In an action for the recovery of money, where the plaintiff shall recover fifty dollars. But in an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages. And in an action to recover the possession of personal property, if the plaintiff recover less than fifty dollars damages, he shall recover no more costs than damages, unless he recovers also property the value of which, with the damages, amounts to fifty dollars, or the possession of property be adjudged to him, the value of which with the damages amounts to fifty dollars. Such value must be determined by the jury, court, or referee, by whom the action is tried.

5. When several actions shall be brought on one bond, recognizance, promissory note, bill of exchange, or other instrument in writing, or in any other case, for the same cause of

action, against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided that the party or parties proceeded against in such other action or actions shall, at the time of the commencement of the previous action or actions, have been within this State, and not secreted.

Note to Subdivision 1.

a. **When does a claim of title to real property arise?**—In *Heaton* v. *Jervis* (1 Johns. 146), it was held that the title came in question when the controversy was, whether the defendant had a right of way or not over lands admitted to be the plaintiff's (2 Caines, 220); where the issue is, whether the defendant has a right by prescription to overflow the plaintiff's lands (*Eustau* v. *Tuthill*, 2 Johns. 185). In *Sing* v. *Annin* (10 Johns. 302), an action of trespass *quare clausum fregit*, the defendant pleaded that the plaintiff's fences were insufficient; it was held the title was not in question. In *Jackson* v. *Randall* (11 Johns. 405), an action for *mesne profits*, after the trial of an ejectment suit, it was held that the title did not necessarily come in question. Title could only come in question in case the plaintiff claimed damages for occupation prior to the time of the demise alleged in the declaration in the ejectment suit. See *Brown* v. *Scofield* (8 Barb. 239); and in *Tunnicliff* v. *Lawyer* (3 Cow. 382) it was held it was not sufficient that the plaintiff offered evidence pertinent to the question of title. In *Hubbel* v. *Rochester* (8 Cow. 115), in trespass on *wild* and unoccupied lands, on the trial, defendant admitted plaintiff's title; held nevertheless it was in question and must have been proved but for the admission on the trial. This decision rested on the ground that the lands were *wild*, and that plaintiff must prove title to establish a constructive possession (*Brown* v. *Majors*, 7 Wend. 495; *Gardner* v. *Heart*, 1 Coms. 528). And in *Brown* v. *Majors*, which was also in trespass on land, part of it uninclosed and part in occupation, it was held the title was not in question. In *Radley* v. *Brice* (6 Wend. 539), trespass for taking timber, the defendant sought to justify by proof of a right of common of estovers as tenant; held that the title came in question.

b. In *Chandler* v. *Duane* (10 Wend. 563) there was set up a parol license to overflow the plaintiff's land; held the title did not come in question. In *The People* v. *N. Y. Com. Pleas* (18 Wend. 579), in trespass, a parol license to enter the plaintiff's land, to repair a drain, was set up; held the title did not come in question. In *Wickham* v. *Seely* (18 Wend. 649), trespass for entering uninclosed land covered with water; defence, license to enter; held title did not come in question; and see *Utter* v. *Gifford*, 25 How. 287; *Muller* v. *Bayard*, 15 Abb. 450; and *ante*, p. 64, *e*; *contra*, a dictum of Duer, J., *Niles* v. *Lindsley*, 8 How. 133; 1 Duer, 610).

c. In *Dunckel* v. *Farley* (1 How. 180), trespass on *wild* lands, plea not guilty, held the title was in question.

d. An answer in an action for an assault, that the place where the assault took place was a highway, puts title in issue (*Dinehart* v. *Wells*, 2 Barb. 432).

e. In *Burnet* v. *Kelly* (10 How. 406) the complaint alleged a forcible entry into the house of the plaintiff, and severing from the freehold and carrying away and converting a cooking-range of the plaintiff. The defence was that at the time of the alleged trespass the premises were possessed by one Reed, and not by the plaintiff, and alleged a license to enter from Reed, and that the said range was the property of the defendant. On the trial, the plaintiff offered to prove his title to the premises; the defendant objected on the ground that only the *possession* and not the title was in question. The court admitted the evidence to show possession. The plaintiff had a verdict, damages six

cents. A motion by the plaintiff for a certificate that the title came in question, was denied; and per Mitchell, J., after referring to the cases above abstracted and some others: "The result of the cases seems to be (1), that under the old system of pleading, if the lands were wild, the plaintiff could not prove his possession without proving his title, and that, therefore, the title to the land would be in controversy in the case of such lands whenever the possession was in controversy. (2) But if the lands were *not wild*, although they were *unoccupied*, proof of title would not be necessary in proving implied possession. (3) That under the old system of pleading, a defendant in trespass put in issue the *right to the possession*, as well as the *fact of possession*; and because the *right* was thus put in issue, the title to the land was in question. (4) But under the present system nothing is in issue but what the answer puts in issue; it does not put in issue the *right* to the possession, but only the fact of possession; the title to the land is not in question. (5) If the answer does not raise the question, the proof cannot; unless from the circumstances of the case the fact of possession could not be proved without proving the right to the possession. (6) In this case the plaintiff in his complaint did not rely on his title to the land, but on his possession of it merely; and that he alleged not to be a possession as implied from ownership, but a possession in fact. (7) The proof of a title not necessary to the plaintiff's case, not alleged in the pleadings, and not controverted there, and not disputed at the trial, although allowed by the judge *ex abundanti cautela*, should not be allowed to give the plaintiff costs, as if the defendant had questioned his title."

a. A claim of possession is not a claim of title to land. In its most comprehensive sense, the term title embraces the possession, but not in the sense used in the code, § 304 (*Muller* v. *Bayard*, 15 Abb. 449). As there used, it is nothing less than an assertion of a right of possession. An action to recover damages for the diversion of water from land of which the plaintiff alleges he is the owner and in possession, does not involve a claim of title (*Rathbone* v. *McConnell*, 20 Barb. 311; 21 N. Y. 466).

b. Where the claim of title to real property arises on the pleadings, and the plaintiff recovers a verdict, he is entitled to costs, of course. And in such a case the defendant cannot relieve himself of his liability for the costs, by admitting the title on the trial (*Niles* v. *Lindsley*, 8 How. 133; 1 Duer, 610).

c. Where the complaint alleged that the defendant entered the plaintiff's close and took and converted certain personal property therein, the answer admitted the plaintiff's title to part of the close mentioned in the complaint, and denies his title as to the residue, and justified the entry on the whole close. The verdict was special, as follows: The jury find for the defendant on the question of title put in issue, and a verdict for fifty cents, in favor of the plaintiff, for the conversion of the personal property. On motion at special term, an order was made that plaintiff recover full costs. From this order the defendant appealed, and the general term reversed the order (*Burhans* v. *Tibbits*, 7 How. 74).

On this subject see, further, note to section 55, p. 64, *ante*.

d. The only proper evidence that title came in question on the trial is the certificate of the judge who tried the cause, or an entry in the minutes, unless the pleadings show it (*Mayor &c. of N. Y.* v. *Hillsburg*, 2 Code Rep. 152; *Niles* v. *Lindsley*, 1 Duer, 610; 8 How. 133; *Burhans* v. *Tibbitts*, 7 How. 75). The certificate may be made *nunc pro tunc* even after appeal to the general term (*Snyder* v. *Beyer*, 3 E. D. Smith, 243).

e. In an action for trespass on lands where the plaintiff recovers a verdict for any amount he is entitled to recover costs under the revised statutes (2 R. S. 613, § 3), which has not been repealed by the code (*Utter* v. *Gifford*, 25 How. 289; expressly contra, *Smith* v. *Keeler*, 8 How. 55; and impliedly contra are most of the cases referred to in this note; and see *Ashley* v. *Marshall*, 19 How. 110).

f. **Costs after answer of title in justice's court.**—Where an action was originally commenced against two defendants in a district court of the city of New York, and a plea of title interposed, and thereupon the action was dis-

continued and commenced in the supreme court. The plaintiff alleged two causes of action; on one cause of action he recovered against one defendant less than $50, and failed entirely as to the other defendant, there was no certificate that title came in question, held that the plaintiff by virtue of section 61 of the code, was entitled to costs, and that the defendants were not nor was either of them entitled to costs (*Blake* v. *James*, 19 How. 321).

Note to Subdivision 2.

a. Where the plaintiff brought an action in the nature of replevin, to recover the possession of a horse, the referee before whom the cause was tried, found for the plaintiff six cents damages, and assessed the value of the horse at twenty-five dollars. The plaintiff proceeded to have his costs adjusted at the like sum of twenty-five dollars, supposing that he was entitled to as much costs as the value of the property and damages. The defendant moved to reduce the costs to twelve cents. The motion was granted (*Minks* v. *Wolf*, 8 How. 238).

b. Where in an action to recover the possession of personal property the jury find a verdict in favor of the plaintiff for a return of the property, assessing the value at less than $50, and without finding any damages for the detention, held that the plaintiff was the prevailing party and entitled to nominal damages and to as much costs as damages, and that the defendant was not entitled to costs (*Von Schoning* v. *Mitchell*, 23 How. 44; affirmed at general term, 23 How. 164; 14 Abb. 185; 468; and see *Corbin* v. *Milton*, 27 How. 76).

c. In an action to obtain possession of personal property, the plaintiff had a verdict for a portion of the property assessed at the value of $200, and the defendant a verdict for the residue, held that each party was entitled to costs (*Porter* v. *Willet*, 14 Abb. 319; *Summers* v. *Jarvis*, 14 Abb. 322, *note*).

d. In an action to recover possession of personal property, where the defendant before the retaking of the property, under an equitable defence tendered the amount he claimed to be due and kept his tender good, and on the trial the plaintiff had a verdict for less than the sum tendered, held the plaintiff was not entitled to costs (*Archer* v. *Cole*, 22 How. 411).

Note to Subdivisions 3 *and* 4.

e. There is no provision in the code saving from the operation of this section cases pending at the time of its adoption; and, therefore, in an action for an assault, commenced while the code of 1848 was in force, and decided after the passage of the code of 1849, where the plaintiff recovered six cents damages, it was held that he was entitled to no more costs than damages (*Stone* v. *Duffy*, 1 Code Rep. N. S., 129; *Keating* v. *Anthony*, ib. 233; *Holmes* v. *St. John*, 2 Code Rep. 46). The same was decided in an action for libel (*Taylor* v. *Gardner*, 2 Code Rep. 47; *Belding* v. *Conklin*, ib. 112; 4 How. 196; *Wheeler* v. *Westgate*, ib. 269).

f. In the case of an action in the supreme court, against a justice for a false return, if the plaintiff recover less than $50, the defendant is entitled to costs, although such an action is not within section 53 (*Worden* v. *Brown*, 14 How. 327), and the same was held in an action against a sheriff for not returning an execution (*Loughran* v. *Orser*, 15 *id.* 281).

g. Where the action was on a promissory note for $200 and interest, the plaintiff admitted payments and off-sets, but claimed a balance of $95 85. The cause was referred, and the referee reported that the principal and interest on the note amounted to $258 60, and that the payments and set-off amounted to $253 40, leaving due the plaintiff $5 20. The question was whether the plaintiff was entitled to costs. He contended that he was, because the total accounts of the parties proved on the trial to exceed $400. Harris, J., however, held that the plaintiff was not entitled to costs: "The plaintiff only claimed $95 85. He admitted the residue of the note had been satisfied. The only matter in dispute was the amount to be allowed the defendant. It is in no sense true

therefore, that the sum total of the accounts of both parties proved on the trial exceeded $400" (*Hoodless* v. *Brundage*, 8 How. 263).

a. Where an action was brought on a promissory note for $186, given on the settlement of accounts between the parties, and the defence was that a mistake occurred in such settlement which, if corrected, would show that the defendant did not owe any thing. The total amount of the accounts exceeded $2,000. The accounts were examined by the referee on the trial, and the mistake corrected, by which the amount due the plaintiff was reduced to $26 12. The referee found, "that plaintiff recover of defendant $26 12 with costs." The plaintiff's costs were adjusted by the clerk, and entered in the judgment; and, on motion to set aside the judgment for the costs, held plaintiff was entitled to his costs, as the case was one in which a justice of the peace had no jurisdiction (*Gilliland* v. *Campbell*, 18 How. 177).

b. A plaintiff who sues in a court of record in an action arising on contract, for the recovery of money only, and proves contested demands which, with those established by defendant, exceed $400 in amount, is entitled to costs, although he recover less than $50. Thus, where the plaintiff demanded $656 76 and interest. On the trial, the amount was admitted to be $832 97. Defendant established a set-off to $831 82, and the plaintiff had judgment for $1 15, —held he was entitled to his costs (*Stillwell* v. *Staples*, 5 Duer, 691). Demands admitted on the trial are *proved* (id; and 8 Abb. 365).

c. Where the plaintiffs sued in the superior court for $414 51, and were allowed only $120, and the defendant set up a counter-claim of $98 38, and was allowed $78 24, and for the balance, $41 76, the plaintiffs recovered,—held that the defendant was entitled to costs (*Spring Valley Shot & Lead Co.* v. *Jackson*, 2 Sand. 622). And where the plaintiff claimed $336, the defendant set up payment and counter-claim $200. On the trial plaintiff established his claim to the amount of $260 92, and defendant payment to the amount of $95 85, and counter-claim to the amount of $136 43. The actual demands therefore were less than $400, namely, $387 35,—held that the defendant was entitled to costs (*Crim* v. *Cronkhite*, 15 How. 250).

d. Where in an action on contract to recover money only, the plaintiff claims over $50, but recovered less than $50, he must pay costs as a matter of course (*Peet* v. *Warth*, 1 Bosw. 653; *Landsberger* v. *Magnetic Telegraph Co.*, 8 Abb. 35).

e. An action by a judgment creditor to set aside transfers of property made by the debtor, and to procure the appointment of a receiver of such property, its proceeds and profits, and to compel the assignee to deliver such property and proceeds, &c. to the receiver, is not an action "for the recovery of money" within subdivision 4 of section 304, nor section 308. Those words are used in the same sense in both sections, and do not include actions in which relief other than a judgment for money, must be granted to enable a plaintiff to maintain the action; these words, as here used, mean an action in which the plaintiff merely seeks to recover a judgment for a sum named (*Buchanan* v. *Morrell*, 13 How. 296).

f. Where, in an action upon contract, the plaintiff recovers less than $50, but extinguishes a counter-claim set up in the answer which exceeds that amount, neither party is entitled to costs (*Kalt* v. *Lignot*, 8 Abb. 190; affirming S. C. *id.* 33; 12 How. 535; contra, *Crane* v. *Holcomb*, 2 Hilton, 270; and see 8 Abb. 35 *n*; *Peet* v. *Warth*, 1 Bosw. 653).

g. An action brought to enforce a lien, in which the plaintiff claims not possession of the property subject to the lien but judgment for the amount of the debt, is an action for the recovery of money (*Trust* v. *Person*, 3 Abb. 84), and the court has no discretion over the costs. Where, in such an action, the plaintiff proved a claim of $40, and the defendant a counter-claim of $59, held that defendant was entitled to costs. (*Id.*)

h. In suits by city authorities in the supreme court, even to enforce the assessment laws, if the plaintiffs recover less than $ 50 damages, they can recover no more costs than damages. (This was the decision; the case, *Mayor &c., of N. Y.* v. *Hillsburgh*, 2 Code Rep. 152, is erroneously reported).

a. A distinction was attempted between costs and disbursements, and it was held, that although where the plaintiff obtained an order for less than $50, he was not entitled to costs, he might nevertheless recover his disbursements (*Newton* v. *Sweet's Ex'ors*, 2 Code Rep. 61; 4 How. 134). But it was previously held, in *Swift* v. *De Witt*, 1 Code Rep. 25, and subsequently in *Belding* v. *Conklin*, *Wheeler* v. *Westgate*, *Stone* v. *Duffy*, and *Keating* v. *Anthony* (*ante*, p. 594, *e*), that where a party was not entitled to costs, he was not entitled to disbursements. Costs include disbursements (*Peet* v. *Warth*, 1 Bosw. 653).

b. The word "*recover*" means what shall be assessed as damages, *eo nomine* (*Van Horn* v. *Petrie*, 2 Caines' R. 213; *Seaman* v. *Bailey*, ib. 214). Before the code, it was said that the amount of the judgment recovered was the test to determine the right to costs (12 Wend. 189; 8 Johns. 111; 13 *ib.* 345; 18 Wend. 560; 2 Hill, 127, *n.*; 1 How. 135; and see *Hoe* v. *Sanborn*, 24 How. 26).

c. This section does not apply to foreclosure suits (*Gallagher* v. *Egan*, 2 Sand. 742; 3 Code Rep. 203).

d. Where in an action on a joint promissory note, brought against the representatives of one of the deceased joint debtors, and the surviving joint debtor, the survivor being alleged to be insolvent, the plaintiff recovered,—held that he was entitled to costs, and that the case was not within the provisions of the revised statutes (2 R. S. 90), respecting costs against executors (*York* v. *Peck*, 9 How. 201; and see section 317 and note).

e. In an action for damages for taking personal property, the plainitff recovered six cents damages, which were paid at the trial. Defendant entered judgment for his costs. On plaintiff's motion to set aside that judgment,—held that defendant's proper course would have been, if plaintiff refused to enter judgment, to move for leave to enter judgment for his costs; yet it would be useless to set aside the judgment, as he would be entitled on the same papers to have leave to re-enter it, therefore the motion was denied without costs (*Runnell* v. *Griffin*, 8 Abb. 39).

f. Where two or more defendants are sued on a joint liability, and one suffers judgment by default, and the other defends unsuccessfully, but one judgment can be entered, and the defendants are equally liable for the whole costs (*Warner* v. *Ford*, 17 How. 54).

Note to Subdivision 5.

g. Semble, this subdivision does not apply to costs on an appeal prosecuted by defendants (*Pratt* v. *Allen*, 19 How. 450); and if several defendants appeal from several judgments on the same bond, &c., the plaintiff if he succeed may have costs of each appeal. (*Id.*)

h. Where more than one action is brought upon a bond, note or instrument against the different parties thereto, a full bill of costs is allowed in one action only and the disbursements in the others (*Pratt* v. *Allen*, 19 How. 450), and so if but one action is brought and there is a severance by the defendants. (*Id.*)

§ 305. [260.] *When allowed to defendant.*

Costs shall be allowed of course to the defendant, in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein.

i. Prima facie, a defendant is entitled to costs on the dismissal of a complaint against him. It lies on the plaintiff to show himself within some exception to this rule (*Banta* v. *Marcellus*, 2 Barb. 373).

j. "Section 305 of the code is confined to the actions mentioned in section 304, which does not apply to foreclosure suits, as is shown by the language of section 308" (*Gallagher* v. *Egan*, 2 Sand. 742). In a foreclosure suit, the court, will permit the plaintiff, on receiving his debt and costs, to dismiss his suit, without paying costs to junior incumbrancers, who have appeared to protect

their rights. So, as to the mortgager personally liable for the debt, who has conveyed the mortgage premises subject to its payment. (*Id.*)

a. Sections 305 and 306 apply as well to appeals as to original suits. Where there are two defendants, and judgment is affirmed as to one, and there is a complete reversal as to the other, the reversal, in the absence of any special circumstances, will be with costs (*Montgomery Co. B'k.* v. *Albany City B'k.*, 3 Selden, 465).

b. In an action for tort against two, where there is a verdict in favor of one defendant, and in favor of the plaintiff against the other defendant, the defendant prevailing is entitled of course to costs under section 305 (*Decker* v. *Gardner*, 4 Selden, 29; *Daniels* v. *Lyons*, 5 *id.* 549; *Hinde* v. *Meyers*, 4 How. 356; *Brown* v. *Bowen*, 16 *id.* 544; see, contra, *Bulkley* v. *Smith*, 1 Duer, 704); and except in cases brought after discontinuance in a justice's court on the ground of title coming in question (*Blake* v. *James*, 19 How. 321). And this is so, although the defendant acquitted was absent from the State at the time of the trial, but his co-defendant had in charge the preparation of the cause for trial, and the witnesses were subpœnaed and attended for both defendants (*Brown* v. *Bowen*, 16 How. 544); and in an action on contract against two, if the plaintiff fails as to one defendant, he is entitled to his costs of course (*Cuyler* v. *Coats*, 10 How. 141; *Williams* v. *Horgan*, 13 *id.* 138; 6 Duer, 658).

c. Where the defence of infancy is set up by one of several defendants, the plaintiff may as to him discontinue the action *without costs*, on application to the court before trial; but if he goes to trial and compels the defendant to establish his defence of infancy, then the plaintiff must pay the costs (*Cuyler* v. *Coats*, 10 How. 141). Where two are sued on a joint debt and they answer separately, one pleading infancy, they thenceforth cease to be united "in interest" within section 306. In such a case the judge on the trial, on the fact of infancy being proved, may, in his discretion permit the plaintiff to discontinue the action as against such infant without costs (*Butler* v. *Morris*, 1 Bosw. 329; *Wellington* v. *Classon*, 9 Abb. 177).

d. Where, in an action against a foreign corporation, it was disclosed on the trial, for the first time, that the plaintiff was a non-resident, and the complaint was thereupon dismissed for "want of jurisdiction" in the court, held that the defendants were entitled to costs as of course without any order for the purpose (*McMahon* v. *Mutual Benefit Ins. Co.* 3 Bosw. 644; 8 Abb. 297; contra, *Harriott* v. *New Jersey R. R. Co.* 8 Abb. 284. See *ante*, p. 585 *f.*

e. Where one in possession of chattels, claiming them as owner, brought an action against the mortgagee of said chattels restraining him from taking possession of them and then sold them and received the avails. On the trial, defendant's title to a small portion of the goods was established, and he had judgment against the plaintiff for the conversion, in an amount exceeding $50, held that defendant was entitled to costs (*Ashley* v. *Marshall*, 9 Abb. 361; 30 Barb. 426).

f. In an action against two defendants for the recovery of money alleged to be due from them jointly, if either defendant has a verdict or report of a referee in his favor, he is entitled to costs of course (*Corbett* v. *Ward*, 3 Bosw. 632).

See note to §§ 306, 386; and as to costs after an offer, see § 385 and note.

§ 306. [261.] (Am'd 1849, 1851.) *When allowed to either party in the discretion of the court.*

(1.) In other actions costs may be allowed or not, in the discretion of the court.

(2.) In all actions where there are several defendants not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all,

the court may award costs to such of the defendants as have judgment in their favor, or any of them.

(3.) In the following cases the costs of an appeal shall be in the discretion of the court:

1. When a new trial shall be ordered;

2. When a judgment shall be affirmed in part, and reversed in part.

a. **Costs in the discretion of the court.**—The "*other actions*" referred to in this section, are equity causes of action (*Hines* v. *Myers*, 4 How. 356; 2 Code Rep. 48; *Gallagher* v. *Egan*, 2 Sand. 742). Costs are in the discretion of the court in an action to vacate the award of arbitrators (*Wood* v. *Brooklyn Fire Ins. Co.* 10 How. 154). In an action brought after an irregular levy and sale on execution, to enjoin the parties from perfecting the sale, and to recover damages for the injury already done (*Sunney* v. *Roach*, 4 Abb. 16). In an action against a mere stakeholder under the lien law (*Eagleson* v. *Clarke*, 2 Abb. 364). In an action to set aside an assignment for the benefit of creditors (*Webb* v. *Daggett*, 2 Barb. 10). In an action where the defendant succeeds on the trial on a ground that might have been taken advantage of under section 154 (*Bridge* v. *Payson*, 5 Sand. 217). In actions of strict foreclosure (*O'Hara* v. *Brophy*, 24 How. 379); of foreclosure (*Barlow* v. *Cleaveland*, 16 How. 364; 7 Abb. 389). On appeal where a new trial is granted (3 Duer, 659).

b. The court may set aside the report of a referee, and grant a new trial, on the ground that the decision is against the weight of evidence, without imposing costs (*Wentworth* v. *Candee*, 17 How. 405).

c. The court has no discretionary power to charge either party with the entire costs, in partition, upon the ground that he has unreasonably refused to make partition by deed (*McGowan* v. *Morrow*, 3 Code Rep. 9).

d. In an action against several as joint debtors, where the costs are in the discretion of the court, and where each defendant appears by a separate attorney and counsel, and the judgment is for the defendant, the court will not allow full costs to each defendant as of course. Thus where the action was against seven different insurance companies who each appeared by separate attorney and counsel, on judgment in favor of the defendants, only three sets of costs were allowed. And per Mitchell, J.: "The fact that the defendants are incorporated companies, and have each their own attorney, gives them no greater right than private individuals have" (*Wood* v. *Brooklyn Fire Ins. Co.* 10 How. 154); and in an action against several defendants not united in interest, and making separate defences by separate answers, on judgment for all the defendants it is in the discretion of the court to restrict the defendants to one bill of costs or to allow certain of the defendants each a bill of costs (*Harper* v. *Chamberlain*, 14 Abb. 408).

See notes to §§ 304, 305.

e. **Several defendants not united in interest, making separate defences by separate answers.**—This clause applies to all actions, whether of a legal or an equitable nature (*B'k of Attica* v. *Wolf*, 18 How. 102; *Wicklow* v. *Bell*, id. 397). One of several defendants not united in interest who defends separately and succeeds, is not entitled to costs of course, but must obtain an order for their allowance (*Williams* v. *Horgan*, 13 How. 138); otherwise if the defendants are united in interest, and the case is one of those mentioned in § 304. (*Id.*) And where several defendants sued as makers and indorsers of a promissory note, answered separately, and one of them succeeded on the defence of infancy, held he was not entitled to costs of course; and he having entered judgment for his costs without any order for the purpose, was held to be irregular in so doing (*B'k of Attica* v. *Wolf*, 18 How. 102; *Wicklow* v. *Bell*, id. 397). But where such defendants do not make a separate defence by separate answers, but unite in one general denial, such as the plaintiff fails to recover

against are entitled to costs of course under section 305 (*Zinck* v. *Attenburg*, 18 How. 108).

a. In an action to dissolve a copartnership and for an accounting, the defendants appeared by one attorney, but put in separate answers, held that the defendants were not entitled to separate bills of costs (*Hall* v. *Lindo*, 8 Abb. 341).

b. Where two defendants appear by the *same attorney*, but put in separate answers, and the plaintiff succeeds in the action, either after a verdict in his favor, on demurrer, or otherwise, he can have but *one* bill of costs (*Latham* v. *Bliss*, 13 How. 416; *Buel* v. *Jay*, 13 id. 33; *Phipps* v. *Van Cott*, 15 id. 110; *Hall* v. *Lindo*, 8 Abb. 341; see, contra, *Comstock* v. *Halleck*, 4 Sand. 671). So, if the defendants appear by different attorneys, but pending the action, the defendants unite in employing the same attorney, but one bill of costs can be allowed them if they succeed (*Castellanos* v. *Beauville*, 2 Sand. 670; 3 Code R. 204).

c. Where defendants sever in their defences, collusively, and to increase the costs, the court on judgment for defendants will allow but one bill of costs (*Slater Bank* v. *Sturdy*, 15 Abb. 75). The fact that the attorneys who appear for defendants, severing in their defences, occupy the same office, afford strong presumption that the severance was to increase costs. (*Id.*) But where in good faith several defendants appear by different attorneys and defend successfully, each defendant was held entitled to costs, although the action was on an indemnity bond, executed by the defendants who at the time were partners (*Bridgeport Ins. Co.* v. *Wilson*, 7 Bosw. 699); and where in actions of tort separate defences are made by several defendants [by separate attorneys], in good faith, and not for costs, each is entitled to a full bill of costs on succeeding in the suit (*Castellanos* v. *Beauville*, 2 Sand. 670; 2 Code Rep. 204; *Colomb* v. *Caldwell*, 1 Code Rep. N. S. 41; 5 How. 326; *Bridgeport Ins. Co.* v. *Wilson*, 12 Abb. 209; 20 How. 511). Where in an action for an assault and battery against several defendants, who appeared and answered jointly and by one attorney, the plaintiff recovered against some of the defendants only, and to an amount not sufficient to carry costs, held that the defendants who had judgment in their favor were entitled to costs (*Stone* v. *Duffy*, 1 Code Rep. N. S. 129; 3 Sand. 761; and see *Marks* v. *Bard*, 1 Abb. 63).

d. Where in an action against several defendants sued jointly, one of them appears and demurs to the complaint and the other defendants appear by a different attorney and put in a joint answer, and judgment is given for the defendant on the demurrer and the complaint is dismissed, and judgment thereon in favor of the other defendants, two separate bills of costs are taxable against the plaintiff (*Wilbur* v. *Wiltsey*, 13 How. 506). But where in such a case some of the defendants, who have jointly answered appear by different attorneys on the argument of the appeal taken by the plaintiff to the general term, they cannot recover separate bills of costs on affirmance of the judgment. (*Id.*)

e. Several defendants appearing by different attorneys who are partners, are entitled if they succeed, to only one bill of costs (*Crofts* v. *Rockefellow*, 1 Code Rep. N. S. 177); and where in an action against several defendants alleged to be jointly liable on contract, two of the defendants appeared by one attorney, and the other defendant appeared by another attorney, who was clerk in the office of the former attorney, and the defendants succeeded, but one bill of costs was allowed (*Perry* v. *Livingston*, 6 How. 404).

f. Where in a suit against three, for the recovery of money, two suffer judgment by default, and the third defends the suit and has a verdict in his favor, he is entitled to costs against the plaintiff (*Comstock* v. *Bayard*, 2 Sand. 705).

g. The defendants being sued as drawers and endorsers of a note, and having put in a joint defence, and judgment having been entered for the plaintiff against two of the defendants, and the plaintiff having discontinued as to the other defendant, such defendant is not entitled to costs; because he did not

sever in his defence, but joined with the others (*Stafford* v. *Onderdonk*, 2 Code Rep. 115; 8 Barb. 99).

* § 307. [262.] (Am'd 1849, 1851, 1852, 1857, 1858, 1859, 1862, 1863, 1864.) *Amount of costs allowed.*

When allowed, costs shall be as follows:

* 1. For all proceedings before trial, including actions where judgment on failure to answer can only be taken on application to the Court, twenty-five dollars; where judgment may be taken upon failure to answer without application to the Court, ten dollars; for each additional defendant served with process, not exceeding ten, two dollars; and for each necessary defendant in excess of that number served with process, one dollar.

2. To the defendant for all proceedings before notice of trial, ten dollars, and for all proceedings after notice of and before trial, fifteen dollars.

3. To either party, where a new trial shall be had, for all proceedings before such new trial and after the granting of such new trial, twenty-five dollars; for attending upon and taking the deposition of a witness conditionally, or attending to perpetuate his testimony, ten dollars; for drawing interrogatories to annex to a commission for the taking of testimony, ten dollars; for attending the examination of a party before trial, ten dollars; for making and serving a case or case containing exceptions, twenty dollars, except that where the case shall necessarily contain more than fifty folios, there shall be allowed ten dollars, in addition thereto, and for making and serving amendments thereto, ten dollars.

4. To either party for the trial of an issue of law, twenty dollars; for every trial of an issue of fact, thirty dollars; and where the trial shall necessarily occupy more than two days, ten dollars in addition thereto.

* 5. To either party on appeal, except to the Court of Appeals, and except appeals in the cases mentioned in section three hundred and forty-nine, before argument, twenty dollars; for argument, forty dollars; and the same costs shall be allowed to either part before argument, and for argument on application for judgment upon special verdict, or upon verdict subject to the opinion of the Court, or for a new trial, on a case made, and in cases where exceptions are ordered to be heard in the

* *Amended—See Appendix.*

first instance, at a General Term, under the provisions of section two hundred and sixty-five.

6. To either party on appeal to the court of Appeals, before argument, thirty dollars; for argument, sixty dollars; and when a judgment is affirmed, the court may, in its discretion, also award damages for the delay, not exceeding ten per cent. on the amount of the judgment; for preparing and serving a case or case containing exceptions, in appeals to the court of Appeals, twenty dollars.

7. To either party, for every circuit or term not exceeding five circuits, and five special and five general terms, at which the cause is necessarily on the calendar, and is not tried, or is postponed by order of the Court, ten dollars; but in an action hereafter brought to recover dower, before admeasurement, of real property aliened by the husband, the plaintiff shall not recover costs, unless it appear that the dower was demanded before the commencement of the action, and was refused. The same costs shall be allowed to the plaintiff in proceedings under chapter two, title twelve, of the second part of this code (sections three hundred and seventy-five to three hundred and eighty-one) as upon the commencement of an action.

Note to Subdivision 1.

a. The amount of costs, $25 or $10, before trial, does not depend on the fact whether an application is made to the court or not, or whether the issue is such that application to the court would be necessary; but on the nature of the action and the mode of service, without reference to the pleadings (see *Pardee* v. *Schenck*, 11 How. 500; *Van Valkenburg* v. *Van Schaick*, 8 id. 272; *People* v. *Van Deusen*, 2 Code Rep. 7; *Candee* v. *Ogilvie*, 5 Duer, 658; *contra*, *Lawrence* v. *Davis*, 7 How. 354; *Gould* v. *Carpenter*, id. 97).

b. The allowance for each additional defendant should only be allowed for defendants who are *necessarily* made parties. The objection may be taken, for the first time on the adjustment of the costs, that some of the persons named as defendants are not necessarily parties (*Case* v. *Price*, 17 How. 348; 9 Abb. 111).

Note to Subdivision 2.

a. The fee for all subsequent proceedings before notice of trial, is not chargeable until the action has been noticed for trial (*Bedell* v. *Powell*, 3 Code Rep. 61; 13 Barb. 183; *Morrison* v. *Ide*, 3 Code Rep. 27; *Burnett* v. *Westfall*, 16 How. 430); and on payment or tender to the defendant of $10 and disbursements, the plaintiff may, at any time before the cause is noticed for trial, discontinue the action. (*Ib.*) See in note to § 322, *post*, *Discontinuance of course on payment of costs.*

d. The charge after notice of trial is taxable but once, although the cause is more than once noticed at the circuit, or upon a reference (*Perry* v. *Livingston*, 6 How. 404; *Jackson* v. *McBurney*, *ib.* 408; *Jackett* v. *Judd*, 18 How. 385; *contra*, see *Considerant* v. *Brisbane*, 1 Bosw. 644).

e. Where a verdict was set aside on payment of the costs of the circuit, held, that in such costs might be included the fee for all proceedings subsequent to the notice of trial (*Mitchell* v. *Westervelt*, 6 How. 265).

a. Where in an action against several defendants, the cause had been noticed and put on the calendar by one of the defendants, but had never been noticed or put on the calendar either by the plaintiff or the other defendant,—held, that as to that—the other defendant, the case had never been noticed, and that on obtaining an order dismissing the complaint as to him, he was not entitled to the fee for all proceedings after notice and before trial (*Tillspaugh* v. *Dick*, 8 How. 33).

b. On costs of amending after decision upon a demurrer, the successful party, if a defendant, is entitled to charge for proceedings before notice of trial (*Hendricks* v. *Bouck*, 2 Abb. 360; 4 E. D. Smith, 461).

c. Where a defendant, after judgment, is let in to defend on payment "of all the costs of the hearing before the referee, and of the proceedings subsequent thereto, held that the costs included the charge for all subsequent proceedings before notice of trial (*Buckingham* v. *Minor*, 18 How. 287). Costs of the circuit or term [to the defendant,] include costs after notice of trial and before trial" (*Shanks* v. *Rae*, 19 How. 540; *Mitchell* v. *Westervelt*, 6 How. 265; 311; *Dewey* v. *Stewart*, 6 How. 465).

d. On dismissal of a complaint before notice of trial for want of prosecution of the action, the defendant is entitled only to proceedings before notice of trial and costs of the motion to dismiss (*Tillspaugh* v. *Dick*, 8 How. 33).

Note to Subdivision 3.

e. For argument of a motion for a new trial what if any fee can be allowed see *Moore* v. *Cockcroft*, 9 How. 479; *Potsdam R. R. Co.* v. *Jacobs*, 10 How. 453; *Ellsworth* v. *Gooding*, 8 How. 1. These decisions were prior to the amendments of 1864, probably now, *where a new trial is granted*, the fee for argument is included in the allowance "*for all proceedings before such new trial*,"—but what if a new trial is denied?

Note to Subdivision 4.

f. Where questions of law arise, pending the trial of an issue of fact, and the presiding judge reserves such questions for further consideration, and such questions are subsequently decided at special term, as a motion founded on the judge's minutes, the successful party is entitled to include in his costs the charge for the trial of an issue of law (*Waterbury* v. *Westervelt*, 1 Code Rep. N. S. 215; 3 Sand. 749).

g. "I am inclined to think the provision allowing a specific fee for the trial of an issue, should be so construed as to entitle the prevailing party to that fee as often as the cause is brought to a hearing upon the merits under the issue that has been made. Thus, if an issue of fact be brought to trial, and for any cause a juror is withdrawn, or, being unable to agree, the jury is discharged without rendering a verdict, the party who is finally successful would, undoubtedly, be allowed a trial fee though the trial did not result in a decision" (Harris, J., *Ellsworth* v. *Gooding*, 8 How. 4; and see *Van Schaick* v. *Winne*, *ib.* 5; *Potsdam R. R. Co.* v. *Jacobs*, 10 *id.* 454).

g. Upon the decision of a demurrer noticed as frivolous under § 247, the prevailing party is not entitled to a trial fee of an issue of law (*Rochester City Bank* v. *Rapelje*, 12 How. 26; *Bk. of Providence* v. *Jacobson*, 22 How. 470; *Bell* v. *Noah*, 24 How. 478; *contra*, *Pratt* v. *Allen*, 19 How. 450; *Lawrence* v. *Davis*, 7 How. 354; *Roberts* v. *Morrison*, 7 How. 396). It is not the trial of an issue (*id.*), and the fee is allowed only where there is an issue (*Pardee* v. *Schenck*, 11 *id.* 500; *Chapman* v. *Lemon*, *id.* 236; *contra*, see *Roberts* v. *Morrison*, 7 How. 396).

h. Trial fee to each of several defendants, see *Transcript*, 22 Oct. 1860.

i. In a suit for a partnership account, a fee for the trial of issues of law is taxable on the cause being heard at the special term, and a reference to take an account directed (*Wiggins* v. *Arkenburg*, 4 Sand. 688). After the referee had determined the question of fact, there was a motion for a re-hearing at a general term; held that a fee for the trial of an issue of law was taxable. (*Ib.*)

a. Where the plaintiff withdraws a juror, and is allowed to amend his complaint on payment of costs of the term, the defendant is allowed a trial fee, and for services subsequent to notice of trial and before trial (*Dewey* v. *Stewart*, 6 How. 465).

b. A fee for the trial of an issue of fact, is allowable in an action at issue where the plaintiff fails to appear when the case is called upon the calendar, and the defendant takes an order that the complaint be dismissed (*Dodd* v. *Curry*, 2 Code Rep. 69; 4 How. 123; *Shannon* v. *Brower*, 2 Abb. 377).

c. [In the first judicial district, an application to the court for judgment under section 246, is regarded as a trial of an issue of fact; and a trial fee is always allowed on the adjustment of costs. See however, 11 How. 240].

d. The assessment of damages by a sheriff's jury or a reference to take an account or to ascertain damages, is not a trial (*Tuaks* v. *Schmidt*, 25 How. 340; *Randolph* v. *Foster*, 4 Abb. 262).

e. When a plaintiff voluntarily submits to a nonsuit, after evidence admitted on both sides, and while the defendant's counsel is summing up, a trial has been had; and *semble*, on the adjustment of costs, defendant is entitled to the fee for trial of an issue of fact; and so where the plaintiff is nonsuited on resting his case (*Allaire* v. *Lee*, 1 Abb. 125; 4 Duer, 609; 8 How. 4).

f. See *ante*, and note to § 252.

Note to Subdivision 5.

g. Where there is but one set of papers, one argument, and one judgment, there is but one appeal, and the successful party is entitled to but one bill of costs, notwithstanding that the several adverse parties appeared by different attorneys (*Everson* v. *Gehrman*, 2 Abb. 413). Thus, where three defendants joined in an appeal from the special to the general term. The notice of appeal was signed by three different attorneys, and was of *one* appeal. The respondents were obliged to give notice to each of the attorneys, but there was only one set of papers, one argument, and one judgment, which was for the respondent—held that he was entitled to but one bill of costs. (*Id.*)

h. On an appeal to the general term from an order granting or refusing a new trial, the costs are $20 before argument, and $40 for argument (see *Ellsworth* v. *Gooding*, 8 How. 1; *Jackett* v. *Judd*, 18 How. 385).

Note to Subdivision 6.

i. This subdivision is applicable to costs of appeals to the court of appeals in special proceedings (*The People* v. *Sturtevant*, 9 How. 304).

j. In the court of appeals all appeals are on the same footing and on the dismissal of an appeal with costs, general costs follow whether the appeal be from an order or a judgment (*White* v. *Anthony*, 23 N. Y. 164; see *Kanouse* v. *Martin*, 2 Sand. 739; *Peterson* v. *Dickell*, 8 Abb. 259). And where the court of appeals, after argument of an appeal on its merits, dismisses same with costs, it will be intended that full costs were meant; if costs of a motion only are intended, it would be so specified (*Webb* v. *Norton*, 10 How. 117).

k. Where there was judgment at special term for the defendant for costs $193, which judgment was affirmed at general term with $54, the court of appeals affirmed the judgment of the general term with costs and ten per cent. in addition upon the amount of the judgment, held that the percentage should be computed upon the amount of both the judgments below but not upon the interest accrued thereon (*Adams* v. *Perkins*, 25 How. 368).

Note to Subdivision 7.

l. Where proceedings are stayed until the return of a commission, a term fee is not allowable for any term during such stay, although the cause may have been noticed and put on the calendar (*Shufeldt* v. *Power*, 13 How. 89).

a. There can be no right to term fees until the cause is actually at issue (*Livingston* v. *Vielle Montagne Zinc Mining Co.* 2 Abb. 255; 4 Duer, 681). Thus, when the complaint was served in February, and the answer not until May, but by stipulation the cause was placed on the calendar at the March and April terms, held that no term fee was allowable for the March and April terms. (*Id.*) And on costs of an appeal or motion for a new trial on a case, no term fee is allowed for a term on which the cause may be on the calendar before the case is in fact served (*Stafford* v. *Crasto*, unreported).

b. Where a cause is set down for a particular day, and is not reached on that or any following day in the term, the prevailing party is entitled to a term fee for that term (*Ormsby* v. *Babcock*, 2 Abb. 253; 4 Duer, 680).

c. "If parties do not dispose of their cases when reached, they are not entitled to the costs of the term" (*Hendricks* v. *Bouck*, 2 Abb. 360; 4 E. D. Smith, 461).

d. "A cause is *necessarily* on the calendar when, being at issue and in readiness for trial, the party who has noticed it for trial has put it on the calendar for the purpose of trying it if he has an opportunity" (*Sipperly* v. *Warner*, 9 How. 333; *Trustees of Penn Yan* v. *Tuell*, ib. 400).

e. Where only the plaintiff notices the cause for trial, and has it in his power to try, but for any reason does not choose to do so, he cannot recover the costs of the circuit (*Whipple* v. *Williams*, 4 How. 28).

f. Where, on the application of the defendant, a cause is put over the circuit on payment of $10 costs and disbursements, which are paid, the plaintiff, on recovering a verdict, is not entitled in his general bill of costs to $10 term fee for that circuit (*Trustees of Penn Yan* v. *Tuell*, 9 How. 400).

g. Where a stipulation was given in several suits depending on the same principal point, to the effect that all should abide the event of the one first tried, and the suits were noticed for trial, several terms thereafter, though notes of issue were filed in one only,—it was held, that the plaintiff on recovering might tax a fee for attending at those terms in each of the causes. (*Ib.*)

h. Where an appeal was on the calendar for argument, and before it was reached, and at the first term after it had been placed on the calendar, the respondent moved to dismiss the appeal, and the motion was allowed with costs, held, that he was not entitled to a term fee (*Kanouse* v. *Martin*, 2 Sand. 739). But where an appeal was on the calendar, and not reached at the first term, but was reached at a subsequent term and dismissed, the court refusing to hear it, there the respondent was entitled to his term fee for all the terms during which the appeal was on the calendar and not reached, but not for the term at which the court refused to hear it (*Eckerson* v. *Spoor*, 3 Code Rep. 70).

i. In actions "*necessarily on the calendar*," and referred at the circuit *after the cause was called*, the prevailing party, on entering judgment, is entitled to $10 costs of the circuit besides disbursements (*Benton* v. *Sheldon*, 1 Code Rep. 134).

j. Where a cause is on the calendar, and before it is reached is referred by stipulation, there the successful party is entitled to a fee of $10 for the circuit at which the cause was thus postponed (*Sipperly* v. *Warner*, 9 How. 333; see *Toll* v. *Thomas*, 15 How. 315).

k. But where the cause was referred on motion *before* it was reached on the calendar at the circuit, at the instance of the defendant and against the consent of the plaintiff, it was held that the $10 for a circuit fee was not taxable: the cause was not necessarily upon the calendar (*Perry* v. *Livingston*, 6 How. 404; *Sipperly* v. *Warner*, supra).

l. The term fee of $10 cannot be allowed when the cause is unnecessarily on the calendar (*Jennings* v. *Fay*, 1 Code Rep. N. S. 231). Thus, where the defendant after receipt of notice that the plaintiff had left the State, and that no further proceedings would be taken in the cause, nevertheless continued to notice it from time to time, held that he was not entitled to a term

fee for any term subsequent to the notice that the plaintiff had abandoned the suit. (*Ib.*)

a. After a cause has been referred it is not only not necessarily on the calendar but cannot properly be on it at all. And no costs can be allowed for the terms that elapse between ordering and closing the reference, for the reason that none are given by law (*Anon.*, 1 Duer, 651; 8 How. 82).

b. A fee cannot be allowed for a term subsequent to stipulating to settle the action, and for which term notice had been given (*Latham* v. *Bliss*, 13 How. 416).

c. After a cause had been two terms on the calendar on plaintiff's notice, he moved for and obtained judgment on account of the frivolousness of the answer, held he was not entitled to term fees (*Candee* v. *Ogilvie*, 5 Duer, 658). Where there is in fact no issue to try, putting the cause on the calendar will not entitle either party to term fees (*Pardee* v. *Schenck*, 11 How. 500).

d. Where a cause goes off for the term at the request of one party, he is not entitled on his prevailing, to a term fee for that term (*Hanna* v. *Dexter*, 15 Abb. 135; *Hirsman* v. *Berger*, 5 How. 245).

e. A successful party is entitled to his term fee for attending the circuit prepared for trial when, without his own default, he had failed in trying his cause (*Fisher* v. *Hunter*, 15 How. 156; *Minturn* v. *Main*, 2 Sand. 737).

f. In *Forbes* v. *Lock* (8 How. 218), the cause was on the calendar, and was noticed by both parties for the April circuit. On the first day of the circuit the cause was reached, and called in its order and passed, neither party moving it. Afterwards, and on the same day, the plaintiff's attorney discontinued the action, and tendered defendant's attorney $12 50 for the costs of the defence, which was refused, as not being sufficient by ten dollars. Afterwards, on a second call of the calendar, the cause was again reached, and moved on behalf of the defendant. The question was, to what costs the defendant was entitled; and per Welles, J., "I think, under the circumstances of this case, the defendant was entitled to the additional $10 claimed. As soon as the circuit has commenced, the attorney becomes entitled to $10, provided the cause is necessarily on the calendar, and either not reached or postponed." (*Ib.*)

g. On an appeal to the general term from an order granting or refusing a new trial, or sustaining or overruling a demurrer [to an entire pleading]. the successful party is entitled to a term fee for each term the cause was on the special term calendar and not reached, and a term fee for each term the cause was on the general term calendar and not reached (Harris, J., *Van Schaick* v. *Winne*, 8 How. 7; and see *Elsworth* v. *Gooding*, *ib.* 1; *Moore* v. *Cookcroft*, 9 *ib.* 480; *Hagar* v. *Danforth*, 8 *ib.* 448; *Mechanics' Banking Association* v. *Kiersted*, 10 *ib.* 400; 4 Duer, 639; *Malan* v. *Simpson*, 12 Abb. 225; 20 How. 488, contra, *Jacket* v. *Judd*, 18 How. 385).

h. Where there are two defendants defending separately and only one of them puts the cause on the calendar, the cause not having been put on the calendar either by the plaintiff or the other defendant,—held that, as between the plaintiff and the defendant who did not put the cause on the calendar, the cause had never been on the calendar; and on a dismissal of the complaint for non-prosecution of the suit, it was held that the defendant who did not put the cause on the the calendar was not entitled to a term fee (*Tillepaugh* v. *Dick*, 8 How. 33).

i. Where the plaintiff in a suit commenced before the code took effect, omitted to try the cause when it was called, by reason of which omission it was placed at the bottom of the calendar at the next term, and although noticed, was not reached on the calendar, but the plaintiff had been placed under a stipulation to try the cause at the last-mentioned term,—it was held that he was entitled to the costs of that term as costs in the cause (*Post* v. *Westervelt*, 4 Sand. 689).

j. Where the attorneys of the respective parties, by a stipulation fairly en-

tered into, agree that the costs of a term or circuit at which the cause is noticed, shall abide the final event of the action, the agreement should be enforced without limit to five calendar fees (*Emmons* v. *N. Y. and Erie R. R. Co.*, 17 How. 490).

a. When the cause was noticed at the circuit by both parties, and put upon the calendar by the clerk, and on Saturday previous to the commencement of the circuit on Monday the plaintiff discontinued, held the defendant was not entitled to a term fee for the circuit which commenced on the Monday after the discontinuance (*Drew* v. *Comstock*, 17 How. 469).

b. No term fees can be allowed in the court of appeals until the return is filed (*Ref. Dutch Church* v. *Brown*, 24 How. 89). But the prevailing party is entitled to a term fee for every term after the return is filed, he is not limited to five term fees (*Adams* v. *Perkins*, 25 How. 368; *Shord* v. *Dwight*, 26 How. 168; S. C. 17 Abb. 18; *Glentworth* v. *Mount*, 17 Abb. 15).

c. A party entitled to the costs of a circuit (for attendance, &c.), should move the first opportunity after the circuit adjourns, or he will be held to have waived his right to the costs (*Whipple* v. *Williams*, 4 How. 28).

See note to §§ 172, 322.

d. **Costs where favors granted on payment of costs.**—The general practice in all cases where an amendment is allowed *on payment of costs*, is, that the party paying such costs shall be charged with the costs of all proceedings which, by the operation of the order authorizing the amendment, will be vacated. Thus, if upon the trial a plaintiff is permitted to amend his complaint in a material matter, so that a new answer is required, he would be charged with the costs of the former answer, which, as the effect of the rule, would be vacated. In other words, he would be required to pay the costs allowed for proceedings before notice of trial. On the other hand, if the defendant were allowed to amend his answer, that being the last pleading, no proceeding before the notice of trial would be vacated as the effect of the order, and the fee for proceeding before notice of trial should not be allowed. So, in case of a demurrer, if the party demurring has judgment against him, and is permitted to withdraw his demurrer and plead over upon payment of costs, the fee for proceedings *before notice of trial* is not allowable on the taxation of costs (*Nellis* v. *Deforest*, 6 How. 413). But if judgment is rendered in favor of the party demurring, and the party whose pleading is found defective is allowed to amend on payment of costs, the fee for proceedings before notice of trial should be allowed. It is the compensation allowed for drawing and serving the demurrer (*Collomb* v. *Caldwell*, 5 How. 336). Harris J. in *Van Valkenburg* v. *Van Schaick*, 8 How. 272.

e. In an action against several defendants, each defendant appeared by a separate attorney, and each demurred to the complaint, the demurrer was allowed at special term and judgment ordered for the defendant with leave to the plaintiff to amend. From this decision an appeal was taken to the general term as from an order, and on such appeal the decision at special term was reversed; and the demurrer disallowed and judgment ordered for the plaintiff, with liberty to the defendants to answer on payment of costs. The defendants desiring to answer the question arising as to the amount of the costs to be paid, it was held that, (1) the plaintiff was entitled to *only* one bill of costs; (2) that the plaintiff was entitled to charge all the disbursements occasioned by the defendants' severing in their defences; (3) that in such disbursements might be included the expense of printing the case and points; (4) that plaintiff might recover for subsequent proceedings before trial; (5) term fees not exceeding three [five]; (6) trial fee of an issue at law at special term $15; (7) trial fee at general term $15. [This is our reading of the decision, but we are by no means sure that we correctly construe the opinion of the court, particularly as to whether or not it allowed the seventh item.—Ed.] (*Phipps* v. *Van Cott*, 15 How. 110).

f. Where a demurrer to a complaint is sustained, with leave to the plaintiff to amend on payment of costs, the sum allowed "for all proceedings before notice of trial," must be included in the costs (*Hendricks* v. *Bouck*, 4 E. D. Smith, 461; 2 Abb. 360).

a. Where on a decision overruling a demurrer to an answer, leave is given to the plaintiff to withdraw his demurrer on payment of costs, the defendant is not entitled to claim costs before notice of trial, but may demand costs for subsequent proceedings before trial, together with a trial fee (*Crary* v. *Norwood*, 5 Abb. 219).

b. When a special term order which overrules a demurrer to an amended complaint is on appeal reversed, and judgment is ordered in favor of the defendant, but leave is given to the plaintiff to amend his complaint on payment of the costs of the demurrer at special term, the defendant is entitled, (1) for proceedings before notice of trial; (2) for proceedings after notice of trial, although that sum has been once paid in the action on sustaining a demurrer to the original complaint (*Considerant* v. *Brisbane*, 1 Bosw. 644; 7 Abb. 345, *note;* and see 11 How. 168).

c. At the time when the code provided a fee to the plaintiff of $10 for proceedings subsequent to notice of trial and before trial, it was held that when on the defendant's motion a cause was put over the term on payment of costs of the term, the plaintiff was entitled to the fee of ten dollars for the costs subsequent to notice of trial (*Shanks* v. *Rae*, 19 How. 540).

d. Costs fixed as the condition of a favor granted to the client are sufficiently demanded by giving notice to the attorney (*Hanna* v. *Dexter*, 15 Abb. 136).

e. **New trial on payment of costs.**—Where a new trial is granted on payment of costs, the costs to be paid include the costs of all such proceedings as are vacated by the order for the new trial; and when on the first trial an additional allowance has been made, an order is afterwards made for a new trial on payment of costs, the amount of the allowance will form part of the costs to be paid (*Ellsworth* v. *Gooding*, 8 How. 1). This case was decided without any reference to the previous case of *Hicks* v. *Waltermire* (7 How. 370), in which the trial was before referees, and on a report in favor of the plaintiff he obtained the allowance of a percentage on the amount reported due. Subsequently, the defendant obtained an order for a new trial on payment of the "costs of the reference heretofore had." The question raised, was whether the percentage allowed the plaintiff formed part of those costs; and Barculo, J., held it did not; for an extra allowance can only be obtained on a *judgment*, and as no judgment has been recovered, and there is no certainty that the plaintiff will ever recover a judgment, there is, therefore, no basis upon which a percentage can be estimated. In a subsequent case in the superior court (*McQuade* v. *N. Y. & Erie R. R. Co.*, 5 Duer, 613; 11 How. 434), it was held that, "when an action has been twice tried, the jury disagreeing on the first trial and finding for the plaintiff on the second, and a new trial is granted to defendant on condition that he pay the costs of the second trial,"—all a defendant is bound to pay is the costs of the term at which the second trial was had. He is not bound to pay the fees of plaintiff's witnesses for attending at a term or circuit intermediate those at which the two trials were had. Nor should he be required to pay the amount of any percentage that may have been allowed to the plaintiff on the coming in of the verdict."

f. Where a new trial is granted on payment of costs, it means the costs of the trial and all subsequent costs (*North* v. *Sargeant*, 14 Abb. 224), but not term fees on appeal (*North* v. *Sargeant*, 13 Abb. 259), but it includes the costs of proceedings subsequent to notice and before trial (*Keil* v. *Rice*, 24 How. 228).

Ree Rule 57.

§ 308. [263.] (Am'd 1849, 1857, 1862.) *Additional allowance.*

In addition to these allowances there shall be allowed to the plaintiff upon the recovery of judgment by him, in any action for the partition of real property, or for the foreclosure of a mortgage, or in any action in which a warrant of attachment

has been issued, or for an adjudication upon a will or other instrument in writing, and in proceedings to compel the determination of claims to real property, the sum of ten per cent. on the recovery, as in the next section prescribed, for any amount not exceeding two hundred dollars; an additional sum of five per cent. for any additional amount not exceeding four hundred dollars; and an additional sum of two per cent. for any additional amount not exceeding one thousand dollars.

And in the actions above named, if the same shall be settled before judgment therein, like allowances upon the amount paid or secured upon such settlement, at one-half the rates above specified.

a. **No motion for allowance under this section necessary.**—In the cases specified in this section the clerk enters the extra allowance of course; no order for the purpose is necessary (*Hunt* v. *Middlebrook*, 14 How. 300).

b. **Extra allowance may be made.**—In an action by the people for the repeal of royal letters patent for fraud (*The People* v. *Clarke*, 5 Selden, 349; S. C., 11 Barb. 337). Tender of the principal, interest, and costs in a foreclosure suit, before hearing, does not defeat the plaintiff's right to an allowance (*Connecticut River Banking Co.* v. *Voorhies*, 3 Abb. 173). And where an attachment has issued, a percentage may be allowed on the amount claimed, although no property has been levied upon (*Jackson* v. *Figaniere*, 15 How. 224).

c. **Extra allowance cannot be had in the following cases.**—An action to restrain defendant from violating his written agreement to sell certain articles to the plaintiff solely (*Gray* v. *Robjohn*, 1 Bosw. 618). In proceedings to foreclose a mechanic's lien (*Randolph* v. *Foster*, 4 Abb. 262; 3 E. D. Smith, 648). In procedings under the act of May, 1841, authorizing the sale of real estate to pay assessments; or under the act of April, 1855, to apportion taxes, &c., on such a sale (*Powers* v. *Barr*, 24 Barb. 142. In an action in the nature of a *quo warranto*, to try the title to an office (*The People* v. *Flagg*, 15 How. 36; 25 Barb. 652), or to set aside a voluntary assignment (*Osborne* v. *Betts*, 8 How. 31), or to compel specific performance of a contract for sale of real estate (*Weeks* v. *Southwick*, 12 How. 170), or to restrain foreclosure of a mortgage (*Sprong* v. *Snyder*, 6 How. 11), or to set aside a conveyance (*Buchanan* v. *Morrell*, 13 How. 296).

d. Where an attachment was issued and levied on sufficient property to satisfy plaintiff's claim (over $3,000), and the attachment was subsequently discharged by the defendant giving the requisite undertaking after issue was joined, the cause noticed for trial and placed on the calendar, the parties settled on the terms of defendant paying a certain sum, and plaintiff's costs and disbursements in the action,—held not to be a case in which an additional allowance could be made (*Bostwick* v. *Tioga R. R. Co.*, 17 How. 456).

e. An allowance cannot be made where, although the construction and adjudication of a written instrument is material to the decision, yet other facts established by testimony are also material (*State of Michigan* v. *Phœnix Bank*, Hoffman, J., not reported; and see 1 Bosw. 618). But an allowance can be made where the action is to set aside an assignment as fraudulent by reason of provisions on its face. Otherwise where the judgment is on account of fraud *dehors* the instrument—established by testimony. The phrase "adjudication upon a will or other instrument in writing" imports construction and determination upon the instrument exclusively, except in cases where evidence con-

ducive to interpretation is admissible. The construction intended applies to cases in which a court of equity would have been resorted to before the code, to expound, or to expound and act upon a written instrument (*Lewis* v. *Bryce*, Hoffman, J., not reported).

a. The words, "proceedings to compel the determination of claims to real property" in this section, refer only to the special proceedings authorized by the revised statutes (*Bridges* v. *Miller*, 2 Duer, 683).

b. In the actions mentioned in this section the court have no discretion to make any allowance other than that prescribed, and the allowance can be to the plaintiff only (*Williams* v. *Hernon*, 13 Abb. 297; *Hotoling* v. *Marsh*, 14 Abb. 161; 13 Abb. 297, *note*; *McLees* v. *Avery*, 4 How. 441). Thus a defendant against whom a judgment is obtained for an amount less than he offered to allow judgment to be taken against him, although entitled to costs, is not entitled to an extra allowance (*McLees* v. *Avery*, 4 How. 441). But in *Livingston* v. *Gidney* (25 How. 1), the court allowed two per cent. on the whole amount recovered, viz.: $25,000, on the ground that there was no sufficient excuse for the defence.

c. A plaintiff in an action in which an attachment issued is not entitled to costs, where pending the action the attachment was vacated (*Iselin* v. *Graydon* 26 How. 95).

* § 309. [264.] (Am'd 1849, 1857, 1858, 1859, 1862.) *Percentage, how computed. Difficult and extraordinary cases.*

These rates shall be estimated upon the value of the propetry claimed or attached, or affected by the adjudication upon the will or other instrument, or sought to be partitioned, or the amount found due upon the mortgage in an action for foreclosure. And whenever it shall be necessary to apply to the court for an order enforcing the payment of an installment falling due after judgment in an action for foreclosure, the plaintiff shall be entitled to the rate of allowance in the last section prescribed, but to no more in the aggregate than if the whole amount of the mortgage had been due when judgment was entered. Such amount of value must be determined by the court, or by the commissioners in case of actual partition. In difficult and extraordinary cases, where a trial has been had, except in any of the actions or proceedings (other than those for the partition of real estate) specified in section three hundred and eight, and in actions or proceedings for the partition of real estate, the court may also, in its discretion, make a further allowance to any party, not exceeding five per cent, upon the amount of the recovery or claim, or subject-matter involved.

d. **Where section does not apply.**—This section does not apply to applications to the court for the distribution of surplus money arising on a foreclosure sale (*N. Y. Life Ins. Co.* v. *Vanderbilt*, 12 Abb. 458); nor to trials of feigned issues or issues in the nature of feigned issues (*Burritt* v. *Silliman*, 24 How. 337).

* *Amended—See Appendix.*

Allowance in difficult and extraordinary cases.

a. **When a trial has been had.**—When a plaintiff voluntarily submits to a nonsuit, after evidence has been given on both sides, and while the defendants' counsel is summing up, it cannot be objected on application by the defendants for an allowance that a trial has not been had (*Allaire* v. *Lee*, 4 Duer, 609; 1 Abb. 125; *Wood* v. *Illinois Cent. R. R. Co.* 20 How. 285). On dismissal of complaint, for plaintiff's failure to appeal, allowance may be made (*Rogers* v. *Degan*, 4 Bosw. 669; 19 How. 119; 10 Abb. 313); and so where the cause is on the calendar, and the plaintiff voluntarily discontinues it (*Danenhover* v. *March*, 4 Abb. 254). The argument of a demurrer on which a final judgment is rendered, is a trial, and the successful party may have an extra allowance where the case is difficult or extraordinary. But this rule does not apply to a decision upon a demurrer noticed as frivolous, and so adjudged (*Small* v. *Ludlow*, 1 Hilton, 307. See however in note to § 247).

b. It has been the practice in the second judicial district to make an allowance in every case in which there is a trial (*Schwartz* v. *Poughkeepsie Ins. Co.* 10 How. 93). But the allowance must depend on the circumstances of each case (*id.*; *Sackett* v. *Ball*, 4 How. 71). The allowance should be denied in doubtful cases (*Gould* v. *Chapin*, 4 How. 185); and not allowed to executors or administrators (*Van Sickler* v. *Graham*, 7 How. 208).

c. The right of a party to an extra allowance is perfect at the time when a verdict is rendered in his favor, although the amount of such allowance may not be determined until afterwards. Thus, in an action to recover money where the cause was difficult, the plaintiff obtained a verdict in his favor at a time when the statute provided for an extra allowance; held the plaintiff was entitled to such allowance although the order for the allowance was not made until after the provision for an allowance had been repealed (*Cook* v. *N. Y. Floating Dry Dock Co.*, 1 Hilton, 556). Costs are to be adjusted according to the law in force at the rendition of the last verdict in the action (*Jones* v. *Underwood*, 18 How. 532; *Jackett* v. *Judd*, id. 385).

d. **What cases are difficult and extraordinary.**—That a cause occupied a long time in the trial of it, does not of itself make it a "difficult or extraordinary case" (*Sands* v. *Sands*, 6 How. 453; *Dexter* v. *Gardner*, 1 Code R. N. S. 80; 5 How. 417; *Howard* v. *Rome Plank Road Co.* 4 How. 416; and see *Fox* v. *Fox*, 22 How. 453). The term "difficult or extraordinary" is used in contradistinction to "common or ordinary;" it does not authorize the allowance in all litigated cases (*Fox* v. *Gould*, 5 How. 279). But by Barculo, J.: all litigated trials are "difficult and extraordinary" in some respect (*Dyckman* v. *McDonald*, 5 How. 121; *Niver* v. *Rossman*, id. 158; see *Schwartz* v. *Po'keepsie Mut. Ins. Co.* 10 id. 93; *Matthewson* v. *Thompson*, 9 id. 23). The *motive* of a plaintiff in purchasing a note for prosecution, is not a proper subject for an *extra allowance* of costs. After he has got the note, he may conduct the *prosecution* of it fairly and without objection (*Burnett* v. *Westfall*, 15 How. 421). Where a case is retried, the fact that an allowance was denied on the first trial, does not prevent an allowance being made on the second trial (*Fox* v *Fox*, 24 How. 385).

e. Extra allowance denied where defendants had separated in their defence, and each obtained a bill of costs (*Matthewson* v. *Thompson*, 9 How. 231).

f. Extra allowance is not made for the sole purpose of punishing the defendant (*Anon.*, 12 How. 565).

g. **Amount of allowance—how computed.**—The amount of allowance within the limits prescribed by this section, is entirely discretionary (*Union Bank* v. *Mott*, 13 Abb. 247). Unless the allowance exceeds the limit of section 309, or is not authorized by that section, no appeal lies (*id.*; *Wilkinson* v. *Tiffany*, 4 Abb. 98; *Cook* v. *Dickenson*, 5 Sand. 663; *Dickson* v. *McElwain*, 7 How. 189; *Dresser* v. *Jennings*, 3 Abb. 240; *Dana* v. *Fielder*, 1 Code Rep. N. S. 224).

h. It is only where the defendant recovers judgment that the allowance can be on the amount claimed (*Wilkinson* v. *Tiffany*, 4 Abb. 98).

i. The value of the property to be directly affected by the result of the ac-

tion affords a proper basis for computing the percentage authorized by this section as an allowance in difficult and extraordinary cases, so held in an action to restrain defendants from discontinuing and removing a rail-road (*The People* v. *Albany & Vermont R. R. Co.* 16 Abb. 465).

a. **Where, when, and to whom the application for the allowance should be made.**—The application must be made before the entry of judgment (*Martin* v. *McCormick*, 3 Sand. 755; 1 Code Rep. N. S. 214); but not "until all the litigation is ended" (*Powers* v. *Woolcott*, 12 How. 565). It must be made to the "*court*," and cannot be made to a "*justice at chambers*" (*Mann* v. *Tyler*, 6 How. 236; 1 Code Rep. N. S. 382; Rule 52); and it should be made in the county where the judgment is rendered, unless some special reason exist for applying elsewhere (*Niver* v. *Rossman*, 5 How. 153; 3 Code Rep. 192; see Rule 52).

b. When the trial is by jury, the application should be made at the coming in of the verdict, or at least during the term at which the trial is had (*Flint* v. *Richardson*, 2 Code Rep. 80; *Van Rensselaer* v. *Kidd*, 5 How. 242). And it must be to the judge who tried the cause (*Ib. Sackett* v. *Ball*, 3 Code R. 47; 4 How. 71). And where a cause was tried before Harris, J., in November, 1852, in which the complaint was dismissed without costs as to the defendant Betts, and with costs as to the defendant Smith—the defendant Smith moved in March, 1853, at special term before Parker, J., for an extra allowance, and attempted to excuse his delay in making the application on the ground of professional engagements; the motion was denied. (*Ib.*) But when the trial was at the circuit held in July, and the motion was made at a special term in September following, the delay was held not to be a waiver of the right to move, and an allowance was made (*Saratoga R. R. Co.* v. *McCoy*, 9 How. 341).

c. Where ejectment had been brought in the superior court of the city of New York, and judgment passed for the defendant, which was affirmed in the court of appeals, on a motion in the court of appeals for an additional allowance, the court, on denying the motion, said—The additional allowance pursuant to this section can only be made by the court of original jurisdiction, and in reference to the trial in that court (*Wolfe* v. *Van Nostrand*, 4 How. 208; 2 Coms. 570).

d. It is too late to apply at general term after judgment on appeal (*Van Rensselaer* v. *Kidd*, 5 How. 242).

e. The application should be on notice (*Niver* v. *Rossman*, 3 Code Rep. 192; 5 How. 153; *Howe* v. *Muir*, 3 Code Rep. 21). "But perhaps there is no objection to entertaining the application at the time of the trial *without* a formal notice, if the same judge is then holding a special term. That, I suppose, is what Mr. Justice Parker intended to say in *Van Rensselaer* v. *Kidd*, 5 How. 242). But if not then made, notice should be given as in other cases." (Hand. J., *Mann* v. *Tyler*, supra; approved, Allen, J., *Saratoga R. R. Co.* v *McCoy*, 9 How. 341).

f. When the allowance is made by the judge who tries the cause, at the same term as that in which the trial is had, notice of the application for an allowance is not necessary, nor need the party against whom the allowance is made be present in court. It is usual, so far as my experience goes, to ask for it when the verdict comes in, and for the judge to grant it then or during the circuit, without hearing counsel. It would be intolerable if a judge were bound to listen to affidavits and arguments upon every such question that arises. When the cause is tried before him, he obtains all the information from the trial itself which can be of any value on the subject" (Barculo, J., *Mitchell* v. *Hall*, 7 How. 491).

g. In an action against executors, the motion should not be made until the right to recover costs has been adjudged. But in such an action the motion for costs and for an allowance may be united in one motion (*Mersereau* v. *Ryers*, 12 How. 301).

h. The unsuccessful party has a right, upon an application for an allowance, to insist that there be a determination of the value of the property recovered

or claimed in the action (*Dresser* v. *Jennings*, 8 Abb. 240). It is competent to such party to waive this right. (*Id.*)

a. On motion to vacate an order granting an allowance, held (1) that as the moving papers did not show that when the order was granted the unsuccessful party objected that no proper determination of the value of the property involved in the action had been had, it must be presumed that the objection was not raised. (2) That the failure to raise it on the application for the allowance was a waiver of the right to such a determination. (3) That the granting of an allowance being a matter within the discretion of the justice, his decision ought not to be reviewed on motion before another justice. (*Id.*)

b. The last clause of rule 52 was designed to enable a party who had succeeded in a cause tried before a referee to apply for an extra allowance at a special term of the court (*Sackett* v. *Ball*, 4 How. 71). This was necessary, for the reason that no such application could be made to the referee" (*Osborne* v. *Betts*, 8 How. 31).

c. A rule in the second judicial district provide that in actions tried at the circuit or the special term, application for additional allowance must be made to the justice who heard the cause, unless he is out of the State, or unable to attend to business from ill health, or out of office. And in actions heard before referees, the application must be made in the judicial district where the action is pending. Such allowance will be made whenever there has been a trial, and the parties have appeared, and litigated the questions in controversy. See Rules in Appendix.

d. **Costs on motion for allowance.**—It has not been usual, at least so far as my own experience allows me to know, to allow costs on a motion for an extra allowance (Harris, J., *Dickson* v. *McElwain*, 7 How. 139; and to the same effect in *Schwartz* v. *Poughkeepsie Mut. Ins. Co.* 10 *id.* 93).

e. **Allowance after trial before a referee.**—Where the trial is had before referees, the application must be made to the court for the allowance (*Howe* v. *Muir*, 3 Code Rep. 21; 4 How. 252; *Niver* v. *Rossman*, 5 How. 153; 3 Code Rep. 192). The application should be on notice to the adverse party. (*Ib.*) And the court should be furnished with an affidavit of facts sufficient to enable it to form an opinion on the subject. The mere certificate of the referee that the cause is within this section, is not sufficient. Facts must be stated. (*Ib.*; *Gould* v. *Chapin*, 4 How. 185). But the certificate of the referee is more proper than an affidavit, to show what took place before him (*Main* v. *Pope*, 16 How. 271).

f. In cases heard before a referee, the motion for an extra allowance for costs is subject to the same rules, with respect to the place at which it should be made, as any other motion (*Sprang* v. *Snyder*, 1 Code Rep. N. S. 178; 6 How. 11). In a previous case, *Niver* v. *Rossman* (3 Code Rep. 192; 5 How. 153), it was held that such a motion should be made in the county where the judgment is rendered, unless some special reason exist for applying elsewhere.

g. **Review of order for allowance.**—The order for an allowance is not appealable (*Cook* v. *Dickenson*, 5 Sand. 663; *Dickson* v. *McElwain*, 7 How. 139); at least it is not reviewable on motion before another judge (*Dresser* v. *Jennings*, 8 Abb. 240). But where the allowance exceeds the prescribed percentage, then it is said the order affects a substantial right, and is subject to appeal (*Wilkinson* v. *Tiffany*, 4 Abb. 98; *Union Bank* v. *Mott*, 13 Abb. 247), or review on motion at special term. (*Id.*)

§ 310. [265.] *Interest on verdict or report, when allowed.*

When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto.

a. Interest on a report of a referee is to be computed from the time the report is made, and not from its date, if the date differs from the time when the report was in fact made (*Fuller* v. *Squire*, 8 How. 121).

§ 311. [266.] (Am'd 1849, 1857, 1862.) *Costs, how to be inserted in judgment. Disbursements, how stated. Notice of adjustments. Interlocutory costs.*

The clerk shall insert in the entry of judgment, on the application of the prevailing party, upon five days' notice to the other, except when the attorneys reside in the same city, village, or town, and then upon two days' notice, the sum of the allowances for costs, as provided by this code, the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing when required by a rule of the court. The disbursements shall be stated in detail and verified by affidavit. A copy of the items of the costs and disbursements shall be served, with a notice of adjustment.

Whenever it shall be necessary to adjust costs in any interlocutory proceeding in an action, or in any special proceedings, the same shall be adjusted by the judge before whom the same may be heard, or the court before which the same may be decided or pending, or in such other manner as the judge or court may direct.

b. Taxation or adjustment of costs and the entry of the amount in the judgment, are not stayed by an appeal with security (*Curtis* v. *Leavitt*, 1 Abb. 118). [Can appeal be perfected until costs ascertained?]

c. The words "prevailing party" in this section, "must be understood to be that party whose right to costs has prevailed" (*Johnson* v. *Sagar*, 10 How. 554; *Peet* v. *Wurth*, 1 Bosw. 653).

d. Costs are to be adjusted according to the law existing at the time of the verdict, as to all items prior to that time. The recovery which gives the right to costs means the verdict. The court cannot order judgment *nunc pro tunc* as of a date prior to the actual judgment, merely to affect the amount of a party's costs (*Moore* v. *Westervelt*, 14 How. 279; *Crary* v. *Norwood*, 5 Abb. 219; *Fisher* v. *Hunter*, 15 How. 156; *Huber* v. *Lockwood*, id. 74; *McCann* v. *Bradley*, id. 80; *Torrey* v. *Hadley*, 14 id. 357; *Hunt* v. *Middlebrook*, id. 300; *Jones* v. *Underwood*, 18 How. 532; *Jackett* v. *Judd*, id. 385; *contra*, see *Steward* v. *Lamoreaux*, 5 Abb. 14; see *ante*, p. 584, *g*).

e. The determination of an action as respects the question of costs, is the final decision authorizing a judgment. In the case of a trial by the court, it is the making and filing the decision. In the case of a referee, it is the making and delivery of the report (*Hunt* v. *Middlebrook*, 14 How. 300, Hubbard, J.). But in *Torrey* v. *Hadley*, (14 How. 357) Davis, J., held that in the case of a judgment on the report of a referee, the right to costs does *not* accrue at the time of the making the report, nor until the report is filed.

a. **When notice is necessary.**—A defendant not appearing is not entitled to notice of adjusting the costs (*Richards* v. *Swetzer*, 1 Code Rep. 117; *Wilcox* v. *Curtis*, ib. 127). But giving notice of appearance entitles the defendant to notice of adjusting the costs (*Elson* v. *N. Y. Equit. Ins. Co.*, 2 Code Rep. 30; 3 How. 418; 5 How. 233).

b. If the costs are not adjusted on the day for which notice is given, and the opposite party does not attend, the costs may be adjusted on a subsequent day without further notice (1 Johns. Cas. 32; 2 Wend. 252).

c. Where it is sworn positively that no notice of adjustment of costs has been received, it is incumbent upon the other side to show the time and manner of service (*Van Wyck* v. *Reid*, 10 How. 366). Thus where the defendant swore positively that he had received no notice of adjustment of costs, and the plaintiff's attorney merely swore that he at some time, without mentioning on what day, but more than four days prior to the time of adjustment, served a notice by mail, it was held insufficient, and a re-adjustment of the costs was ordered. (*Ib.*)

d. **What is a sufficient notice.**—Service of notice on Saturday for Monday is not a notice of two days (*Whipple* v. *Williams*, 4 How. 28, and see *Maxwell* v. *Phillips*, 6 Ves. 146; *Ross* v. *McGregor*, 1 Dowl. & L. 583; 12 M. & W. 517; *Anon.* 2 Hill, 375). The New York common pleas held recently at a general term, that a notice on Saturday for Monday is a notice of two days. See note to § 407, *post.*

e. It is no objection to a notice of the adjustment of costs, that it was given before the right to recover was established, provided the right to such costs as were noticed exist at the date for which the notice was given (*Anon.* 4 Sand. 693). So held, where the plaintiff, in an action for money only, in anticipation of a default gave notice of adjusting the costs to which he would be entitled on taking judgment by default, for a day subsequent to the time when he could regularly enter the judgment (*Ib.;* and see *Oothout* v. *Rooth*, 12 Johns. 151).

f. **Effect of omitting notice.**—The effect of omitting to give notice of adjusting the costs in the cases where the defendant is entitled thereto, has been differently decided; thus, in *Elson* v. *N. Y. Equit. Ins. Co.* (2 Code Rep. 30; 2 Sand. 654), *Bank of Masillon* v. *Dwight* (2 Code Rep. 49); *Goldsmith* v. *Marpe* (1 Code Rep. 49), *Doke* v. *Peek* (*ib.* 54), it was held that the omission made the judgment irregular, and liable to be set aside on motion; but in *Richards* v. *Swetzer* (1 Code Rep. 117), *Hughes* v. *Mulvey* (1 Sand. 92), *Dix* v. *Palmer* (3 Code Rep. 214; 5 How. 233), *Tracey* v. *Humphrey* (1 Code Rep. N. S., 197), *Stimson* v. *Huggins* (16 Barb. 658; 9 How. 86), *Potter* v. *Smith*, (9 *ib.* 262), *Macomber* v. *Mayor of N. Y.* (17 Abb. 37), *Henry* v. *Bow* (20 How. 215), the omission was held not to affect the regularity of the judgment, but only to entitle the defendant to a re-adjustment at the cost of plaintiff.

g. The question was again brought before the superior court in *Gilmartin* v. *Smith* (4 Sand. 684), when Bosworth, J., held (all the justices of that court concurring), that the adjustment of costs without notice, where the adverse party is entitled to notice, does not affect the regularity of the *entry of judgment.* But the omission of notice makes the *insertion of the costs* in the entry of judgment irregular, and liable to be vacated; so also of the judgment roll, the docket of judgment, if perfected, and the execution if issued.

h. It is irregular, in cases where the defendant has appeared, to have the costs adjusted and entered in the judgment *without notice;* and it is such an irregularity as makes the entry of judgment irregular. "The old practice of perfecting judgment, and then giving notice of re-taxation, cannot obtain under the code. * * * The true rule is laid down in *Gilmartin* v. *Smith* (4 Sand. 684)" (*Mitchell* v. *Hall*, 7 How. 491).

i. **Power of the clerk.**—No authority is conferred on the clerk to adjust costs, except in cases of final judgment; but the court may confer such authority by a special reference to him (*Eckerson* v. *Spoor*, 3 Code Rep. 70; *Morrison* v. *Ide*, 4 How. 304; *Mitchell* v. *Westervelt*, 6 How. 268; *Nellis* v. *DeForrest*, id. 413). The clerk may tax costs on mandamus (*The People* v. *Colborne*, 20

How. 378), but not in special proceedings, as in street opening cases (*Re Fourth Ave.*, 11 Abb. 190).

a. The clerk is bound to perform any service lawfully required of him on being paid his fee therefor. He cannot refuse to perform the service *i. e.* refuse to file a judgment roll, because the fee for some former service remains unpaid (*Purdy* v. *Peters*, 15 Abb. 160).

b. The clerk should examine the charges, whether they be opposed or not, and should strike out all disbursements and charges which, in his judgment have been unnecessarily incurred (*Belding* v. *Conklin*, 4 How. 199; *Stimson* v. *Huggins*, 16 Barb. 662; 9 How. 86). If he has a doubt as to the correctness of a charge, he should correct it (*Rogers* v. *Rogers*, 2 Paige, 460).

c. Has a clerk authority to adjust interlocutory costs? *Semble*, he has not (*Hicks* v. *Waltermire*, 7 How. 370; and see *Van Shaick* v. *Winne*, 8 *ib.* 6; *Ellsworth* v. *Gooding*, 8 *ib.* 1). And in *Mitchell* v. *Westervelt* (6 How. 268), Hand, J., said, "Both parties seemed to have acquiesced in the power of the clerk to tax. If that were not so, the practice in such cases might be a little doubtful. The code does not say the clerk shall not tax or "*adjust*," as it is now denominated, except on final judgment; nor does it establish a complete system in all respects. But the amendment to the judiciary act (Laws of 1847, p. 645, § 38; still in force in *Re Fourth Ave.*, 11 Abb. 190), prohibits the county clerk taxing costs, except where they shall be limited by law, exclusive of disbursements. And it has been said, the clerk has no power to tax costs. Many of the profession have, however, treated the clerk as a taxing officer; and rule 88 [now 57] recognizes taxation of interlocutory costs. No doubt the better way is to fix the amount of costs, where that can be done; and it would be proper to direct that process issue to enforce payment, which, in that case, would issue of course after twenty days. And if the sum cannot be ascertained conveniently by the court, I have no doubt it can be referred to the clerk to ascertain or adjust the amount; and I see no reason why the order may not further authorize process to collect the amount so ascertained (*People* v. *Nevins*, 1 Hill, 154)."

d. **Disbursements, how stated and verified.**—*What are not allowed as disbursements.*—Fees for serving subpœnas (*Wheeler* v. *Lozee*, 12 How. 446; *Burnett* v. *Westfall*, 15 *id.* 431); certificate of service of object of action (*Benedict* v. *Warriner*, 14 How. 568). In an action to recover the possession of lands, the *surveyor's fees*, in procuring the boundaries of the land (*Haynes* v. *Mosher*, 15 How. 216).

f. **What are allowed as disbursements.**—Disbursements include the necessary expenses in executing a commission in a foreign state (*Finch* v. *Calvert*, 13 How. 13; contra, *Perry* v. *Griffin*, 7 How. 263); the fees to witnesses (*Walker* v. *Russell*, 16 How. 91); certified copy order of reference (*Toll* v. *Thomas*, 15 How. 315); referee's fees (*id.*); fees for docketing judgment, and for transcripts (*id.*); for service of object of the action (*Benedict* v. *Warriner*, 14 *id.* 568); for service of summons (see *ante*, p. 176, *d*, *e*); printing a case (*Wilcox* v. *Curtiss*, 10 How. 91). A reasonable sum actually paid for service of the summons, complaint or notice of the object of the action, by any person other than the sheriff, and not exceeding the sheriff's fees for the like services, may be allowed as a disbursement (*Case* v. *Price*, 17 How. 348; 9 Abb. 111). The affidavit should show the reasonableness of the charge by stating the facts respecting such service. (*Id.*)

g. It is proper to allow as a disbursement proper sums paid for necessary searches, and copies of papers from the clerk's office. (*Id.*)

h. Where there are charges in the bill for the attendance of witnesses, the affidavit should state the respective names and places of abode and occupation of the witnesses, the distance they respectively travelled, the days they respectively actually attended, and that each of them was, or was believed to be, a material and necessary witness for the party on whose behalf he was subpœnaed (5 Hill, 595; 3 *ib.* 457; 6 *ib.* 376; 2 Hall, 530; 19 Wend. 82; 1 Code Rep. N. S. 400; 5 How. 458; 11 *id.* 160; 12 *id.* 446; *Hicks* v. *Brennan*, 10 Abb. 304,

Taaks v. *Schmidt*, 25 How. 340). If the adverse party show that a number of witnesses were not called at the trial, the party asking for the expense of their attendance must explain why they are not called, or the expense of their attendance should be disallowed (6 Hill, 376; *Mead* v. *Mallory*, 27 How. 32). The clerk is not then at liberty longer to follow the ordinary affidavit (*Dowling* v. *Bush*, 6 How. 410). Allowance for attendance of non-resident witnesses (4 Sand. 789).

a. Charges for copies of papers cannot be taxed unless it be stated in the affidavit that such copies were actually and necessarily made for use or used, and it must appear that the disbursements were necessary and reasonable in amount (2 R. S. 653, § 7).

b. Where postage or other disbursements are charged in a bill of costs, each item of such disbursement, and the occasion or circumstance of the expenditure should be particularly specified (2 Paige, 459). And where papers are sent by express instead of by mail, the amount of carriage paid, not exceeding what would have been the amount of postage, may be allowed (*N. Y. Trust Co.* v. *Davis*, 10 Paige 507). Expenses of serving complaint (4 How. 28; 2 Sand. 742).

c. Where the items of disbursement for the attendance of witnesses were particularly stated in the affidavit of disbursements, but where stated in gross in the bill of costs, and objection was made to the allowance of such items on that ground,—held, that the objection was properly overruled (*Hagar* v. *Danforth*, 8 How. 448). In a subsequent case (*Shannon* v. *Brower*, 2 Abb. 377), Emott, J., said he was unable to agree with Parker, J., in *Hagar* v. *Danforth*, and that the items of disbursements must be stated in detail in the bill, and that it was not sufficient that they appeared in the affidavit verifying the bill.

d. It is not material to the adverse party whether the witnesses opposed to him attend in obedience to a subpœna or by agreement, as there is now no fee for the service of a subpœna. Witnesses are entitled to their fees from the party at whose instance they attend, whether they are subpœnaed or not. And it is not necessary that it should be proved to the clerk, on the adjustment of the costs, that the witnesses were subpœnaed. Where no subpœna is used by a party to procure the attendance of his witnesses, persons whose fees he seeks to charge to his adversary must be his *witnesses* in the action. And where no subpœna is served on them they cannot be considered his witnesses, unless they were examined as such, or attended the trial as his witnesses at his request or by agreement; such request or agreement must be stated in terms in the affidavit of their attendance, or be clearly inferable therefrom (*Wheeler* v. *Lozee*, 12 How. 446; *Haynes* v. *Mosher*, 15 *id.* 216; *Taaks* v. *Schmidt*, 25 *id.* 341). A witness residing out of the State, is entitled to fees for the number of miles he travels from the boundary line within the State to the place of trial (*Hinds* v. *Schenectady Ins. Co.*, 7 How. 142). This distance should be estimated by the nearest usually travelled route; and due regard should be had to his residence in the foreign State, and the place where, by the usually travelled route, he would come to the State line. And these facts should be stated in the affidavit used on taxation. If a foreign witness travels from his residence to the place of trial *for the purpose* of attending as a witness, he may then be subpœnaed, and his travel fees will be allowed as a foreign witness. Otherwise, if he attends the trial not for the purpose of being a witness, although he is subpœnaed at the trial (*Id.* and see *Hoxland* v. *Lenox*, 4 Johns. 311; *Moulton* v, *Townsend*, 16 How. 306; *Taaks* v. *Schmidt*, 25 How. 341).

e. Where a witness was duly subpœnaed his trial fees and one days' attendance paid him, and he left home to attend pursuant to his subpœna, but returned without going to the court on learning that no court would be held, the party subpœnaing him was held entitled to tax as part of his costs the fees paid to such witness (*Roth* v. *Meads*, 20 How. 287).

f. A witness subpœnaed at his *temporary* residence or place of business, and attending, is entitled to mileage from the place where subpœnaed, if that

place is more remote than his permanent place of residence (*Clark* v. *Staring*, 4 How. 243).

a. A witness not attending court until after the cause has been adjourned may be entitled to his fees. (*Id.*)

b. A witness actually attending in two cases between the same parties is entitled to fees in both cases (*Hicks* v. *Breman*, 10 Abb. 304); and whether the witness attend pursuant to a subpœna or voluntary on the request of the parties makes no difference (*Vence* v. *Speir*, 18 How. 168; *Taaks* v. *Schmidt*, 25 How. 341).

c. An attorney of record, examined as a witness, is entitled to a witness fee for the day on which he was examined, but is not entitled to mileage (*Taaks* v. *Schmidt*, 25 How. 341).

d. Where an issue is such that the plaintiff's attorney must know the cause will be *referred* by the court, and he has been requested by the defendant's attorney to consent to refer it, and refused, the court, at the circuit orders it to be referred, the plaintiff on succeeding before the referee is not entitled to charge for witnesses' fees attending that circuit (*Pike* v. *Nash*, 16 How. 53).

e. Where a defendant subpœnaed seventeen witnesses upon an issue of forgery, which had been previously found against him on a former trial of another action presenting the same issue, when he had examined twelve, but the court on the latter trial allowed him to examine five of the seventeen only,—held that he should be allowed the costs of all the seventeen witnesses (*Loverre* v. *Vail*, 5 Abb. 227).

f. **Witnesses' fees for attendance of the party as a witness on his own behalf.**—The defendant examined as a witness on his own behalf, in answer to the testimony of the assignor of the demand in suit, is entitled to fees as a witness, to be taxed in the costs (*Querissle* v. *Hilliard*, 3 Abb. 31; and to the like effect *Logan* v. *Brooks*, 8 Abb. 127; 17 How. 29; contra, *Cornell* v. *Potter*, 15 How. 278; *Walker* v. *Russell*, 16 *id.* 91; *Case* v. *Price*, 9 Abb. 111; 17 How. 348). And this is held to include travel fees (*Rogers* v. *Chamberlain*, 7 Abb. 452). But to authorize a charge for the attendance of a party himself as a witness, it should appear that he attended *solely* as a witness (*Hanna* v. *Dexter*, 15 Abb. 135; *Brouner* v. *Frauenthal*, 20 How. 335; 12 Abb. 183). If a *party* to an action can, in any case where he is sworn and testifies as a witness on his own behalf, recover *fees as a witness* (which is doubted), such fees cannot be taxed on the ordinary affidavit. To authorize the allowance he should be required to show that he did not attend as a party, nor to conduct the trial of the cause, that the sole purpose and intent of his attendance was as a witness (*Logan* v. *Thomas*, 11 How. 160).

g. If one defendant attends the trial solely as a witness for his co-defendant, that defendant will be entitled to charge the fee for his attendance (*Walker* v. *Russell*, 16 How. 91).

h. **Review of adjustment.**—A motion in the nature of an appeal from the act of the clerk may be made to the court at special term (3 Code Rep. 24; *Whipple* v. *Williams*, 4 How. 28); and where costs are allowed to the plaintiff on an adjustment, by the clerk, to which he has no legal right, and which the defendant cannot be required to pay without a violation of the statute, and the court, at special term, deny a motion to correct the adjustment, an appeal lies to the general term (*Sluyter* v. *Smith*, 2 Bosw. 673).

i. The motion should be made promptly, and before the costs are paid (*Collomb* v. *Caldwell*, 1 Code Rep. N. S. 41; 5 How. 336; *Schermerhorn* v. *Van Vorst*, 1 Code Rep. N. S. 400; 5 How. 458; *Dresser* v. *Wickes*, 2 Abb. 460).

j. On motion in the nature of an appeal from the decision of a clerk, allowing items in a bill of costs, the affidavit in support of the motion should show that the allowance of such items was opposed, and that the items were allowed under objection (*People* v. *Oakes*, 1 How. 195); or *semble*, that the party was debarred the opportunity to object (*Goodyear* v. *Baird*, 11 How. 377). On a motion to review the adjustment of costs by the clerk, Welles, J., said, "In

regard to the items now objected to, it is not shown that they were pointed out or objected to before the clerk; and the objections now made to them cannot, therefore, be considered" (*Cuyler* v. *Coates*, 10 How. 142). *Semble*, that on the motion, only the affidavits presented to the clerk in support of the items objected to can be considered on the part of the respondent (*Logan* v. *Thomas*, 11 How. 160).

a. It is the duty of a party who is dissatisfied with the taxation, as to particular items, to bring the question as to such items directly before the court by a motion on his part, although the adverse party applies for a readjustment as to other items (*Rogers* v. *Rogers*, 2 Paige, 460).

b. If the adjustment of costs by the clerk of a county court is erroneous, the remedy of a party aggrieved, is by a motion in that court in the nature of an appeal from the decision of the clerk, not by an appeal from the judgment of the court (*Beattie* v. *Qua*, 15 Barb. 132).

c. On a motion to readjust costs and for leave to amend answer, the adjustment being sustained and the leave to amend granted, the defendant was charged $10 costs of motion in addition to the costs moved to be readjusted (*Shanks* v. *Rae*, 19 How. 540).

c. **Adjustment of costs by judge at chambers.**—The taxation of costs other than those in an interlocutory proceeding, by a judge at chambers is clearly a nullity. The clerk is the only officer authorized by the code to tax or adjust costs; and his authority is limited to the taxation of costs upon the entry of judgment, or in an interlocutory proceeding by an order (*Nellis* v. *De Forest*, 6 How. 413; *Van Schaick* v. *Winne*, 8 *id.* 6; *Hanna* v. *Dexter*, 15 Abb. 135).

§ 312. [267.] *Clerks' fees.*

The clerk shall receive,

On every trial, from the party bringing it on, one dollar; on entering a judgment by filing transcript, six cents;

On entering judgment, fifty cents; except in courts where the clerks are salaried officers, and in such courts one dollar.

He shall receive no other fee for any services whatever in a civil action, except for copies of papers, at the rate of five cents for every hundred words.

d. The fee of one dollar on every trial, from the party bringing it on, is not payable until the cause is called on to be heard (*Malcomb* v. *Jennings*, 1 Code Rep. 41). Nor is this fee payable in actions refered at the circuit, and tried before referees (*Benton* v. *Sheldon*, 1 Code Rep. 134).

e. The clerk is not entitled to charge, in any case whatever, for entering in the rough minutes, or in the books, any rule or order. Where either party desires a copy of an order, or of any other paper, the clerk may charge for the same at the rate of five cents for every hundred words. There can be no additional charge for the certificate, or for the signature to the certificate. This provision extends to every entry made, and to every paper filed (*Re Clerk of Albany*, 3 Code Rep. 102; 5 How. 11).

f. The clerk is allowed one dollar for every trial, to be paid by the party bringing it on. This extends to trials of issues of law as well as issues of fact (§ 252). The clerk is, therefore, entitled to this fee for every cause actually tried at the circuit, including demurrers (*id.*), and arguments at general term on questions reserved (*Wilcox* v. *Curtiss*, 10 How. 91).

g The dismissal of a complaint, on motion at a special term, for want of prosecution of the action, is a judgment; but the hearing of the motion is not a trial, and in such a case the clerk is not entitled to a trial fee (*Tilspaugh* v *Dick*, 8 How. 33). See *ante*, p. 455, *b*

a. The fee for entering judgment is not payable till the judgment is perfected (*Clerk's Case*, 5 How. 11). It is chargeable to the party in whose favor judgment is entered, although he may not recover costs (*Burnett* v. *Westfall*, 15 How. 430). The fee belongs to the clerk, and he may refuse to receive it (*Schermerhorn* v. *Van Vorst*, 1 Code Rep. N. S. 400; 5 How. 458).

b. The fee bill in the revised statutes, so far as is relates to clerks' fee, is repealed (*The People* v. *Supervisors of Munroe*, 15 How. 225).

c. The clerk before performing any service is entitled to insist on the payment of the fees for such service. If however he performs the service without insisting on payment of the fees therefor, he gives credit to the party who is bound to pay them, and must look to him personally (*Purdy* v. *Peters*, 23 How. 328), and the clerk is bound to perform each service required of him on being paid his fee therefor. He cannot insist that before performing some certain service required of him, he shall first be paid his fees for some previous service for which he has given credit. (*Id.*)

§ 313. [268.] *Referees' fees.*

The fees of referees shall be three dollars to each, for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation.

See note to *Trial by referees*, p. 501, *a*, *ante*.

§ 314. [269.] *Costs on postponement of trial.*

When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed, as the condition of granting the postponement.

d. Where a party obtains the postponement of a trial to a subsequent term on payment of costs, on the cause being moved for trial, on his omission to pay the same, the adverse party may insist on having the trial proceed; or he may waive that right, and the court will compel payment (*Bulkeley* v. *Keteltas*, 2 Sand. 375). The application for the costs must be made without delay, or the right will be deemed to be waived. (*Ib.*)

e. The costs, on postponing a cause at the circuit, cannot exceed $10, besides the fee of witnesses (*Noxon* v. *Bentley*, 6 How. 418). The case of *Mitchell* v. *Westervelt* (ib. 265), does not apply to a postponement under this section.

f. The costs should be paid immediately after they are ascertained, without waiting for any demand (19 Johns. 270). If the trial be postponed at the defendant's request, on condition of his paying costs, if the condition is not complied with, the plaintiff may proceed to trial (5 Hill, 516); or the court will, if the plaintiff has lost the opportunity of going to trial, enforce payment of the costs by attachment (18 Wend. 509). The circuit judge cannot make a direct order for the payment of the costs (5 Hill, 516).

g. Where the court ordered a cause postponed for the term, at defendant's instance, on payment of costs, within twenty days, or that plaintiff have judgment, it was held that on default made in payment of the costs, the plaintiff might take judgment (5 Hill, 446).

h. In a case since the code, the trial was postponed on payment of costs The defendant neglected to pay the costs. The court denied a motion for an attachment to enforce the payment (*Vreeland* v. *Hughes*, 2 Code Rep. 42).

§ 315. [270.] (Am'd 1849, 1857.) *Existing suits. Costs on a motion.*

Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute or directed to abide the event of the action.

a. **When costs are allowed.**—Where the notice of motion states that the moving party will ask for certain relief, *more* than the court, on the hearing of the motion, decide he is entitled to, he is not entitled to costs (*Whipple* v. *Williams*, 4 How. 28; *Steam Navigation Co.* v. *Weed*, 8 id. 50; *Penfield* v. *White*, id. 88; *Corbin* v. *George*, 2 Abb. 465) And where the notice of motion asks, in the alternative, for two different modes of relief, one of which the party is not entitled to, costs of opposing the motion will be allowed to the opposite party (*Smith* v. *Jones*, 2 Code Rep. 33).

b. The application for judgment under section 247 is a motion, and, "whether the application is made to a judge out of court or in court, the plaintiff may be allowed the costs of a motion. * * * * If the pleading is adjudged frivolous, the party seeking to be relieved from it will ordinarily be entitled to the costs of the application. If the application fails, the party whose pleadmg, though attacked, has been sustained, will be entitled to the costs of defending it" (*Gould* v. *Carpenter*, 7 How. 99).

c. In all motions to change the place of trial, where costs are asked for by the notice, costs to abide the event will be allowed (*Northrup* v. *Van Deusen*, 3 Code Rep. 140; 5 How. 134).

d. Before the code it was held, that costs would not be allowed on motions, unless such motions were necessary for the attainment of some substantial right in the cause; or unless they were awarded by way of punishment (*Jacobs* v. *Hooker*, 1 Barb. 71).

e. The court will in future be disposed to grant costs to the successful party in motions involving the construction of the code (*Dolner* v. *Gibson*, 3 Code Rep. 153.)

f. Where the objects of motions in two or more actions are alike, there should be but one set of papers, and costs of only one motion will be allowed (*Hornfager* v. *Hornfager*, 6 How. 13). The defendant has made two motions, when relief could have been obtained by one. He must, therefore, pay $10 costs of opposing these motions (*Mitchell* v. *Westervelt*, 6 How. 268, 311).

g. On a motion for a new trial, the court may grant the costs of a motion, not exceeding $10 (*Fellows* v. *Sheridan*, 6 How. 419; *Jacket* v. *Judd*, 18 How. 385).

h. The court will impose costs on all parties who commit irregularities (*Beech* v. *Southworth*, 6 Barb. 73; 1 Code Rep. 99; *Kellog* v. *Klock*, 2 *ib.* 28).

i. In *Saratoga and W. R. R. Co.* v. *McCoy* (9 How. 341), Allen, J., denied costs of the motion, "as none are asked for in the notice." So in 4 Abb. 225 a notice asking for other relief was held to include costs (*Falconer* v. *Ucoppel*, 2 Code Rep. 71).

j. In *Bowne* v. *Anthony* (13 How. 301), Brown, J., held that this section applied only "to such motions as are litigated, or which require the preparation and service of papers and notice upon the adverse party," and not to such motions as "applications for a reference, for judgment, for confirmation of a report of sale, in cases where there is no appearance." In that case, the action being to foreclose a mortgage, the plaintiff, on taking the usual order to compute the amount due, inserted in the order a direction allowing $10 for the costs of the motion, and in the judgment inserted a direction that they recover $10 for the costs of the motion for judgment, and the further sum of $10 for the cost of the motion to confirm the sheriff's report of sale. These three several sum of $10 were included in the plaintiff's bill of costs, and allowed by the clerk. On motion of defendants, Brown, J., struck out those items, with $10 costs.

a. In *Weeks* v. *Southwick* (12 How. 170), Harris, J., says, "I should not have thought this a proper case for charging the defendants with the costs of the motion, were it not for the fact that they have themselves claimed such costs without presenting, in their own papers, a case which, under any circumstances, would have entitled them to costs. The motion must therefore be denied, *with* costs."

b. Costs of a motion are discretionary, and cannot be interfered with on appeal (*Dennison* v. *Dennison*, 9 How. 246).

c. **Order should determine amount of costs.**—"The amount of costs upon interlocutory proceedings should be fixed in the order which awards them. In cases where a party is required to pay costs as the condition of granting him a favor, the order should specify the amount, or designate some officer to settle the amount. It is usual in such cases to provide in the order that the costs shall be fixed by the clerk, or by one of the justices of the court, or by a county judge" (*Van Schaick* v. *Winne*, 8 How. 6; see 4 How 283; 304; 13 How. 301, overruling *Thomas* v. *Clark*, 5 How. 375; 1 Code Rep. N. S. 71).

d. Where no provision is made in an order at a general term for the taxation of the costs to be paid as the condition upon which the party is to have the benefit of the order, the proper practice is to apply at a general term for a modification of the order, so as to fix the amount of costs, or direct the payment of such amount as shall be fixed by some officer designated for that purpose (*Id.*; and *Ellsworth* v. *Gooding*, 8 *ib.* 1).

e. By laws of 1840, p. 333, §. 15, "All orders awarding costs upon granting or denying special motions, shall specify the amount of such costs." This provision is supposed to be still in force (*Poillon* v. *Houghton*, 2 Code Rep. 14; *Lucas* v. *Johnson*, 1 Code Rep. N. S. 301; 6 How. 123).

f. Where a motion has been granted or denied, and nothing is said about costs in the order deciding it, the clerk can make no allowance for costs of such motion in the final costs of the action. The code provides for no costs of motion, unless the same are allowed and the amount fixed by the court on the decision of the motion (*Morrison* v. *Ide*, 3 Code Rep. 27; 4 How. 305; *Van Wyck* v. *Alliger*, 4 How. 164; *Mitchell* v. *Westervelt*, 6 *ib.* 265–311; *Nellis* v. *De Forest*, ib. 413).

g. An appeal from an order at chambers is a motion; and where no costs are awarded on the decision of such an appeal, none can be allowed (*Savage* v. *Darrow*, 4 How. 74). And where the court order that "no costs be allowed" upon granting a motion in an interlocutory order (dissolving an injunction), and the party in whose favor the motion is granted finally succeeds in the suit, costs for such motion cannot be allowed with the general costs of the cause (*Van Wyck* v. *Alliger*, 4 How. 164).

h. **Costs on order by default.**—Where notice of motion did not state that the moving party would ask for costs, but concluded in the ordinary form by stating that the moving party, the defendant, would apply for such other and further order in the premises as the court may deem proper to grant, the plaintiff did not appear to oppose the motion, and the defendant took an order by default, which order gave costs of the motion to abide the event of the suit. It was, on motion to strike out as irregular so much of said order as allowed costs, held, that under the words asking for such other order, the party could not take costs of the motion (*Northrop* v. *Van Deusen*, 3 Code Rep. 140; 5 How. 134; *Banta* v. *Marcellus*, 2 Barb. 374; see however, *Falconer* v. *Ucoppel*, 2 Code Rep. 71).

i. **Costs on a motion and interlocutory costs, how collected.**—The provisions of law for collecting interlocutory costs are not repealed by the code (*Lucas* v. *Johnson*, 1 Code Rep. N. S. 301; 6 How. 121; *Poillon* v. *Houghton*, 2 Code Rep. 14). And these provisions are,—

j. Laws of 1840, p. 333, § 15. "All orders awarding costs upon granting or denying special motions, shall specify the amount of such costs: and where the order for the payment of such costs, or any sum of money upon a special

motion, is not conditional, a precept to enforce payment of such costs or sum of money may be issued without any demand or application to the court."

a. Laws of 1847, p. 491, § 2. "No person shall be imprisoned for the non-payment of interlocutory costs, or for contempt of court for not paying costs, except attorneys, solicitors, and counsellors, and officers of court, when ordered to pay costs for misconduct as such, and witnesses when ordered to pay costs on an attachment for non-attendance (§ 3). Process in the nature of a *fieri facias* against personal property, may be issued for the collection of such costs, founded on such order of court.

b. If costs on a motion are not paid within twenty days, no previous demand is necessary prior to issuing an execution in the nature of a *fi. fa.* for their collection (*Mitchell* v. *Westervelt*, 6 How. 265; affirmed, id. 311; *Wetzell* v. *Schultz*, 3 Abb. 468: 13 How. 191). The cases of *Busard* v. *Gross* (4 How. 23); *Eckerson* v. *Spoor* (ib. 361); so far as they hold a demand necessary before process can issue, overruled. (*Ib.*)

c. The act of 1847 "does not apply to those cases of contempt where a party may be fined for any misconduct productive of an actual loss or injury to the other party" (*Livingston* v. *Fitzgerald*, 2 Barb. 396).

d. Process in the nature of a *fieri facias* cannot be issued to collect costs allowed by an order made in supplementary proceedings, because such an order is not an order of *the court*, but only of the judge or officer before whom the proceeding is pending (*Hulsaver* v. *Wiles*, 11 How. 446).

e. The costs of an application for judgment, when made upon the whole of the pleadings, relating to all or only one of the alleged causes of action, are to be collected as part of the judgment. Thus, where the defendant demurred to one of several causes of action, and judgment on account of the frivolousness of the demurrer was ordered for the plaintiff, with liberty to the defendant to amend on payment of costs, the defendant appealed to the general term, where the decision was affirmed with $10 costs of the appeal, and unless the defendant paid the costs, &c. then the plaintiff was to have judgment. The defendant not desiring to amend, refused to pay the costs, and the plaintiff moved for leave to issue a precept for their collection; his motion was denied, and it was held that the costs must be inserted in the judgment roll, and collected as part of the costs of the action (*Wesley* v. *Bennett*, 6 Abb. 12).

f. **What are interlocutory costs.**—Where one of several defences is demurred to and the demurrer is sustained with liberty to the defendant to amend on payment of costs, if the defendant does not amend, the costs of the demurrer are not interlocutory, and are not collectable by precept (*Moss* or *Mora* v. *Sun Mut. Ins. Co.* 22 How. 60; 13 Abb. 304; *Palmer* v. *Smedley*, 13 Abb. 185). Interlocutory costs are those of some proceeding intermediate the commencement of the action and its final decision (*Purchase* v. *Bellows*, 16 Abb. 108).

§ 316. *Costs against infant plaintiff.*

When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor, and payment thereof may be enforced by attachment.

§ 317. (Am'd 1851, 1852.) *Costs in an action by or against an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue. Reference of claim against a deceased person. Security for costs.*

(1.) In an action prosecuted or defended by an executor,

administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered, as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected of the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defence. But this section shall not be construed to allow costs against executors or administrators, where they are now exempted therefrom by section forty-one of title three, chapter six, of the second part of the revised statutes. (2.) And whenever any claim against a deceased person shall be referred, pursuant to the provisions of the revised statutes, the prevailing party shall be entitled to recover the fees of referees and witnesses and other necessary disbursements, to be taxed according to law. (3.) And the court may, in its discretion, in the cases mentioned in this section, require the plaintiff to give security for costs.

a. **Sureties and trustees.**—Any endorser or other surety, and any assignee, executor, administrator or other trustee, shall be entitled to and allowed to recover from his principal or *cestui que trust*, all necessary and reasonable costs and expenses paid or incurred by him in good faith, as surety or trustee in the prosecution or defence in good faith of any action by or against any assignee, executor, administrator, or other trustee as such (Laws 1858, ch. 314, § 3).

b. Assignees, trustees, and receivers stand in the same position as executors, and administrators, as to their liability for costs (*St. John* v. *Denison*, 9 How. 344).

c. **Trustees of an express trust within this section.**—A general assignee for the benefit of creditors (*Cunningham* v. *McGregor*, 12 How. 305; 5 Duer, 648). A person who, pending the action became assignee of one of the plaintiffs, by an assignment, the object of which was to indemnify him, the assignee, from all loss by reason of having indorsed and guaranteed the notes of such plaintiff (*Conger* v. *Hudson R. R. R. Co.*, 7 Abb. 255; see, *ante*, p. 119, *b.*) An action brought on behalf of a bank, in the name of its president, is not an action prosecuted in another's right so as to excuse the plaintiff, failing in the action, from paying costs (*Lowerre* v. *Vail*, 5 Abb. 229).

d. **Executor plaintiff—costs against.**—A plaintiff who sues as executor, on judgment being rendered against him, is liable for costs, either personally or to be paid by the estate, in all cases where one suing in his own right would pay costs (*Curtis* v. *Dutton*, 4 Sand. 719; *Woodruff* v. *Cook*, 14 How. 481). It is only in actions *against* executors or administrators, not in actions *by* them that any exemption from costs is provided for (*Fox* v. *Fox*, 22 How. 453).

e. Where one suing in *autre droit* has commenced a wrong suit by mistake, or has ascertained that it would be useless to proceed in consequence of facts subsequently discovered, he will be permitted to discontinue without the payment of costs (*Arnoux* v. *Steinbrenner*, 1 Paige, 82; see *Reeder* v. *Seeley*, 4 Cow. 548; and *Phœnix* v. *Hill*, 8 Johns. 249; cited and approved, *St. John* v. *Denison*, 9 How. 345). See *post* in note to § 322.

f. **Executor, &c. defendant—costs against.**—To entitle a plaintiff to charge an executor defendant, with the costs of the action, he must establish

to the satisfaction of the court, that the demand being duly presented, payment of it was, (1) unreasonably neglected, or (2) unreasonably resisted, or (3) that the executor refused to refer, as provided by the statute [2 R. S. 90, § 41] *Buckhout* v. *Hunt*, 16 How. 407; *Snyder* v. *Young*, 4 How. 217; *Van Vleck* v. *Burroughs*, 6 Barb. 341: *Fort* v. *Gooding*, 9 *id.* 388; *Russell* v. *Lane*, 1 Barb. 519; *Bullock* v. *Bogardus*, 1 Denio, 276). An executor *defendant* is not liable for costs for omitting to advertise for the presentment of claims (*Snyder* v. *Young*, 4 How. 217; *Van Vleck* v. *Burroughs*, 6 Barb. 341; 22 Wend. 571; 6 Hill, 386).

a. Where an action is commenced against an intestate in his life-time, and after his death is by order continued against his administrators pursuant to section 121, if the plaintiff succeed he is entitled to costs against the estate (*Lemen* v. *Wood*, 16 How. 285; *Benedict* v. *Caffe*, 3 Duer, 669), if the verdict be one which would have entitled the plaintiff to recover costs of the original defendant if living. (*Id.*) The exception in this section (317) refers only to actions *commenced* against executors, &c., not to an action commenced against a testator and continued against his executor (*Id. Tindall* v. *Jones*, 11 Abb. 258; 19 How. 469). In *McCann* v. *Bradley*, 15 How. 79, the general term in the first district held that where an action is commenced against a defendant, and *pendente lite*, he dies and his administrators are substituted as defendants, and the action is continued against them without any presentment of the claim to the defendants, the administrators, that the plaintiff succeeding in the action (for less however than he claimed), could not recover costs. In a subsequent case *Mitchel* v. *Mount* (17 Abb. 213), the New York Common Pleas followed the case of *Lemen* v. *Wood* (16 How. 285), and held that the provisions of 2 Rev. Stat. 90, § 41 do not affect actions brought against a testator or intestate in his lifetime and revived by his executors or administrators.

b. When in an action upon a promissory note brought against the representatives of a deceased joint debtor upon the insolvency of the survivor, in which the surviving joint debtor was made a co-defendant, and a recovery had in favor of the plaintiff,—held that the plaintiff was entitled to recover his costs (*Yorks* v. *Peck*, 9 How. 201).

c. **Offer to refer.**—The offer to refer may be by parol (*Lanning* v. *Swarts*, 9 How. 434).

d. **Disputed claim.**—A disputed claim cannot be tried by the Surrogate (*Andrews* v. *Wallige*, 17 How. 262; *Disseway* v. *B'k of Washington*, 24 Barb. 60).

e. **Unreasonable resistance.**—A claim cannot be said to be unreasonably resisted where on the trial it has been materially reduced (*Cruikshank* v *Cruikshank*, 9 How. 350; *Comstock* v. *Olmstead*, 6 *id.* 77; *Buckhout* v. *Hunt*, 16 id. 407; and cases there cited). A reduction from $1,000 to $350, or from $5,000 to $3,000 is a material reduction. (*Id.*)

f. A claim against an estate, cannot be said to be unreasonably resisted where the credit was originally given and the amount charged to a third person, but on the hearing proved to be for the benefit of the deceased (*Comstock* v. *Olmstead*, 6 How. 77); nor where the administratrix had good reason to suppose there was a valid defence to the claim in whole or a material part of it, and that probably the defence interposed would have been successful if, at the trial, she could have procured her witness (*Stephenson* v. *Clark*, 12 How. 282).

g. **Unreasonable neglect.**—Where a claim was presented thirty-four days after the issuing of letters testamentary, and was put in suit fifteen days after its presentment, held that it had not been unreasonably neglected (*Buckhout* v. *Hunt*, 16 How. 407; and see *Stephenson* v. *Clark*, 12 *id.* 282; *Russel* v. *Lane*, 1 Barb. 519; *Fort* v. *Gooding*, 9 Barb. 388; *Knapp* v. *Curtis*, 6 Hill, 386).

h. **Refusal to refer.**—In order to charge an estate with costs, on the ground of a refusal to refer a claim, it must appear affirmatively that there was a *refusal* by the legal representative to refer. Where the claimant said to the administratrix, on presenting his account, "I don't want any trouble about it, as we have always been good friends, and I am willing to have the account referred to some disinterested persons," and she replied, "I hope there will

be no trouble about it; and I will see George [her son] about it;" and on the same day a summons on the claim was put into the sheriff's hands, but not served until some fourteen days afterwards,—held that it was natural that the administratrix should understand that a general leaving out of the matter in the nature of an arbitration was intended, instead of a strict, legal reference under the statute; besides, there was, in fact, no *refusal* to refer (*Stephenson* v. *Clark*, 12 How. 282). The refusal, by executors, to refer a claim against the estate, may be either by the rejection of an offer to refer, made by the creditor, or by some equivalent act on their part. An unqualified rejection of the claim, unaccompanied with an offer to refer, is equivalent to a refusal to refer (*Fort* v. *Gooding*, 9 Barb. 388; see, however, what is said as to that case, *Buckhout* v. *Hunt*, 16 How. 412). It is not enough to show that the administrator refused to arbitrate (*Swift* v. *Blair*, 12 Wend. 278). Nor, where a claim was presented to one of several executors, which he disputed, but declined to refer, saying he wished to consult his co-executors before doing so, and the creditor, without waiting a reasonable time for that purpose, commenced a suit (*Knapp* v. *Curtis*, 6 Hill, 386). An unqualified rejection of the claim, unaccompanied with an offer to refer, is not equivalent to a refusal to refer (*Proude* v. *Whiton*, 15 How. 304; *contra*. *Fort* v. *Gooding*, 9 Barb. 394; but see 16 How. 412). A creditor having a claim against executors, &c., who desires a reference, must move first; he must offer to refer, and until he does, the executors, &c., cannot be said to refuse to refer (*Proude* v. *Whiton*, 15 How. 304). It is not sufficient for the executors, &c., to offer to refer the claim to three referees named by themselves If such an offer is rejected, and the claimant proposes that the parties shall appear before the surrogate, to have referees sel cted, the executors must accept such offer to save the liability for costs (*Gorham* v. *Ripley*, 16 How. 313).

a. What claims the executors are not bound to refer (*Sands* v. *Craft*, 18 How. 438; *Francisco* v. *Fitch*, 25 Barb. 130).

b. Actions on disputed claim need not be within six months (*Dolbeer* v. *Cosey*, 19 Barb. 149).

c. Costs against the estate will be allowed to a creditor who succeeds in an action against an executor or administrator on a claim the payment of which was unreasonably resisted (*Boyd* v. *Wilkin*, 23 How. 137).

d. In suits *against* executors, or administrators, trustees of express trusts, &c., the plaintiff cannot include costs in his judgment without obtaining leave of the court (*Mersereau* v. *Ryerss*, 12 How. 301; *Woodruff* v. *Cook*, 14 How. 481; *Marsh* v. *Hussey*, 4 Bosw. 614). If costs are included without leave of the court they will on the defendant's motion be stricken out (*Snyder* v. *Young*, 4 How. 217). Such leave may be given at the trial or upon a motion subsequently made for the purpose (*Lansing* v. *Cole*, 3 Code R. 246). Where a motion for costs against executors or administrators is made, at a term of the court not held by the same judge before whom the trial was had, the certificate of the judge before whom the trial was had must be presented, showing what facts bearing on the question of costs appeared on the trial. Whether where the motion for costs is made at a term held by the same judge who presided on the trial, any certificate is necessary, query? (*Parkhill* v. *Hillman*, 12 How. 353). A certificate of the referee's that the claim was "unreasonably resisted," is no evidence. (*Ib.*) But the better course, it is said, is to present a certificate of the referee, of what took place on the trial (*Mersereau* v *Ryerss*, 12 How. 303).

e. Under § 317 of the code which repeals § 17, title 1, ch. 10, part 3, of the Revised Statutes (2 R. S. 615) if an executor or administrator fails in an action prosecuted by him in his representative capacity, the defendant recovers costs as a matter of course, to be collected out of the estate represented, but the defendant cannot enter judgment for costs against the plaintiff *personally* unless the court so directs (*Woodruff* v. *Cook*, 14 How. 481).

f. **Reference of a claim against executors, &c., without action.**—On a reference without action of a claim against an executor or administrator after the referees have made their report, judgment cannot be entered thereon

without an application to the court at special term (*Boyd* v. *Bigelow*, 14 How. 512; *Radley* v. *Fisher*, 24 How. 404). Then either party dissatisfied may oppose the confirmation of the report or move to set it aside. If the report is confirmed, judgment is entered thereon, and then appeal may be brought from the judgment to the general term. Such an appeal is within the "act in relation to special proceedings," and no security need be given by the appellant in the first instance; but if he desire to stay proceedings pending the appeal he must apply to the court or a judge for an order for that purpose. An appeal can be brought only in the case of a judgment entered by order of the court, and not from a judgment entered on a stipulation (*Boyd* v. *Bigelow*, 14 How. 511). On a motion to confirm the report the court must either confirm the report or set it aside, it cannot order a judgment contrary to the report (*Coe* v. *Coe*, 14 Abb. 86).

a. The agreement to refer must be filed and an order entered to give the court jurisdiction (*Comstock* v. *Olmstead*, 6 How. 77).

b. A claim against the estate of deceased executor, for assets held by him as executor at his death is not a debt of the estate and is not referrable under the statute (*Sands* v. *Craft*, 10 Abb. 216).

c. Where it is agreed to refer a claim, the agreement to refer need not notice matters of defence. On the approval by the surrogate of the agreement to refer and on filing the same in the office of a clerk of the supreme court, the agreement became operative as a voluntary submission by the parties to the jurisdiction of the court. No pleadings are necessary. On the trial the plaintiff must prove his claim as on a trial and the executors may insist upon any defence they think proper (*Tracy* v. *Suydam*, 30 Barb. 110; *Munson* v. *Howell*, 12 Abb. 77; 20 How. 59).

d. **Costs on a reference of a claim.**—Where a claim against an estate had in good faith been referred under the revised statutes (2 R. S. 89), and a lengthy litigation ensued,—on motion by the prevailing party for confirmation of the report and for costs, held that section 317 of the code *excluded* all costs or allowance other than the the fees of referees and witnesses and disbursements, and such fees and disbursements were all that could be allowed to the prevailing party (*Avery* v. *Smith*, 9 How. 349). And to the like effect is *Van Sickler* v. *Graham* (7 *id.* 208); but in *Linn* v. *Clow* (14 *id.* 508), Harris, J., considered the rulings in the preceding cases had been made "apparently without much consideration," and he awarded costs of an action and disbursements to a claimant who succeeded on a reference without action; and see *Boyd* v. *Bigelow*, 14 How. 511; and see *Munson* v. *Howell*, 20 How. 59; 12 Abb. 77; *Radley* v. *Fisher*, 24 How. 404).

e. The provision of the Revised Statutes authorizing the court to adjudge costs on a reference of a claim against executors or administrators remains in force (*Radley* v. *Fisher*, 24 How. 404).

f. Where a claim against executors or administrators is referred and the referee reports adversely to the claimant, the executors or administrators are entitled to costs against the claimant as in an action (*Radley* v. *Fisher*, 24 How. 404; *Munson* v. *Howell*, 20 How. 59; 12 Abb. 77; *Linn* v. *Clow*, 14 How. 508; *Boyd* v. *Bigelow*, 14 How. 511).

g. Whether a proceeding on a referred claim is to be considered an action (*Coe* v. *Coe*, 14 Abb. 86; and note *id.* 89; *Radley* v. *Fisher*, 24 How. 404).

h. **Executor, &c. When personally liable for costs.**—Costs are not allowed against executors or administrators *personally*, except for wantonly bringing a suit (*Theriot* v. *Prince*, 12 How. 451), or for liability arising by their own act (*Ackerman* v. *Smith*, 3 Barb. 626). Where two persons sue as executors and fail in the action, one of them cannot be charged with costs on the ground that he was beneficially interested in the recovery in right of his wife (*Finley* v. *Jones*, 6 Barb. 229). But the code does not exempt every assignee or trustee from personal liability to costs, though he be not guilty of mismanagement or bad faith. Where the estate, fund, or party represented, are not brought before the court by the pleadings, judgment for costs will be given against the assignees or trustees, personally, should the defendant recover, be-

cause judgment can only be given against the parties actually before the court. Would an assignee who has a fund at the commencement of the suit from which the costs ought to be paid, should he be successful, be deemed to have mismanaged, if he pay his own costs, &c., instead of reserving it for the opposite party, who would otherwise be entitled to it? Per Mitchell, J., at special term, April, 1852, in *Smith* v. *Norris* (not reported): A trustee, &c., must sue as such in order to avoid personal liability for costs; for if he sues in his own right and is defeated he must pay costs, and no order is necessary to charge him personally (*Murray* v. *Hendrickson*, 6 Abb. 96; 1 Bosw. 635; *Carnahan* v. *Pond*, 15 Abb. 194). And a receiver who sues without leave of the court and is defeated, will as a general rule be held personally liable for the costs (*Smith* v. *Woodruff*, 6 Abb. 65; *Phelps* v. *Cole*, 3 Code Rep. 157).

a. An executor or administrator suing as such is *personally* liable for costs in any action *not necessarily* prosecuted in his representative character. And those actions *only* are necessarily prosecuted in his representative character where his testator or intestate had a complete cause of action in his life-time (*Woodruff* v. *Cook*, 14 How. 481).

b. Where a plaintiff sues as assignee or trustee of an express trust, and the court holds the instrument under which he claims void, and that he is not in fact assignee or trustee, he cannot claim any exemption from costs under this section (*Sibell* v. *Remsen*, 30 Barb. 441).

d. The provision as to mismanagement and bad faith should be confined to cases of mismanagement or bad faith on the part of the plaintiff in commencing the action, and not extended to his conduct in the management of his trust (*Kimberly, Rec'r, &c.* v. *Stewart*, 22 How. 281; *Kimberly* v. *Blackford*, 22 How. 443). Where bad faith in a receiver in commencing the action is shown, he will be required to give security for costs. Security ordered (*Kimberly* v. *Goodrich*, 22 How. 424).

e. A receiver having appealed from the decision at special term, and failed, is no evidence of mismanagement or bad faith, nor is the fact of his having paid a subsequent judgment any such evidence (*Devendorf* v. *Dickinson*, 21 How. 275).

f. Facts other than those appearing on the trial are proper to be considered in determining whether costs shall be recovered against executors or administrators (*Mercereau* v. *Ryerss*, 12 How. 301).

g. No judgment for costs against an executor, &c., *personally*, can in any case be entered unless nor until the court so directs (*Woodruff* v. *Cook*, 14 How. 481; *Devendorf* v. *Dickinson*, 21 How. 275; *Marsh* v. *Hussey*, 4 Bosw. 614; *Execution against Executor*, *Olmstead* v. *Vredenburg*, 10 How. 215; *ante*, p. 624, *a*).

h. A motion to compel a receiver to pay a judgment for costs recovered against him, should not be made until *after* an order that he pay such costs personally (*Devendorf* v. *Dickinson*, 21 How. 275).

i. **Real estate—costs against executors.**—Costs awarded against executors can in no event be a charge on real estate in the hands of an heir (*Sanford* v. *Granger*, 12 Barb. 392).

j. **Security for costs—when not required.**—Security for costs will not be required of an assignee who brings an action to recover possession of property, which has been seized on an attachment at the suit of the creditor of the assignor, on an allegation that the assignment is a fraud upon creditors and the assignee is a party to the fraud, unless there be such evidence of the truth of the allegation as renders it highly probable that the allegation is in accordance with the facts of the case (*Shepherd* v. *Burt*, 3 Duer, 645). Nor of an executor, administrator, or trustee, merely upon the ground that the estate which he represents is insolvent (*Darby* v. *Condit*, 1 Duer, 599). Unless it also appears that the plaintiff is himself insolvent. (*Id.*)

See *ante*, note to § 303.

§ 318. (Am'd 1862.) *Costs on review of a decision of an inferior court in a special proceeding.*

When the decision of a court of inferior jurisdiction in a special proceeding, including appeals from surrogates' courts, shall be brought before the supreme court for review, such proceedings shall, for all purposes of costs, be deemed an action at issue, on a question of law, from the time the same shall be brought into the supreme court, and costs thereon shall be awarded and collected in such manner as the court shall direct, according to the nature of the case.

a. Where plaintiff was nonsuited in the court below, and upon appeal to the supreme court it was held that he was entitled to recover part of what he had claimed in his action, held, that the costs in such case are discretionary with the court (*West* v. *Newton*, 5 Monthly Law Rep. N. S. 164).

b. A summary proceeding to compel a party to support a relative, brought by certiorari from the court of sessions to the supreme court for review, is within this section (*Haviland* v. *White*, 7 How. 154).

c. On an appeal to the supreme court from an order of commissioners of highways, touching the laying out of the highway, no costs can be allowed to the prevailing party (*The People* v. *Heath*, 20 How. 304, overruling *The People* v. *Flake*, 14 How. 527; see however *The People* v. *Comm'rs of Schodack*, 27 How. 158; *The People* v. *Board of Police*, 17 Abb. 324, *note*, holding that costs are allowed to the prevailing party on a common law certiorari).

d. Where the general term on a common law certiorari reversed a decision of a county judge and referees upon the question of laying out a private road, without any direction as to costs, held that a judgment entered without order for costs was irregular (*The People* v. *Robinson*, 25 How. 345). An order in such a case at special term for costs is not appealable. (*Id.*)

See Laws 1854, p. 598, § 3, as to costs on appeal in special proceedings, in note to § 349, *post*.

§ 319. *Costs in actions by the people.*

In all civil actions prosecuted in the name of the people of this State, by an officer duly authorized for that purpose, the people shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the people as plaintiff, he shall be liable in the first instance for the defendant's costs; which shall not be recovered of the people, till after execution issued therefor against such private party and returned unsatisfied.

§ 320. *Costs in actions by the people.*

In an action prosecuted in the name of the people of this State for the recovery of money or property, or to establish a right or claim, for the benefit of any county, city, town village,

corporation, or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the people.

a. In suits instituted by the district attorney of a county in the name of the people, under the Metropolitan Police Act, for selling intoxicating liquors on Sunday, if the defendants succeed the people are liable for costs (*The People* v. *Staats*, 17 How. 10).

§ 321. *Costs against assignee of cause of action, after action brought.*

In actions in which the cause of action shall, by assignment after the commencement of the action, or in any other manner, become the property of a person not a party to the action, such person shall be liable for the costs, in the same manner as if he were a party, and payment thereof may be enforced by attachment.

b. If an action be brought in the name of another, by an assignee of any right of action, or by any person beneficially interested in the recovery in such action, such assignee or person will be liable for costs in the same cases and to the same extent in which the plaintiff would be liable (2 R. S. 619, § 44), [and the payment of such costs may be enforced by attachment (*id.*); and this power of the court is not taken away by laws of 1847, ch. 290 s. 2 (*Giles* v. *Halbert*, 2 Kernan, 32)]; 1 Hill, 629; 18 Wend. 672; 10 *id.* 622; see *Evans* v. *Rees*, 1 Dowl. N. S. 388; 1 Gale and D. 579; 1 Ad. and Ell. N. S. 579). Such assignee or person also is bound to indemnify the plaintiff on record, and will be directed to pay the costs, on his application (20 Wend. 630; 7 *ib.* 497). If the party in interest, however, succeed in the action, and the defendant sues out a writ of error, and the judgment is reversed, the former is not liable for the costs of the reversal (19 *ib.* 151; and see 11 Abb. 259).

c. An assignee is liable to the defendant for costs, although the assignment is made pending the suit, if he afterwards proceed in the action (5 Cow. 17; *Carnahan* v. *Pond*, 15 Abb. 194); and in such a case he takes the demand *cum onere*, and is liable for the costs which had accrued before as well as those which may arise after the assignment (10 Wend. 622; 20 *id.* 630; *Creighton Ingersoll*, 20 Barb. 541). Where the plaintiff pending the action, made a general assignment to trustees for the benefit of creditors, and the cause was afterwards tried and the defendants had judgment, the assignees not having intermeddled with the prosecution, held, that they were not liable for the defendant's costs (*Taylor* v. *Bolmer*, 2 Denio, 198). And where a receiver of a judgment debtor brought suit as such receiver and failed, held the judgment debtor was not liable for the costs (*Wheeler* v. *Wright*, 14 Abb. 358).

d. Where a *real* plaintiff prosecuted a suit against the defendant for a penalty, by virtue of a parol agreement to divide the amount, if successful, with the *nominal* plaintiff on record, and the defendant succeeded, held that the real plaintiff was liable for the defendant's costs (*Giles* v. *Halbert*, 5 How. 319; 2 Kernan, 32).

e. A person interested by way of mortgage or lien, and who prosecutes the suit, is subject to the costs (1 Hill, 629; 15 Abb. 194). So he is liable, although an assignee of only part of a demand (1 Denio, 656).

f. A landlord, or other person, who is entitled by statute to be substituted in the place of or joined with the defendant in an ejectment suit, who without causing himself to be made a party, defends such suit unsuccessfully in

the name of the original defendant, will be ordered to pay the costs of the plaintiff, after execution against the defendant on the record has been returned unsatisfied (*Farmers' Loan and Trust Co.* v. *Kursch*, 1 Selden, 558). See *ante*, p. 584, *f*.

a. Where pending an action, the cause of it becomes the property of another, not a party to the action, the test of such person's liability for costs under § 321 is, would he have been liable if he had brought the action (*Conger* v. *Hudson R. R. R. Co.*, 7 Abb. 255).

§ 322. *Costs on a settlement.*

Upon the settlement, before judgment, of any action mentioned in section 304, no greater sum shall be demanded from the defendant as costs, than at the rates prescribed by that section.

b. **Costs on settlement.**—Excess of costs paid to an attorney on the settlement of an action may be recovered by action—it is not a voluntary payment (*Britton* v. *Frink*, 4 How. 144).

c. **Payment after action commenced.**—Where plaintiff brought a suit upon a note, and and before the time to answer expired. the defendant tendered to plaintiff's attorney the amount claimed to be due on the note—principal and interest—which he refused to receive, on the ground that he was also entitled to $7 costs, held on a motion by defendant to stay all plaintiff's proceedings, and that the note be delivered up,—that the plaintiff was entitled to such costs, and that the amount should also have been tendered, in order to have made such tender of any avail to the defendant (*Rockefellow* v. *Wiederwax*, 2 Code Rep. 3; 3 How. 382).

d. Where a defendant after suit brought called at the plaintiffs' store, and in their absence paid to a clerk, who was ignorant that a suit had been brought, the amount claimed in the complaint, but without costs, held that the plaintiffs were, notwithstanding, entitled to costs, and it seems that if the defendants refuse to pay the costs, the plaintiffs may proceed in the action (*Bogardus* v. *Richtmeyer*, 3 Abb. 179). [Perhaps to justify proceedings with the action the amount paid should be repaid or tendered to defendant.] (See 1 Parsons, *contra*, 231, *note*; and see *Hull* v. *Peters*, 7 Barb. 331.) A defendant may, pending the action, satisfy the plaintiff's claim, and then set up such satisfaction in his answer (*Willis* v. *Chipp*, 9 How. 568).

e. Query? Can a tender be made after action commenced, except in the form of an offer to allow judgment for a specific sum with costs. It certainly cannot in a foreclosure suit (*Thurston* v. *Marsh*, 5 Abb. 393; 14 How. 572).

f. **Several defendants.**—In an action against several defendants defending separately, if the plaintiff settles with one or some of the defendants, without the concurrence of the other or others, he is liable to such other or others for the costs of the defence (9 Wend. 435; and see p. 597, *b*, *ante*).

g. When persons severally liable are united as defendants, but appear by different attorneys and answer separately, and, after issue joined and after the action has been noticed for trial, settled, and as part of the terms of settlement agree to pay to the plaintiff the legal costs of the action, the plaintiff is entitled to only one bill of costs. He cannot have a full bill against each defendant. He is entitled to all the disbursements actually made, and which would have been taxable if the defendants had been sued separately (*Latham* v. *Bliss*, 13 How. 416). See *ante*, p. 599.

h. **Discontinuance of course on payment of costs.**—It is a matter of course except in the cases after mentioned, to permit a plaintiff to enter an order to discontinue, *on payment of costs* at any time before an interlocutory or final decree has been made (*Averill* v. *Patterson*, 10 How. 85; 10 N. Y. 500; *Schenck* v. *Fancher*, 14 How. 95; *Burnett* v. *Westfall*, 16 *id.* 430; *Cooke* v. *Beach*, 25 *id.* 356; and see 2 Johns. Ch. Rep. 478; 1 Ves. jun. 401). But an *order* for the

purpose is necessary in all cases: a notice will not suffice (*Id.*; *Morrison* v. *Ide*, 3 Code R. 27; 4 How. 304; *Bedell* v. *Powell*, 13 Barb. 183; *Moffatt* v. *Ford*, 14 Barb. 577; ; *Weigan* v. *Held*, 3 Abb. 462). He cannot have an order in any case to discontinue *without costs* unless upon a motion on notice to all the defendants who have appeared. An *ex-parte order* to discontinue is, therefore, always upon the condition of payment of costs (*Pignolet* v. *Daveau*, 2 Hilton, 584). The order is nugatory unless the costs are paid (*Averill* v. *Patterson*, 10 N. Y. 500). And the action is not out of court so as to authorize the plaintiff to commence a new action, until he has paid or at least tendered or offered to pay the costs to the adverse party (*Cummins* v. *Bennett*, 8 Paige, 81). The order for leave to discontinue on payment of costs is not *per se* a stay of proceedings (*Beeton* v. *Jupp*, 15 M. & W. 149; 15 Law Jour. Ex. 120); nor is the action discontinued until the costs are paid (*Jennings* v. *Fay*, 1 Code Rep. N. S. 231). If the costs are not paid defendant may proceed or ask to have the action dismissed if not prosecuted, but he cannot enter a judgment for costs (*Hicks* v. *Brennan*, 10 Abb. 304; 420). Where the complainant obtains the usual order to discontinue, upon payment of costs, the defendant may apply to the court to enforce the payment, or if the costs are not paid after a demand, he may consider the action as still in court, and may plead its pendancy as a defence to a subsequent action, or apply to the court to stay proceedings in the second suit, until the costs of the first are paid (*Cummins* v. *Bennett*, 8 Paige, 81; and to the like effect is *Simpson* v. *Brewster*, 9 *id.* 245; *Saxton* v. *Stowell*, 11 *id.* 526).

a. Semble, after a defendant has been arrested at the commencement of the action and moved to vacate the order of arrest, the plaintiff cannot discontinue of course without paying the costs of the motion to vacate (*Crockett* v *Smith*, 14 Abb. 62); after an order for a new trial at general term, plaintiff will not be allowed to discontinue while the amount of the costs is in dispute and unpaid (*North* v. *Sergeant*, 14 Abb. 224).

b. Where the plaintiff's attorney procures from the defendant personally, a consent that plaintiff may discontinue, and gives no notice of such consent to the defendant's attorney, and suffers him to proceed in the action, the plaintiff cannot discontinue without paying the defendant's attorney his costs subsequent to obtaining such consent to discontinue (*Pilger* v. *Gore*, 21 How. 155; 12 Abb. 244).

c. If before the *service* of an order allowing a party to discontinue on payment of costs, the adverse party has noticed the cause for trial, such adverse party is entitled as a part of the costs on the discontinuance to the fee for proceedings subsequent to notice of trial (*Hall* v. *Lindo*, 8 Abb. 341).

d. **Discontinuance before notice of retainer.**—If an attorney has been actually employed, though no notice of retainer has been served, the plaintiff cannot discontinue except on payment of costs (*Foster* v. *Bowen*, 1 Code Rep. N. S. 236; see *Bedell* v. *Powell*, 13 Barb. 183). The contrary was said in *Schenck* v. *Fancher* (14 How. 95), by Paige, J., following the case of *Smith* v. *White* (7 Hill, 520), in which the court of errors decided that if a suit was discontinued before a notice of retainer, although after an actual retainer, the attorney of the defendant was not entitled to any costs.

e. **Discontinuance without costs.**—Where a plaintiff recovers costs against one of several defendants, defending jointly, he may enter a discontinuance as to the others without payment of costs (*Stafford* v. *Onderdonk*, 8 Barb. 99; 2 Code Rep. 115).

f. A plaintiff who is not an executor or administrator [or it is presumed a trustee] will rarely be allowed to discontinue without payment of costs, not even if it should appear that he would be entitled to a judgment if he proceeded in the action (*Lewis* v. *Germond*, 1 Paige, 300; and see *Hammersley* v. *Barker*, 2 *id.* 372). And a plaintiff under the section allowing him to amend of course (section 172), cannot amend by leaving out the name of a defendant, so as to discontinue as against him without costs (*Chase* v. *Dunham*, 1 Paige, 572; see *ante*, 623, *e*).

g. Where plaintiff in bad faith prevented defendant from making a tender be-

fore suit, for which he was prepared, held that defendant was entitled on payment of the amount claimed into court to have a discontinuance without costs (*The People* v. *N. Y. Superior Court*, 19 Wend. 104).

a. Plaintiff allowed to discontinue without costs where defendant is sent to the State prison or is insolvent (*Lackey* v. *McDonald*, 1 Cal. 116; *Hart* v. *Story*, 1 Johns. 143; *Steinback* v. *Hallett*, 1 Johns. 141); but query? if on the ground of insolvency, unless defendant has been discharged in insolvency (*Wheaton* v. *McGlade*, 1 Wend. 34).

b. On the death of a sole plaintiff pending an action, his executors may be allowed to discontinue without costs, on showing that the defendant is insolvent (*Banta* v. *Marcellus*, 2 Barb. 378).

c. Where a consul is inadvertently sued jointly with other defendants the plaintiff may in *certain* cases discontinue *without costs* as to such defendant (*Taaks* v. *Schmidt*, 19 How. 413).

d. In an action on two promissory notes made by J. Krause & Brother, the parties intended to be sued were Isidore Krause and *Henry* Krause; but the defendants were in fact described as Isidore Krause and *Moritz* Krause. The summons were served on Isidore Krause only, but one *Moritz* Krause appeared voluntarily, and put in an answer denying that he was a partner of Isidore Krause. On motion the plaintiff was allowed to discontinue as to Moritz Krause, and amend the summons and proceedings by substituting the name of Henry for Moritz, without costs (*Waterbury Leather Manuf. Co.* v. *Krauss*, 9 Abb. 175, *note*).

e. If by the plaintiff's own act, the object of the action is defeated, he cannot be permitted to discontinue without costs (*Hammersley* v. *Barker*, 2 Paige, 372).

f. Where a suit is commenced on the authority of a reported decision, and such decision is afterwards reversed or overruled, the courts will usually and where application is made promptly, after knowledge of such reversal or overruling, relieve the party who relied on such reversed or overruled decision, by permitting him to discontinue his action without costs (*Robinson* v. *Rosher*, 1 You. & Col. 7). And in *Sunney* v. *Roach* (4 Abb. 16), the New York common pleas permitted an appellant from a judgment of the marine court to discontinue without costs; the court of appeals having, after the appeal was taken, decided contrary to what had previously been held by the common pleas, that no appeal could be maintained. And a discontinuance of an appeal without costs, was allowed where the law had been changed by statute after the appeal taken (*Gale* v. *Wells*, 7 How. 191; *Porter* v. *Jones*, *id.* 192).

g. Discontinuance on ground of defendant's insolvency (*Ford* v. *Stock*, 1 Dowl. Pr. Cas. N. S. 763).

h. **Discontinuance not a bar to a new action.**—Where, before trial, an order is entered, discontinuing or dismissing the action, such discontinuance or dismissal does not bar a new action for the same cause (*Earl* v. *Campbell*, 14 How. 330).

i. **Discontinuance is a step in the cause.**—An order for a discontinuance a step in the cause, and therefore a violation of a rule staying the proceedings (*Murray* v. *Silver*, 1 New Prac. Cas. 256).

j. **Effect of discontinuance.**—A discontinuance terminates the action for all purposes, and operates to dissolve an injunction (*Hope* v. *Acker*, 7 Abb. 308). It is a final determination of the rights of the parties to the action within § 245 (*Crockett* v. *Smith*, 14 Abb. 62).

k. **Discontinuance after counter-claim interposed.**—After a counter-claim has been set up *and admitted of record* [*i. e.* not replied to], the superior court will not allow the plaintiff to discontinue as a matter of course; special grounds must be shown in favor of the application; he must make a case showing such an interference proper to prevent a plaintiff from being inequitably prejudiced in his rights or remedies, and which at the same time will not work any practical wrong to the defendant (*Cockle* v. *Underwood*, 1 Abb. 1; 3 Duer, 676).

l. In the supreme court (1st district), it has been held that the right of a

plaintiff to discontinue at any time before judgment, formerly existed, and is not abrogated by the code, and that even where the defendant sets up a counter-claim the plaintiff may discontinue of course, *before* the expiration of the time limited for a reply. They distinguish their decision from that in the superior court; the application to discontinue in that case not having been made until *after* the time to reply had expired, and when by not replying the plaintiff had admitted of record the counter-claim (*Seaboard and Roanoke R. R. Co.* v. *Ward*, 1 Abb. 47; 18 Barb. 595; see *Wilson* v. *Wheeler*, 6 How. 49).

a. In the New York common pleas it was held at general term (*Oaksmith* v. *Sutherland*, 4 Abb. 15; 1 Hilton, 265); that the fact that defendant has answered, setting up counter-claim, does not preclude the plaintiff from discontinuing *before* reply or demurrer to the counter-claim or the expiration of the time to reply. They, as did the supreme court, distinguish the case from that of *Cockle* v. *Underwood* (supra), by the fact that the application for leave to discontinue was made before the expiration of the time to reply.

b. In *Rees* v. *VanPatten* (18 How. 258), after an answer setting up a counter-claim and the cause had been referred and part heard, the plaintiff moved for leave to discontinue. The motion was opposed on the ground that the answer set up a counter-claim. Paige, J., granted the motion, and after adverting to the decisions of *Cockle* v. *Underwood*, and *Seaboard and Roanoke R. R. Co.* v. *Ward* (supra), said that he thought the latter most in accordance with the true construction of the code. "Undoubtedly, leave to the plaintiff to discontinue should be refused where the defendant, by a discontinuance, would lose his remedy on his counter-claim, as where such remedy would be barred by the statute of limitations." Thus, where in an action for a balance of an account, the defendant set up a counter-claim, for services as attorney, &c., claiming a balance due him, and after issue joined several years passed without bringing the cause to trial, in consequence of the referee having left the country; on motion by the plaintiff for leave to discontinue the action, the defendant, in opposition, alleged that if the action was discontinued the statute of limitations would be a bar to his counter-claim. Leave to discontinue was denied, with permission to substitute a referee (*Van Alen* v. *Schermerhorn*, 14 How. 287).

c. **Discontinuance in action to dissolve partnership.**—*Semble*, the court will not permit a suit for the dissolution of a partnership and the settlement of the partnership debts, to be discontinued by act or consent of the parties. There must be a special application to the court, and notice to the partnership creditors (*Rutter* v. *Tallis*, 5 Sand. 612).

d. **Discontinuance in foreclosure actions.**—In a foreclosure suit, the court will permit the plaintiff, on receiving his debt and costs, to dismiss his suit, without paying costs to junior incombrancers, who have appeared to protect their rights. So as to the mortgagor personally liable for the debt, who has conveyed the mortgaged premises subject to its payment (*Gallagher* v. *Egan*, 2 Sand. 742; see *ante*, sec. 305).

e. In an action to foreclose a mortgage, where the principal has become due in consequence of default in payment of interest within the time prescribed therefor, the court has not the power to stay or discontinue the action on payment of the interest due (*Hunt* v. *Keech*, 3 Abb. 204; *Ferris* v. *Ferris*, 28 Barb. 29; see *Lynch* v. *Cunningham*, 6 Abb. 94; *Barlow* v. *Cleveland*, 7 Abb. 339; *Pratt* v. *Ramsdell*, 16 How. 59; 6 Abb. 340, *note*; *Thurston* v. *Marsh*, 14 How. 572; 5 Abb. 389).

f. **Discontinuance after order for new trial.**—After a new trial has been ordered by the general term on payment of costs, plaintiff will not be allowed to discontinue while the amount of the costs are in dispute and unpaid (*North* v. *Sargeant*, 14 Abb. 224).

g. **Instalment on bond.**—Discontinuance on bond payable by instalments when only part due (*The People* v. *N. Y. Superior court*, 19 Wend. 104). As to ordering a discontinuance or stay to prevent injustice (see *Jones* v. *Winkfield*, 10 Bing. 308; 3 M. & S. 846; *Ames* v. *Ragg*, 2 Dowl. 35).

a. **Forgery.**—Discontinuance on defence of forgery (*Fowler* v. *Starr*, 3 Denio, 165; *Lowerre* v. *Vail*, 5 Abb. 230).

b. **Proceedings against insurance companies.**—The attorney-general has power to discontinue proceedings instituted by him under Laws of 1853, ch. 466, to close the business of fire insurance companies; the power is with the State comptroller (*Re Mechanics' Fire Ins. Co.*, 5 Abb. 444).

c. **Another action pending.**—The fact of another action pending for the same cause in a foreign state is no reason for ordering a discontinuance of the action in this State (*Republic of Mexico* v. *Arrangois*, 1 Abb. 437).

d. The pendency of an action on behalf of all the creditors is not a reason for ordering a discontinuance of an action by an individual creditor (*La Chaise* v. *Lord*, 10 How. 462).

e. **Discontinuance after answer of action pending has been set up as a defence to a subsequent action for the same cause.**—Where the pendency of a former action is pleaded, the plaintiff may afterwards discontinue; and such discontinuance defeats the answer (*Averill* v. *Paterson*, 10 How. 85; 10 N. Y. 500; see, *ante*, p. 280, *b*, 351, *g*).

f. **Discontinuance after a defence of infancy.**—In an action against several as joint defendants, if one of them sets up the defence of infancy, the court on motion will give leave to discontinue as to such defendant without costs (*Cuyler* v. *Coates*, 10 How. 141; *Wellington* v. *Classon*, 18 How. 10; 9 Abb. 175); provided the plaintiff moves promptly after the answer; if he suffers further costs to be incurred, after he has knowledge of the defence, he must pay such subsequent costs before he will be permitted to discontinue (*St. John* v. *Hart*, 16 *id.* 192). And where defendants were *minors*, and obtained merchandise on credit, and, when sued, interposed the plea of infancy, the plaintiffs were permitted to discontinue without costs (*Van Buren* v. *Fort*, 4 Wend. 209; see, *ante*, p. 129, *h*, 597, *c*).

g. **Discontinuance of actions by overseers.**—Overseers of the poor, after the expiration of their term of office, and after others have been elected to their places, cannot discontinue an action previously commenced in their names as overseers (*Wright* v. *Smith*, 13 Barb. 414).

h. **Discontinuance in action to recover possession of personal property.**—See *ante*, p. 390, *g*.

i. **Discontinuance as to one defendant at the trial.**—Where on the trial the plaintiff asks for leave to discontinue as to a defendant who has answered separately, he may be permitted to do so, but it should be on the condition of paying the costs of such defendant (*Marks* v. *Bard*, 1 Abb. 63). See *ante*, p. 597, *c*.

j. **Discontinuance after supplemental complaint.**—Where a plaintiff in a supplemental complaint claims the same relief as that claimed in the original complaint, if he discontinues it must be on payment of costs in both actions (*Fisher* v. *Hall*, 9 How. 259).

k. **Discontinuance without notice to attorney.**—Where after a defendant has appeared by attorney, and after issue the plaintiff obtains a consent from the defendant in person for a discontinuance, and fails to notify the attorney, or to enter an order for a discontinuance, a judgment by default dismissing the complaint with costs taken by such attorney will not be set aside except on payment of costs (*Pilger* v. *Gore*, 12 Abb. 244; 21 How. 155).

l. **Discontinuance of appeal.**—An appellant cannot dismiss his appeal by serving a notice of discontinuance; he must enter an order to discontinue and pay the costs (*Burnett* v. *Harkness*, 4 How. 158; and see *Gale* v. *Wells*, 7 How. 191; *Porter* v. *Jones*, id. 192).

m. **Election to discontinue.**—An order at special term provided that the plaintiff might discontinue, and in case he elected to do so within twenty days, and served notice of his election on the defendants, the defendants were required to stipulate to answer in a new action. The plaintiff, instead of serving notice of his election to discontinue, appealed to the general term, where, more than twenty days after the order at special term, the order was affirmed;

held, (1) that plaintiff was not required, in order to discontinue the action, to enter an order for that purpose, but service of a notice of his election to discontinue would have effected a discontinuance; and (2), that it was too late, notwithstanding the appeal, to serve such notice after the twenty days limited by the order had expired (*Ferry* v. *Bank of Cent'l N. York*, 9 Abb. 100.)

a. **Setting aside discontinuance.**—The court, after a lapse of eighteen years, refused to set aside a discontinuance entered by consent (*State of Indiana* v. *Woram*, 15 Abb. 264).

See *ante*, p. 623, *a*.

TITLE XI.

*Of Appeals in Civil Actions.**

CHAPTER I. APPEALS IN GENERAL.
II. APPEALS TO THE COURT OF APPEALS.
III. APPEALS TO THE SUPREME COURT FROM AN INFERIOR COURT.
IV. APPEALS IN THE SUPREME COURT, AND THE SUPERIOR COURT, AND THE COURT OF COMMON PLEAS IN THE CITY OF NEW YORK, FROM A SINGLE JUDGE TO THE GENERAL TERM.
V. APPEAL TO THE COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK, OR TO A COUNTY COURT, FROM AN INFERIOR COURT.

CHAPTER I.

Appeals in General.

SECTION 323. Writs of error abolished, and appeals substituted.
324. Orders made out of court, how vacated or modified.
325. Who may appeal.
326. Parties, how designated on appeal.
327. Appeal, how made.
328. Clerk to transmit papers to appellate court.
329. Intermediate orders affecting the judgment may be reviewed on the appeal from the judgment.
330. Judgment on appeal.
331. Time for appealing.
332. The like.

§ 323. [271.] *Existing suits. Writs of error abolished, and appeals substituted.*

Writs of error in civil actions, as they have heretofore

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* *a.* **Existing suits.**—In all suits commenced before the code, the parties must govern themselves on appeal, as far as may be practicable, by the new machinery; but where that will not answer the purpose, they may resort to the former practice, unless that course has been plainly forbidden by the legislature (*Farmers' Loan & Trust Co.* v. *Carroll*, 5 How. 211; see also *Mayor, &c., of N. Y.* v. *Schermerhorn*, 1 Code Rep. 109; *Spalding* v. *Kingsland*, ib. 110; *Selden* v. *Vermilya*, ib.; *Butler* v. *Miller*, ib.; *Lake* v. *Gibson*, 3 How. 420; *Thompson* v. *Blanchard*, 4 How. 260; *Scott* v. *Beeker*, 3 *id.* 73; *Doty* v. *Brown*, ib. 375)

existed, are abolished; and the only mode of reviewing a judgment, or order, in a civil action, shall be that prescribed by this title.

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a. **Writ of error, when proper.**—A judgment upon an award must be reviewed by writ of error (*Isaacs* v. *The Beth Hamedrash Society*, 19 N. Y. 584), and so must a determination of the supreme court in prohibition (*Becker* v. *The People*, 18 N. Y. 487), or mandamus prior to 8 April, 1859; (*Id.*, *The People* v. *Church*, 20 N. Y. 529; and see Laws 1859, ch. 174, and note to § 333, *post;* and as to writ of error in criminal cases under act of 1852, see *People* v. *Barry*, 10 Abb. 225).

b. **Pauper appeal.**—A party cannot appeal in *forma pauperis* (*Ostrander* v. *Harper*, 14 How. 16; and see 3 Paige, 278; and in note to § 471, *post*).

c. **Appeal by the people.**—An appeal may be brought by the people of this State from any judgment against them in any court, without any undertaking or security whatever, and such appeal shall operate as a stay of proceedings on the judgment appealed from, in the same manner as if security had been given as now required by law (Laws 1858, ch. 37, § 2).

d. **Appeals by the people, State officers, &c., may be without security.**—An appeal may be brought by the people of this State or any State officer or board of State officers from any judgment or order against them in any court without any undertaking or security whatever; and such appeal shall operate as a stay of proceedings on the judgment or order appealed from (Laws 1861, ch. 288).

e. **Appeals by municipal corporations.**—All appeals by municipal corporations from the judgment or decree of any court of this State, shall be valid to stay proceedings on such judgment or decree, without security or undertaking being given, unless the court in which such judgment or decree is rendered shall otherwise direct; and in such case an undertaking executed in their official capacity, by either the mayor, comptroller, or counsel to the corporation, in the name and on behalf of said corporation, shall be valid for the purpose of such appeal, and shall bind said corporation to the performance of the conditions of said undertaking (Laws 1859, ch. 262, § 1). And see in note to sect. 354, *post*.

f. **Waiver of right to appeal.**—The right to appeal is waived by acceptance of any benefit under the judgment or order, as costs (*Lewis* v. *Irving Ins. Co.* 15 Abb. 140, *n*; see *Noble* v. *Prescott*, 4 E. D. Smith, 139; *Radway* v. *Graham*, 4 Abb. 468; *Kelly* v. *Bloom*, 17 Abb. 229).

g. **Appeal a new action.**—An appeal is in the nature of a new action (*Tindal* v. *Jones*, 11 Abb. 259; contra, *Johnson* v. *Yeomans*, 8 How. 140). It was probably on the ground that an appeal is in the nature of a new action, that the general term of the New York common pleas held that a notice of appeal required a fifty cent United States revenue stamp; held contra by county judge, *Jackson* v. *Allen*, 26 How. 116). That an appeal is not a new action, but a continuance of the former action, see *Ranney* v. *Stringer* (4 Bosw. 663); *Johnson* v. *Yeomans* (8 How. 140).

h. **Relief on motion, instead of appeal.**—Where facts have arisen since a judgment was entered of such a nature that it is clear the judgment ought not to be executed, relief against the judgment may be given upon a motion to vacate same, provided the facts are undisputed (*Wetmore* v. *Law*, 34 Barb. 515, and see *The People* v. *The Mayor*, 11 Abb. 66). An error that the judgment was entered for more than the verdict and interest and costs, should be corrected by motion in the court below before an appeal to the court of appeals: it cannot be corrected after the decision of the case in the court of appeals (*Griswold* v. *Haven*, 26 How. 170; 16 Abb. 413). Thus where after judgment for plaintiff, defendant obtained an order for a new trial, which order was reversed in the court of appeals and judgment ordered on the verdict, the court below refused to go behind the judgment and inquire into its

§ 324. [272.] *Existing suits. Orders made out of court, how vacated or modified.*

An order, made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

a. It is competent for a judge to vacate and modify an injunction order without notice; but it is not the better practice, and should never be done except when, from the urgency of the case, it becomes necessary to guard against serious loss, which might sometimes be occasioned by the delay incident to serving notice (*Bruce* v. *Delaware and Hudson Canal Co.*, 8 How. 440).

b. This section was not intended to give an unlimited right to vacate orders granted *ex parte*, but only to allow a judge who had improvidently granted an order to rectify the error if applied to immediately and before any subsequent step had been taken in the action. After a subsequent step in the action no judge can vacate the order *ex parte* (*Peck* v. *Yorks*, 24 How. 363).

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regularity, or to entertain a question as to the verdict having been taken subject to an adjustment (*id.*). The remedy for irregularity is not by appeal, but by motion to set aside the proceedings (*Pitt* v. *Davison*, 37 Barb. 97; and see *Ingersoll* v. *Bostwick*, 22 N. Y. 425; *Dart* v. *McAdam*, 27 Barb. 187; *Bank of Genesee* v. *Spencer*, 15 How. 14); or by *habeas corpus* (*Wiles* v. *Brown*, 3 Barb. 37).

c. **Parting with interest.**—The objection that a party had parted with his interest in the subject-matter of an action before or pending an appeal brought by him to the court of appeals, will not, except in a palpable case of fraud, authorize the supreme court to set aside the judgment of the appellate court and afterwards made the judgment of the supreme court, nor to grant a perpetual injunction against the enforcement of such judgment (*Munn* v. *Worrall*, 16 Barb. 221).

d. **Effect of appeal.**—When a right of action has accrued against a sheriff for not returning an execution, such right of action cannot be divested by an appeal taken from the judgment on which such execution issued (*Bowman* v. *Cornell*, 39 Barb. 69).

e. An appeal from a judgment suspends the power of a surrogate to entertain a proceeding to enforce its payment (*Curtis* v. *Stilwell*, 32 Barb. 354).

f. So long as a judgment is subject to an appeal, the court below may correct or modify it in its discretion (*N. Y. Ice Co.* v. *N. West Ins. Co.* 12 Abb. 414; 21 How. 296); and while an appeal is pending in the court of appeals, the court below have still control over the judgment in regard to making amendments, and the judgment is for all purposes of amendment, regarded as remaining in the court below (*Judson* v. *Gray*, 17 How. 289).

g. **Second appeal after first dismissed or abandoned.**—A voluntary dismissal or abandonment of an appeal, is no bar to a further appeal by the same party, within the time prescribed by the statute (*Crafts* v. *Ives*, court of appeals, October, 1852); as in the case of an appeal dismissed for want of a proper undertaking (*Martinez* v. *Galardo*, 5 Cal. 155; *Kelsey* v. *Campbell*, 14 Abb. 368; 38 Barb. 238). Where an appeal had been dismissed with costs, and the costs had not been paid, and the appellant entered another appeal, the court on motion of the respondent stayed the proceedings on the second appeal until the costs of the first were paid (*Dresser* v. *Brooks*, 5 How. 75).

h. **Discontinuance of appeal.**—An appellant cannot, at pleasure, discontinue or dismiss his appeal on payment of costs (*Warren* v. *Eddy*, 13 Abb. 28; 32 Barb. 664; *contra*, see *Burnett* v. *Harkness*, 4 How. 158; *Porter* v. *Jones*, 7 How. 192).

a. To get rid of an order improperly made by a judge at chambers, the remedy is by motion to the court to set it aside, not an appeal (*B'k of Genesee* v. *Spencer*, 15 How. 14).

b. A county judge who has granted an order in an action in the supreme court, *e. g.* an order of arrest, has no power to vacate it on notice (*Rogers* v. *McElhone*, 12 Abb. 292).

c. This section does not apply to an order made out of court *upon notice* (*Follett* v. *Weed*, 3 How. 360). But it extends to an order to examine a defendant in proceedings supplementary to an execution (*Lindsay* v. *Sherman*, 1 Code Rep. N. S. 25; 5 How. 308; *Blake* v. *Locy*, 6 How. 108); an order of arrest (*Cayuga Co. B'k* v. *Warfield*, 18 *id.* 489): for an injunction (*Bruce* v. *Delaware Canal Co.*, 8 How. 440; see *ante*, p. 410, *a;* and *B'k of Genesee* v. *Spencer*, 15 How. 14; and see § 27, *ante*).

§ 325. [273.] *Existing suits. Who may appeal.*

Any party aggrieved may appeal in the cases prescribed in this title.

d. Only the party who is *aggrieved* by the judgment can apply to reverse, and the party in whose favor the judgment is given cannot be *aggrieved* by it, and consequently cannot apply to reverse it (*Fairbanks* v. *Corlies*, 1 Abb. 155). And a party who is aggrieved by one part of a judgment only, cannot by appeal call in question another part of the same judgment in which he is not interested (*Cuyler* v. *Moreland*, 6 Paige, 273). A stranger to the action cannot appeal (see *E. B.* v. *E. C. B.* 8 Abb. 44; *Re Bristol*, 16 Abb. 397; *Martin* v. *Kanouse*, 2 Abb. 390); *contra*, if he is aggrieved by the judgment (*Adams* v. *Woods*, 8 Cal. 306). The term "party aggrieved" embraces the representatives of a deceased party to a suit (*Beach* v. *Gregory*, 2 Abb. 209; *Martin* v. *Kanouse*, id. 392). Although a stranger to the action may be allowed to apply for relief against a proceeding in such action, yet if his application is denied, he cannot appeal from the order denying his application (*Re Bristol*, 16 Abb. 397).

e. Any one of several parties conceiving himself aggrieved by the judgment may appeal, whether his co-plaintiffs or his co-defendants join in the appeal or not (*Mattison* v. *Jones*, 9 How. 152).

f. Where a party to an appeal dies after the return is filed in the court of appeals, that court having thereby obtained jurisdiction, has the power to allow the legal representatives of such deceased party to be substituted in his place (*Hastings* v. *McKinley*, 8 How. 175). In that case, after the return was filed in the court of appeals, the respondent died, and his executrix applied to be substituted in his stead. It was objected that the motion for substitution should have been to the court below; but the objection was overruled, and the motion granted.

§ 326. [274.] *Existing suits. Parties, how designated on appeal.*

The party appealing shall be known as the appellant, and the adverse party as the respondent. But the title of the action shall not be changed in consequence of the appeal.

g. In all proceedings on appeal in the court of appeals the papers must be entitled in that court, and not in the court from the decision of which the appeal is brought (*Olickman* v. *Olickman*, 1 Coms. 611; 1 Code Rep. 98).

§ 327. [275.] (Am'd 1849.) *Existing suits. Appeal, how made.*

(1) An appeal must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same or some specified part thereof. (2) When a party shall give, in good faith, notice of appeal from a judgment or order, and shall omit through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just.

a. **Notice—what sufficient.**—Where a notice of appeal stating that the defendant appealed "from the judgment entered in this action to the general term," was objected to, Harris, J., said, "such a notice is, I think a sufficient compliance with the requirements of the code. It is enough if the notice specify what part of the judgment it is intended to review upon the appeal" (*Wilson* v. *Allen*, 3 How. 372). A notice of appeal from a judgment at special term, in a special proceeding, which stated that the appeal is taken to the "supreme court" instead of the "general term of the supreme court" as required by Laws 1854, p. 592, held sufficient (*The People* v. *Boylston*, 17 How. 120).

b. The serving of exceptions or a case [without any other notice] is notice in writing, that the party doing so intends to appeal; it gives notice to the adverse party as distinctly as if an express notice to that effect were served. It should always therefore be deemed a sufficient notice of appeal if served in due time, especially if not objected to (*Sherman* v. *Wells*, 14 How. 525). [July 12, 1858, Emott, J., referring to the case just cited, said: "That is not law in this (second) district. It is a repeal of the provision of the code on the subject," nevertheless *Sherman* v. *Wells* was followed at general term in the first district in *Jackson* v. *Fassett*, 12 Abb. 281; 33 Barb. 645].

c. **Service of notice.**—The appeal is not made until notice is served on both the *clerk and the adverse party;* therefore the notice of appeal must be served as well on the clerk as on the respondent, within the times respectively prescribed by sections 331, 332 (*Westcott* v. *Platt*, 1 Code Rep. 100), or the appeal is a nullity (*Morris* v. *Morange*, 17 Abb. 86; 26 How. 247).

d. The deposit of a notice of appeal in the post-office on the last day for bringing the appeal, and when such notice is not received by the party to whom sent, until after the time to appeal has expired, is in time; but a like service on the clerk is not in time and is irregular (*Morris* v. *Morange*, 26 How. 247; 17 Abb. 86).

e. The omission of serving the notice of appeal on the clerk within the time limited therefor, can not be rectified (*Morris* v. *Morange*, 26 How. 247; *Elsworth* v. *Fulton*, 24 How. 20; *Trip* v. *De Bow*, 3 Code Rep. 163; 5 How. 114; *The People* v. *Eldridge*, 7 How. 108; contra, *Crittenden* v. *Adams*, 1 Code Rep. N. S. 21; 5 How. 310).

f. Notice of appeal should be served on the attorney of record in the court below, not on the party (*Tripp* v. *DeBow*, 3 Code Rep. 163; 5 How. 114; *Crittenden* v. *Adams*, 1 Code Rep. N. S. 21; 5 How. 110; see rule 4 court of appeals, *post*).

g. The service of such notice being a jurisdictional question, the party can take advantage of it any time, if he has not appeared so as to give jurisdiction in the case. (*Ib.*)

h. Where such service was made upon the party only who had not appeared

so as to give the court jurisdiction, held, that the appeal was a nullity (*Tripp* v. *DeBow*, 8 Code Rep. 163; 5 How. 114).

a. **Amendment.**—"It is true, section 327 allows amendments in cases of appeal; but it provides, as a *sine qua non*, that the party shall have given, *in good faith, notice of appeal.* And where there is a failure to give, *in good faith notice of appeal*, there can be no amendment allowed" (*The People* v. *Eldridge*, 7 How. 108). And, therefore, where a party intending to appeal under sections 351 to 371, omitted to *serve* his notice of appeal within twenty days after the judgment, as required by section 353—but he had given a *verbal* [*oral*] *notice* of appeal within the time prescribed,—it was held that the *verbal* [*oral*] notice "cannot affect the question;" and as to amending under section 327, it is said, "There is nothing to amend, nor to amend by. If the notice had been served and had been defective in some matter of form, or perhaps of substance, I could understand what is meant by *amending*. But here is no notice, and the party, under the head of amendments, asks to bring an appeal after the time limited by statute has expired. This no court has authority to do, in my judgment." (*Ib.*)

b. The New York Common Pleas construe this section to authorize an amendment of the notice of appeal (*Irwin* v. *Moore*, 18 How. 410; *Wood* v. *Kelly*, 2 Hilton, 335; disapproving *The People* v. *Eldridge*, 7 How. 108).

c. Where it appears that an appeal from the special to the general term is taken in good faith, and that the appeal does not upon its merits appear to be frivolous, although no proper undertaking may have been filed and served with the notice of appeal, the court will allow the undertaking to be filed, and a copy of it served, as of the day when the notice was served, with liberty to respondent to except to the sureties, with a stay of proceedings until the appeal be decided (*Mills* v. *Thursby*, 11 How. 129).

d. Where the undertaking is in an amount not sufficient to cause the appeal to operate as a stay of proceedings, the appellant can be relieved under this section and time may be granted him to perfect his appeal by filing a new or additional undertaking (*Sternhaus* v. *Schmidt*, 5 Abb. 66).

e. Where a noitce of an appeal from a judgment has been given, in all respects perfect and containing nothing more, the court will not allow an amendment so as to make the notice also a notice of appeal from an order denying a new trial (*Fry* v. *Bennett*, 16 How. 385). Nor does the fact that the respondent on such appeal appears, and argues some points which properly belong to a motion for a new trial, waive any notice of appeal from an order denying a new trial, nor does such an appearance give the court jurisdiction to reverse such order. (*Id.*)

f. A notice of appeal from an order when actually given in due season, if there be particular defects therein which do not destroy its substantial character, may be amended; and so of an appeal from a judgment. (*Id.*)

See Court of Appeals Rules, in Appendix; and notes to §§ 332, 334, and 341.

§ 329. [276.] (Am'd 1858, 1863.) *Existing suits, transmitting papers to appellate court.*

If the appellant shall not, within twenty days after his appeal is perfected, cause a certified copy of the notice of appeal and of the judgment roll, or, if the appeal be from an order or any part thereof, a certified copy of such order and the papers upon which the order was granted, to be transmitted to the appellate court by the clerk with whom the notice of appeal is filed, the respondent may cause such certified copy to be

transmitted by such clerk to the appellate court and recover the expenses thereof, as a disbursement on such appeal, in case the judgment or order appealed from shall be in whole or in part affirmed, and this provision shall apply to all appeals heretofore taken where the appeal has not been dismissed in the manner provided by the rules of the appellate court.

a. The court has power to and will amend an error in the papers returned (*Lansing* v. *Russell*, 4 How. 213; *Lucas* v. *Baptist Church*, id. 358).

b. Where the certified copy of the notice of appeal and judgment-roll *omitted* the word "copy," and the name of the clerk, and was objected to on that ground, the court permitted an amendment (*Lansing* v. *Russell*, 4 How. 213).

See Court of Appeals Rules, Rule 2.

§ 329. [277.] *Existing suits. Intermediate orders affecting the judgment may be reviewed on the appeal.*

Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.

c. On an appeal from the judgment to the general term, the court may review an order striking out a pleading (*Cowles* v. *Cowles*, 9 How. 361).

e. On an appeal from a judgment to the court of appeals, that court will not review an order denying a motion to stay the proceedings (*James* v. *Chalmers*, 2 Selden, 209).

d. Where a demurrer is overruled with leave to the defendant to answer and he avails himself of the permission he cannot in an appeal from the final judgment object to the order overruling the demurrer (*Wales* v. *Lyon*, 2 Gibbs Mich. R. 276).

f. On an appeal from a judgment, the court will not review an order made at chambers or special term, and from which no appeal has been taken to the general term of the court below (*Kanouse* v. *Martin*, 1 Code Rep. N. S. 385; 6 How. 240; *Grace* v. *Pierson*, 3 How. 218; 1 Coms. 228).

As to an order affecting the merits, see note to section 349.

§ 330. [278.] (Am'd 1849.) *Existing suits. Judgment on appeal. Restitution.*

Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment.

a. **Extent of review.**—On an appeal, only such parts of the judgment as are appealed from can be reviewed (*Kelsey* v. *Western*, 2 Coms. 500).

b. Where a judgment is reversed, the court may send the cause back to be properly disposed of at special term (*Dutch Ref'd Ch. of Canajoharie* v. *Wood*, 8 Barb. 421).

c. On an appeal from a judgment only, in an action tried by a jury, the court will not review the case upon the evidence with a view to determine whether the verdict is against evidence. Such an appeal presents for the consideration of the court, questions of law only (*Bedell* v. *Com. Mut. Ins. Co.*, 3 Bosw. 148).

d. "Where the only error in a judgment is an excess in amount, and such excess consists of a distinct item, or can be definitely ascertained by mere computation, the appellate court may make the reversal of the judgment depend upon the election of the party to relinquish the ascertained excess, and in case of his so electing, may affirm the judgment" (*Chouteau* v. *Suydam*, 21 N. Y. 185; *Boyd* v. *Foot*, 5 Bosw. 111).

e. **Restitution.**—"Although the language of the section is, '*may make restitution*,' I entertain no doubt that the true construction is, to compel the appellate court to make such restitution in all *proper* cases. There is a class of cases where it would or might be improper, to order restitution; such, for instance, as where the judgment appealed from is reversed and a new trial granted. In such case the court has a discretion in relation to granting costs, and as the judgment is not final, there is no restitution to be ordered. But where the judgment of the appellate court is the end of the action, and no new trial is ordered, I think it is imperative upon the court to order restitution of all the appellant has lost. Therefore, in a case on appeal to the supreme court, where the judgment of the justice and the county court are both reversed, complete restitution cannot be made to the appellant short of paying him his costs of defending the action before the justice, and of prosecuting the appeal before the county court," together with his costs in the supreme court (*Estus* v. *Baldwin*, 9 How. 80).

f. On the reversal of a judgment of a district court, the appellant is entitled to have inserted in his costs of appeal such costs as he would have been entitled to, had a proper judgment been entered in the court below (*Jacks* v. *Darrin*, 1 Abb. 282).

g. The restitution to which a party is entitled upon the reversal of an erroneous judgment is not restitution of everything he has lost in consequence of such judgment. He recovers what is still in the possession of his adversary, but not everything else. Collateral things executed under authority of an erroneous judgment will not be divested by its reversal, but collateral things executory are after reversal as if no judgment had ever been (*Lovett* v. *German Ref'd. Ch.*, 12 Barb. 67).

h. Where the judgment below has been paid before appeal, but not satisfied of record, *semble*, on reversal, the appellant cannot enter a suggestion and award of restitution without leave of the court, otherwise where the judgment is satisfied of record (*Sheridan* v. *Mann*, 5 How. 201).

i. In case of an attachment under § 227, and of a judgment recovered in the action, where notwithstanding an appeal the judgment had been paid, on reversal of such judgment with an order for a new trial, a restitution of the money paid on such judgment may be ordered. The money to be deposited in court to abide the result of the new trial (*Britton* v. *Phillips*, 24 How. 111).

j. The remedy by restitution is cumulative, and does not bar the party proceeding by action to recover the amount collected under a judgment subsequently reversed (*Lott* v. *Sweezey*, 29 Barb. 87).

See note to § 369, *post*.

k. Where a party to an appeal pays costs, and the decision upon which such costs were paid is subsequently reversed by the court of appeals, the su-

preme court may order restitution (*Whitbeck* v. *Patterson*, 22 Barb. 87; *Safford Stevens*, 2 Wend. 164).

a. **Reversal of justice's judgment.**—When a judgment for the plaintiff in the marine or justice's court is reversed in the New York common pleas on appeal, without any award of judgment final for the defendant upon the merits, such reversal is not conclusive of the rights of the parties; and in such case the costs incurred by the defendant in his defence in the court below, cannot be allowed him and included in the judgment of reversal in the appellate court. Whether such costs should be allowed to the appellant (on appeal from these courts) when the appellate court not only reverses the judgment but also orders a judgment final for the appellant upon the merits,—? (*Ellert* v. *Kelley*, 4 E. D. Smith, 12; 10 How. 392). [*Semble:* This section does not apply to appeals from justice's courts.]

b. **New trial.**—The court of common pleas for the city and county of New York, have uniformly held that the portion of section 330 which authorizes the appellate court to grant a new trial, has no application to appeals from the marine and district courts of the city of New York. (*Id.*)

c. On appeal to the general term on a case, if the judgment is reversed on a question of law, a new trial must be ordered (*Halsey* v. *Flint*, 15 Abb. 368). The court may reverse or affirm the judgment on a question of fact (*Griffin* v. *Marquardt*, 17 N. Y. 28; *Edmonston* v. *McLoud*, 16 *id.* 543; and see *ante*, p. 481, *g*); and it may, where a several judgment would have been proper in the court below, reverse a judgment as to one defendant and affirm it as to another (*Girard* v. *Beach*, 4 E. D. Smith, 27; 10 How. 369). And where a judgment against two defendants is reversed wholly as to one and affirmed as against the other, and no special circumstances render a different disposition proper, the reversal is with costs to the appellant (*Montgomery Co. B'k.* v. *Albany City B'k*, 3 Selden, 459).

d. **Judgment on dismissal.**—On an appeal from the special to the general term, if the appeal be dismissed, the judgment should be:—"It is ordered and adjudged that the appeal be dismissed and judgment affirmed with costs, and that the respondent have execution for such costs when adjusted and inserted in the entry of the judgment" (*De Agreda* v. *Montel*, 1 Abb. 130).

e. **Reversal as to one defendant.**—Upon appeal to the general term, the judgment may be reversed as to one defendant who appeals, without affecting the judgment as to another defendant who does not appeal, in cases where a several judgment below would be proper (*Geraud* v. *Stagg*, 10 How. 369; 4 E. D. Smith, 27; see *Farrel* v *Calkins*, 10 Barb. 348, in note to § 347, *post*).

f. **Affirmance in part.**—A judgment cannot be affirmed as to a part of the amount recovered and reversed as to the residue, where a new trial is ordered as to the part which is reversed (*Story* v. *New York and Harlem R. R. Co.*, 2 Selden, 86).

g. **Judgment on affirmance.**—Where a judgment entered at special term is appealed to the general term, and is there affirmed, a new judgment should not be entered (*Eno* v. *Crooke*, 6 How. 460; *De Agreda* v. *Mantel*, 1 Abb. 130). The simple judgment of affirmance, with the award of costs (if any), should be attached to the original roll. (*Ib.*) It is improper to enter up two judgments in the same court for the same demand. (*Id.*) The judgment of affirmance should not embrace any sum secured by the judgment appealed from (*Halsey* v. *Flint*, 15 Abb. 368).

h. **Judgment, nunc pro tunc.**—Where a party dies after the argument of an appeal and before the decision thereon, the judgment may be entered *nunc pro tunc* as of a day before his death (*Beach* v. *Gregory*, 2 Abb. 203; and see *De Agreda* v. *Mantel*, 1 Abb. 130). The judgment, if against the deecdent, may be enforced against his representatives (*Beach* v. *Gregory*, 2 Abb. 203).

i. Judgment on an appeal to the general term cannot be rendered as of a day subsequent to the death of a party appellant or respondent; but it may be rendered as of a day prior to such decease, and on which the court was in session and could have heard the appeal (*De Agreda* v. *Mantel*, 1 Abb. 130; see *Beach* v. *Gregory*, 2 Abb. 203).

§ 331. [279.] (Am'd 1857, 1858.) *Existing suits. Time for appealing.*

The appeal to the court of appeals under subdivision two of section eleven of this code, must be taken within sixty days after written notice of the order shall have been given to the party appealing; every other appeal allowed by the second and third chapters of this title must be taken within two years after the judgment shall be perfected by filing the judgment-roll.

See § 11, *ante*, as to time for appealing in cases arising in justice's courts.

a. An appeal cannot be taken until after entry of the judgment appealed from (*Bradley* v. *Van Zandt*, 3 Code Rep. 217; *McMahon* v. *Harrison*, 5 How. 360). But it may be taken at any time on the same day that the judgment is entered; and in that case the court will not inquire which was the first, the entry of the judgment or the taking the appeal (*Blydenburg* v. *Cotheal*, 6 How. 200; and see *Jones* v. *Porter*, 6 How. 286).

b. If the party in whose favor judgment is rendered omit to perfect his judgment, the other party may compel him to do so, in order that an appeal may be brought (*B'k of Geneva* v. *Hotchkiss*, 1 Code Rep. N. S. 153; 5 How. 478; *Lentilhon* v. *Mayor of New York*, 1 Code Rep. N. S. 111; *Purdy* v. *Peters*, 15 Abb. 160; and see *Peet* v. *Cowenhoven*, 14 Abb. 56).

c. A stay of proceedings on the judgment does not extend the time to appeal (*Renouil* v. *Harris*, 2 Code Rep. 71).

See note to § 332, infra.

§ 332. [280.] (Am'd 1849.) *Other appeals within thirty days.*

The appeal allowed by the fourth chapter of this title, must be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing.

See note to § 331.

d. **Time to appeal.**—From an order entered on May 27, a notice of appeal served on June 27, is in time (*Gallt* v. *Finch*, 24 How. 193).

e. *Semble*, Where the notice of the judgment is served by mail, the opposite party has double time to appeal (*Dorlon* v. *Lewis*, 7 How. 132).

f. **Stay of proceedings.**—A stay of plaintiff's proceedings, except entry of judgment, prevents his giving notice of the judgment so as to limit the time to appeal therefrom (*White* v. *Klinken*, 16 Abb. 109).

g. A stay of proceedings on the judgment does not extend the time to appeal (*Renouil* v. *Harris*, 2 Code Rep. 71).

h. **Waiver of objection.**—Giving an admission of *due* service of a notice of appeal, is a waiver of the objection that it was not served within the time to appeal (*Struver* v. *Ocean Ins. Co.*, 9 Abb. 23).

i. **Extending time.**—The code prescribes the time within which an appeal may be taken from the special to the general term; and it is not in the power of the court to extend that period, or to allow an appeal where the time has been suffered to expire (Code, §§ 332, 405: *Renouil* v. *Harris*, 2 Code Rep. 71; *Enos* v. *Thomas*, 1 Code Rep. N. S. 67; *Lindsey* v. *Almy*, ib. 139; *Rowell* v. *Mc*

Cormick, ib. 73; and see *Cadwell* v. *Mayor of Albany*, 9 Paige, 572; *Travers* v. *Silvernail*, 2 Code Rep. 96; *The People* v. *Eldridge*, 7 How. 108; *Fry* v. *Bennett*, 16 How. 385; 7 Abb. 352; *Gallt* v. *Finch*, 24 How. 193; *Morris* v. *Morange*, 26 How. 247; *Wait* v. *Van Allen* 22 N. Y. 319; *Salls* v. *Butler*, 27 How. 133; overruling *Seely* v. *Prichard*, 3 Duer, 669; *Toll* v. *Thomas*, 18 How. 234; see also *Hanse* v. *N. Y. Cent. R. R. Co.*, 14 How. 430). It is improper for the court to attempt to effect the same thing indirectly by ordering a new date to the judgment (*Humphrey* v. *Chamberlain*, 1 Kernan, 274). And the supreme court will not set aside a judgment for the mere purpose of relieving a party from the loss of the remedy by appeal, although from no fault or neglect on his part (*Marston* v. *Johnston*, 13 How. 93; and see *Fry* v. *Bennett*, 16 *id.* 385; 7 Abb. 352); a stay of proceedings on the judgment does not extend the time to appeal (*Renouil* v. *Harris*, 2 Code Rep. 71).

a. **Party appealing.**—The term "party appealing" means the party in whom is the right to appeal (*Beach* v. *Gregory*, 2 Abb. 209).

b. **Notice of judgment.**—This must mean of a judgment so perfected in form that on the very day on which notice is given of its entry, the appellant has on the record a knowledge of all the matters necessary to the perfection of an appeal, and of a stay upon it. One of these matters is the amount of the judgment, and that depends on the amount of the costs. So that while the amount of the costs is kept open [and is uncertain], no notice of the entry of the judgment can be given, which will limit the time for an appeal (*Sherman* v. *Wells*, 14 How. 527). Thus, where a party adjusted his costs, and entered judgment, and served notice of the judgment on the 20th February, and afterwards stipulated to re-submit the costs for adjustment, and that any deduction made should be deducted from the judgment, held that such stipulation was in effect a revocation of the notice of the judgment, and that to limit the time to appeal a new notice of the judgment should have been given after the readjustment of the costs (*id.*; *Leavy* v. *Roberts*, 8 Abb. 310), unless after the order is made or judgment is rendered and entered, or filed and constructively entered, so as to become a part of the record or minutes of the court, the party has some *written notification thereof, by act of the prevailing party or his attorney*, his time to appeal continues without limitation. The adverse party may acquire knowledge of the order or judgment; he may examine it on the files of the court, or on its records, and procure a copy of it, but the knowledge so acquired is inoperative to limit his time for appealing (*Fry* v. *Bennett*, 16 How. 402; 7 Abb. 352; see *Leavy* v. *Roberts*, 8 Abb. 310; *The People* v. *Spaulding*, 9 Paige, 607; *Gay* v. *Gay*, 10 *id.* 370).

c. The time to appeal from an order does not commence to run until written notice of the order, *after it has been duly entered.* A notice of the order before it has been entered will not limit the time to appeal (*Gallt* v. *Finch*, 24 How. 193). And where an issue of fact is tried by the court without a jury, and a decision rendered thereupon, notice of the decision given by the prevailing party before the actual entry of the judgment, is not such a notice of the judgment as will limit the time to appeal (*Leavy* v. *Roberts*, 8 Abb. 310).

d. A party who undertakes to limit the time for appeal must be held to strict practice. A *notice* of judgment not signed by the party, or his attorney, and without any place of business indorsed or mentioned, is a nullity, and will not limit the time to appeal (*Yorks* v. *Peck*, 17 How. 192); so a notice of judgment is defective where it omits to state the clerk's office in which the judgment is entered, and such a notice does not limit the time to appeal (*Valton* v. *Nat. Loan Fund Ass. Soc.*, 19 How. 515).

e. In order to limit the right of appeal, a service of a *written* notice on the party is necessary, even where the appeal is from a judgment or order entered by the appellant himself (*Rankin* v. *Pine*, 4 Abb. 309,—general term, second district). Thus, where the cause was referred, and a report made in favor of the plaintiff, for a sum smaller than that claimed, on July 19, 1856, the plaintiff entered judgment for the amount found due him. On the 19th of November following, the plaintiff served notice of appeal. On motion to dismiss said appeal, on the ground, amongst others, that it was to late,—it not

appearing that the defendant had ever served the plaintiff with written notice of the judgment, the motion was denied. And in *Staring* v. *Jones* (13 How. 423), Wells, J., says, "There has been no *written* notice of the judgment (which in that case was for the plaintiff) served upon the defendants or their attorneys. Nothing short of this will limit the time in which to appeal. Actual knowledge of the entry of the judgment by the defendants or their attorneys will not supersede the written notice."

f. When an order obtained by a party is settled *ex parte*, entered, and a copy of it served, and the judge who made it on a re-settlement, which he directs, modifies it by altering the terms of the original draft order, the party obtaining the order, if he would limit the time in which to appeal from it, must cause it to be entered as it is finally settled, and serve a copy of it. From the time it is resettled, and as resettled, it is the only order there is in relation to the matter covered by it (*Bowman* v. *Earl*, 8 Duer, 691).

See note to section 331.

CHAPTER II.

Appeals to the Court of Appeals.

SECTION 333. Appeal, in what cases. Judgment on verdict, subject to the opinion of the court.
334. On appeal, security must be given or deposit made, unless waived.
335. On judgment for money; security to stay execution. New undertaking on sureties in the first becoming insolvent. Deposit in lieu of undertaking.
336. If judgment be to deliver document or personal property, it must be deposited or security be given.
337. If judgment be to execute conveyance, it must be executed and deposited.
338. Security where judgment is to deliver real property or for a sale of mortgaged premises.
339. Stay of proceedings upon security being given.
340. Undertakings may be in one instrument or several.
341. Security to be approved and sureties to justify.
342. Perishable property may be sold, notwithstanding appeal.
343. Undertaking must be filed.

§ 333. [282.] (Am'd 1857.) *Existing suits. Appeal, in what cases. Judgment on verdict subject to the opinion of the court.*

(1.) An appeal may be taken to the court of appeals, in the cases mentioned in section eleven.

(2.) When any of the courts mentioned therein shall, at general term, render judgment upon a verdict taken subject to the opinion of the court, the questions or conclusions of law, together with a concise statement of the facts upon which they arose, shall be prepared by and under the direction of the court, and shall be filed with the judgment-roll, and be deemed a part thereof, for the purposes of a review in the court of appeals.

The provisions of the last preceding [this] section shall apply to any judgment therein mentioned that has been heretofore rendered, and upon which an appeal has been brought, and is now pending, or upon which an appeal shall hereafter be brought. When the return has already been filed with the clerk of the court of appeals, such statement shall be filed with him, and be deemed a part of such return.

a. The amendment of 1857 was the addition of the second subdivision. It applies only to new trials ordered and judgments rendered after the amendment took effect (*Ely* v. *Holton*, 15 N. Y. 596). The only facts of which the general term is authorized to make a statement under this section are those uncontroverted or conceded on the trial (*Purchase* v. *Mattison*, 15 Abb. 402). The general term has no right of itself to deduce facts from evidence in order to found a judgment. The amendment in 1857, to this section, has not varied this rule, or established another in relation to proceedings that may be had at the trial, or in relation to the powers and duties of the court at general term (*Brower* v. *Oreer*, 2 Bosw. 365).

b. Where the court at general term establish findings of fact different from the facts found by the court at special term, or by the referee, such finding of facts at general term should be made part of the record on appeal to the court of appeals (*Smith* v. *Grant*, 17 How. 381). Where such a case is sent back by the court of appeals for re-settlement, the general term cannot send the case to the special term or referee, for a restatement of the facts. The court of appeals should be furnished with the same facts as those on which the court at general term based its judgment. (*Id.*) Where, in such a case, the facts as found by the general term, have not been stated in the record, pursuant to rule 38, the general term may allow a re-settlement on terms. (*Id.*)

c. **What decisions the court of appeals may review.**—The court has authority to review *only actual determinations*, that is, questions upon which the inferior court has *actually passed* (*Raynor* v. *Clark*, 3 Code Rep. 230; 7 Barb. 581), and only determinations *made* after the code took effect (*Rice* v. *Floyd*, 1 Code Rep. 112; 3 How. 366).

d. In *Gridley* v. *Daggett* (1 Code Rep. N. S. 386; 6 How. 280), a decision was made at special term, and appealed to the general term. At the general term no hearing of the appeal took place, but a judgment was entered under a stipulation, and with a view to an appeal to the court of appeals. An appeal was had; and although both parties asked to have it heard upon the merits, it was held that the court had no discretion, and the appeal was dismissed for want of such an actual determination as the code requires. So too there cannot be an appeal to the court of appeals from a judgment by default at the general term (*Strong* v. *Hardenburgh*, 25 How. 438).

e. The "*special proceedings*" mentioned in subdivision 3 of section 11, are not the "*provisional remedies*" provided for by §§ 178 to 244 (*Genin* v. *Tompkins*, 1 Code Rep. N. S. 415).

f. The words "brought there from another court" include suits pending in the late court of chancery on the first Monday of July, 1847, and *transferred* to the supreme court by force of the constitution (Art. xiv. § 5), and judiciary act (Laws of 1847, p. 322, § 12), where the decree was made after the code took effect (*Farm. Loan and Trust Co.* v. *Carroll*, 4 How. 211; 2 Code R. 138; 2 Coms. 566).

g. The judgment, to be reviewable, must be a final judgment (*Puddock* v. *Springfield Fire Ins. Co.* 2 Kernan, 591). Accordingly where the plaintiff demurred to portions of the defendant's answer, and judgment was rendered thereon against the defendant, in the court below, leaving issues of fact in the cause undecided, held, that the judgment on the demurrer was not reviewable in the court of appeals until the issues of fact were disposed of and final judgment given in the action (*Id.*; and see *The People* v. *Haws*, 34 Barb. 69; *Ford* v. *David*, 3 Abb. 386; *Harris* v. *Clark*, 4 How. 78).

h. When an action is tried before the court without a jury, and a decision is made disposing of the case, except that a referee is directed to take an account and an order is entered in conformity to the decision, an *appeal* from such order to review decisions made at the trial will be dismissed; they can only be reviewed on an appeal from the *judgment*, which appeal cannot be brought until the account has been taken, and all questions arising upon it have been disposed of at special term. Until then, the order entered on the final decision made after the trial, does not mean a *judgment*, within the meaning of that word as defined by the code (*Lawrence* v. *Farmers' Loan and Trust Co.* 15 How. 57; see *Tompkins* v. *Hyatt*, 19 N.Y. 534).

a. Where there has been a reference under subd. 3 of section 271, every question depending not on the facts found, but on error in the proceedings on the trial or in the determination of the facts, must be raised by exception. There can be no review in the court of appeals of the correctness of the determination of the facts (*Marshall* v. *Smith*, 20 N. Y. 251).

b. The provisions of the code in relation to appeals to the court of appeals, apply to all judgments in proceedings upon mandamus rendered after April 8, 1859 (Laws 1859, ch. 174, § 3). Such judgments rendered prior to that day are to be reviewed by writ of error (*Becker* v. *The People*, 18 N. Y. 487; and as to such judgment, see Laws 1859, ch. 174).

c. The court of appeals has power, and it is its duty to hear and determine all cases which were pending in said court on 8th April, 1859, upon writs of error theretofore brought to review the determination of the supreme court, in awarding or refusing to award a peremptory mandamus, in the same manner as if such cases had been brought into said court of appeals by appeal under the code (Laws 1859, ch. 174, § 1; and see further, *id.* § 2).

d. Upon a trial by jury, the plaintiff had a verdict, and in the entry thereof judgment for him was ordered. The defendant moved for a new trial upon a case and exceptions at special term, and his motion was granted. The plaintiff appealed from this order, and it was reversed at general term, the order thereupon entered again ordering judgment. After this the plaintiff applied at special term for an allowance, which was granted. This allowance was affirmed on appeal at general term. An order was entered containing an order for judgment on the verdict, with interest and costs, stating the amount, but not stating whether such order was made at general or special term. The defendant appealed to the court of appeals from the judgment, and from the order at general term, affirming the order for an allowance: held, on motion to dismiss the appeal, that the appeal was well brought, there having been an actual determination at the general term in a judgment of all the questions capable of litigation, and that a previous appeal to the general term, from the judgment rendered at special term, was unnecessary (*Cook* v. *N. Y. Floating Dry Dock Co.* 18 N. Y. 229).

e. The holder of a fund being sued by two parties having conflicting claims thereto, brought the same into court and was discharged from litigation, under section 122 of the code. There was no formal substitution of either claimant, as defendant, but a reference was ordered to ascertain the facts, and upon the coming in of the report, the fund was awarded; held, a final determination, equivalent to a judgment, from which an appeal might be taken to the court of appeals (*Kirby* v. *Fitzpatrick*, 18 N. Y. 484). The report in such case having the effect of a special verdict, the question which party is entitled to judgment is reviewable, on appeal, although no exception has been taken. (*Id.*)

f. Where the case, on the appeal, fails to show the court in which judgment was rendered, or to show such a judgment as is set forth in the notice of appeal, the appeal will be dismissed. It is not enough that the case states facts which make it probable, merely that an appealable judgment has been rendered (*Lahens* v. *Fielden*, 15 Abb. 177). If the court can see that the defect arises from a mere clerical error or omission it may allow an amendment. (*Id.*) And where the record shows an actual determination made at general term, although it does not affirmatively appear that the case was brought there by *appeal*, the court of appeals will presume that the case was regularly at general term by appeal (*Beecher* v. *Conradt*, 11 How. 181).

g. **Order granting a new trial.**—An appeal to the court of appeals, from an order granting a new trial, lies only when the party obtaining the verdict is content, if he cannot sustain it, to fail wholly in his action or defense (*Lanman* v. *Lewiston R. R. Co.* 18 N. Y. 493). Where the order is for a new trial, unless the plaintiff will remit a part of his verdict, he cannot appeal and retain the benefit of the alternative judgment for a reduced amount. Accordingly, where, in such a case, the plaintiff stipulated that in case the order for a

new trial should be affirmed, the judgment should be reduced as proposed by the court below, his appeal was dismissed. (*Id.*)

a. An appeal to the court of appeals from an order of the court below, granting a new trial, does not bring up for review questions of fact. If no error of law is found in the decision, it will be affirmed and final judgment given against the appellant according to the stipulation required to accompany the notice of appeal in such cases (*Hoyt* v. *Thompson's Executors*, 19 N. Y. 207).

b. An appeal to the court of appeals from an order denying a new trial does not *per se* preclude the opposite party from proceeding to enter judgment. But the entry of judgment in such a case does not affect the appeal from the order (*Valton* v. *Nat. Loan Fund Life Ass. Soc.*, 19 How. 515; *McMahon* v. *Allen*, 22 How. 193). The court below may entertain a motion to stay proceeding to judgment or proceedings on the judgment. (*Id.*)

c. Where after a trial by jury a new trial is ordered by the court below, the court of appeals will affirm the order if it can be maintained upon any view of the evidence (*Sanford* v. *Eighth Av. R. R.*, 23 N. Y. 343); for upon an appeal from an order granting a new trial the judgment cannot be reversed unless the case made negatives any inference that the court below may have granted the new trial because it came to a different conclusion upon the facts from that found on the original trial (*Miller* v. *Schuyler*, 20 N. Y. 522). The party defeated must go down to a new trial, unless he can show by a statement of the facts considered as established at the general term that the judgment was founded upon an erroneous conclusion of law. (*Id.*)

d. **Action commenced in a justice's court.**—There cannot be an appeal to the court of appeals from a judgment of the New York common pleas in an action removed into it from a district court without an order allowing such appeal (*Smith* v. *White*, 23 N. Y. 572).

e. Where the record does not show that the action was originally commenced in a justice's court, that fact may be shown by affidavit, on a motion to dismiss the appeal (*Pugsley* v. *Kisselburgh*, 10 N. Y. 420).

f. **Irregular judgment.**—That the judgment which should have been in the alternative for the return of the property or for its value, is for the value absolutely, and does not conform to the report of the referee, is an irregularity to be corrected by the court below, and is not reviewable on appeal (*Ingersoll* v. *Bostwick*, 22 N. Y. 425; and see *ante*, p. 637, *h*).

g. **No appeal lies to the court of appeals in the following cases.**—Where there was a verdict and judgment without any exceptions or proceedings intermediate the verdict and filing the judgment record, and an appeal was brought upon the judgment. The suit was commenced prior to 1st July, 1848; but the verdict and judgment were obtained after that time (*Lake* v. *Gibson*, 3 How. 420).

h. Upon a mere question of costs (*Sherman* v. *Daggett*, 3 How. 426; *Collumb* v. *Read*, 24 N. Y. 517). But an order otherwise appealable is not the less so because it affects only costs (*McGregor* v. *Comstock*, 19 N. Y. 581).

i. From an order of the supreme court at general term, confirming the report of commissioners for opening streets in the city of New York (*Re Canal Street*, 2 Kernan, 406).

j. From an order requiring a receiver of an insolvent corporation to give security for costs (*Briggs* v. *Vandenburgh*, 22 N. Y. 467).

k. From a decision on a motion to set aside a judgment or decree, either for irregularity or as a matter of favor (*Sherman* v. *Felt*, 3 How. 425; 2 Coms. 186; *Dunlop* v. *Edwards*, 3 Coms. 341; *Humphrey* v. *Chamberlain*, 1 Kern. 274). An order of the supreme court, made at general term, setting aside a judgment and execution thereon for irregularity, but giving no direction in respect to the previous proceedings in the action, does not determine the action nor prevent a judgment from which an appeal may be taken, although the irregularity alleged by the defendant consisted in the service of the summons in pursuance of a chamber order, so that if he was right no action was ever

commenced. The chamber order, not having been set aside, the action was to be considered well commenced and still pending (*Jones* v. *Derby*, 16 N. Y. 242).

a. From the decision of the supreme court on a case, there must be exceptions or special verdict. So held, where there was a trial in an action of ejectment, and a verdict taken subject to the opinion of the supreme court upon a case to be made—which was made, and the general term gave judgment for the defendant on the case; which order was appealed to the court of appeals (*Wright* v. *Douglas*, 3 How. 418).

b. From a judgment except upon exceptions or special verdict, presenting questions of law. So held, where there was a trial before a judge, without a jury, and a *case* made, upon which the general term denied a new trial, which was incorporated in the record, and appealed to the court of appeals (*Livingston* v. *Radcliff*, 3 How. 417; and see *ante*, 487, *e*).

c. From an order of the supreme court at a general term, denying a rehearing of an order made at a special term, where the order made at special term is such as would not be reviewed by this court on appeal, if confirmed by the general term (*Marvin* v. *Seymour*, 1 Code Rep. 111; 3 How. 340; 1 Coms. 535). Thus, where a motion was made at a special term for an order to compel one of the complainants to appear and submit to an examination before a master to whom the cause had been referred, and was denied, and an appeal then taken to the general term, where a rehearing was denied, held, not an appealable order to the court of appeals, even if the general term had confirmed the order. (*Ib.*)

d. From an order on a rehearing at a general term of the supreme court vacating an order of reference to ascertain the amount of damages occasioned by a temporary injunction (*Anon.* 4 How. 80).

e. From an order setting aside a decree of divorce taken as confessed, and allowing alimony (*Carpenter* v. *Carpenter*, 2 Code Rep. 83; 4 How. 139).

f. From a decision on a motion to dissolve a temporary injunction (*Vandewater* v. *Kelsey*, 2 Code Rep. 3; 3 How. 338).

g. From the verdict of a jury upon a question of fact upon the trial of which there is a question as to the credibility of a witness by which it is sought to be proved (*Rice* v. *Floyd*, 4 How. 27; 1 Coms. 608).

h. From an order setting aside an answer as frivolous, and that the plaintiff have judgment as for want of an answer, and a further order that the defendant submit to an examination on oath concerning his property, and the judgment to be given on the complaint. It is not the final judgment in the action (*Dunham* v. *Nicholson*, 2 Code Rep. 70; 4 How. 140).

i. On reversal by supreme court of judgment of common pleas on bill of exceptions contained in the record as an appeal under act of December, 1847. (*Fargo* v. *Brown*, 3 How. 294; 1 Coms. 429).

j. From an order of the supreme court at general term, reversing a judgment obtained at the circuit, and ordering a new trial (*Duane* v. *Northern R. R. Co.*, 3 Code Rep. 72; 4 How. 364; 3 Coms. 545).

k. From an order awarding or refusing an issue to be tried at law, and the granting or refusing a new trial (*Lansing* v. *Russell*, 4 How. 213).

l. From a decree which directs a reference for the purpose of taking an account between the parties, and for other purposes and reserves further directions until the coming in and confirmation of the report, and then, "that such further order and decree may be made thereon as shall be just." It is not a *final decree* (*Cruger* v. *Douglas*, 2 Code Rep. 129; 4 How. 215; *Harris* v. *Clark*, 2 Code Rep. 47; 4 How. 78; *Wells* v. *Gibson*, MS. October, 1852).

m. From an order made at the general term of the supreme court confirming an order vacating a master's or receiver's sale. It was a matter in the discretion of the court (*Wakeman* v. *Price*, 3 Code Rep. 186; 2 Coms. 334).

n. From an order made at the general term of the supreme court confirming an order which denied a motion to set aside a judgment entered on a warrant

of attorney, before the code went into effect (*Dunlop* v. *Edwards*, 8 Code Rep. 197; 3 Coms. 341).

a. From a decision at the circuit on a case. So held where a case was inserted in the judgment record, and was there called a bill of exceptions, but had not in fact been turned into a bill of exceptions (*King* v. *Dennis*, 3 How. 419; 2 Coms. 189).

b. From an order of the supreme court at general term denying a motion for a stay of proceedings on a judgment, and for liberty to move to set aside a report of referee without an appeal, or for an order extending the time to appeal (*Enos* v. *Thomas*, 5 How. 359).

c. Where an action was commenced in a justice's court, and the proceedings discontinued by reason of title coming in question, and an action for the same cause was commenced in the *old* court of common pleas, and by operation of law was transferred to the supreme court,—the appeal from the judgment of the supreme court in such action was dismissed, on the ground that it was an action originally commenced in a justice's court (see *Brown* v. *Brown*, 6 How. 320; 2 Seld. 106; *Pugsley* v. *Kesselburg*, 10 N. Y. 420. See now, § 11).

d. A refusal of a referee to adjourn the hearing before him, where it is a matter resting in his discretion, will not be reviewed on appeal (*Carpenter* v. *Haynes*, 1 Code Rep. N. S. 414).

e. The finding of a referee on the questions, whether the plaintiff had performed his contract, and whether performance had been waived, will not be reviewed by the court of appeals on appeal from the judgment of the supreme court, affirming the report of the referee; because they are questions of fact only (*Newton* v. *Harris*, 1 Code Rep. N. S. 414; and see *Easterly* v. *Cole*, 3 Coms. 502; *Davis* v. *Allen*, ib. 168; *Borst* v. *Spelman*, 4 Coms. 280).

f. The provision allowing an appeal from a "final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment," does not include an order granting or refusing a provisional remedy, nor an order vacating or refusing to vacate such provisional remedy; because such provisional remedies are not contemplated by the words "special proceedings," in subdivision 3 of section 11 (*Genin* v. *Tompkins*, 1 Code Rep. N. S. 415).

g. An appeal from a judgment on a report of referees, was dismissed on motion, the record not stating the facts as found by the court below, and there being no bill of exceptions, but simply a case setting forth all the evidence given on the trial (*Colie* v. *Brown*, 1 Code Rep. N. S. 416).

h. From a judgment of the supreme court affirming an order of a surrogate denying a motion for leave to discontinue proceedings of accounting in the matter of a guardian, and directing that the proofs be closed (*Tompkins* v. *Soulice*, 7 How. 194).

i. A motion to open biddings on a judicial sale is addressed to the discretion of the court below, and a decision on such motion cannot be appealed to the court of appeals (*Lord* v. *Peister*, Court of appeals, Oct. 1852, 5 Mon. L. R. N. S. 309; *Hazleton* v. *Wakeman*, 3 How. 457).

j. From the decision of the supreme court, on an appeal from the county court, as to locating a toll-gate (*McAllister* v. *Albion Plank Road Co.* 10 N. Y. 353; 7 How. 301).

k. Where a motion before a surrogate for leave to dismiss an application was denied there, the decision of the supreme court affirming that order is not appealable to the court of appeals; because it is not a final determination (*Tompkins* v. *Soulice*, 7 How. 194).

l. From the decision of the court below, awarding costs against executors, and also making an extra allowance for costs; because it is a matter in the discretion of the court (*Fort* v. *Gooding's Executors*, court of appeals, Oct. 1852, 5 Mon. L. R. N. S. 399).

m. From an order denying a rehearing of an interlocutory decree (*King* v. *Merchants' Exchange Co.* 1 Selden, 547).

a. From an order denying leave to file exceptions to a report of a referee after the usual time for doing so has expired. (*Id*).

b. Where no exceptions to any ruling of the court were taken on the trial below, there is no question of law to be considered in the court of appeals, and therefore the case cannot be reviewed in the court of appeals (*Rich* v. *Kimberly*, Court of appeals, Oct. 1852, 5 Mon. L. R. N. S. 400; and see *ante*, page 487, *e*).

c. Where no question of law is raised by the return, and questions of fact alone are presented for the consideration of the court, the judgment below will be affirmed (*Kendall* v. *Harris*, Court of appeals, Oct. 1852, 5 Mon. L. R. N. S. 400).

d. Where the exception in the case is to the whole of the judge's charge, and where some parts of the charge are correct, the exception cannot avail the party taking it. So, too, as to the refusal to charge, where the exception is to the whole refusal, and where some part of the refusal is right, the exception must fail (*Davenport* v. *Covert*, Court of appeals, Oct. 1852, 5 Mon. L. R. N. S. 399).

e. It appearing by the return to the appeal, that no question of law was raised in the court below, and no exception taken to any ruling or decision of the judge or court on the trial, and it not appearing, therefore, from the record whether the question discussed on the argument had been actually raised and finally determined in the court below, the court of appeals would not entertain such question (*Barto* v. *Himrod*, Court of appeals, Oct., 1852, 5 Mon. L. R. N. S. 400. See 4 Selden, 483).

f. In all cases of an appeal from a decision on a motion to set aside a report of referees, there must be a statement of facts prepared and incorporated into the record by the court below, showing to the court of appeals how the facts were found and understood in that court. And in a case where the record contained merely a special report of the referee, showing what evidence was given before him, the appeal was dismissed for the reason that no statement of facts was prepared and incorporated in the record, showing how the facts were found and understood in the court below (*Geer* v. *Wetmore*, Court of appeals, Oct., 1852, 5 Mon. L. R. N. S. 400; *Sturges* v. *Merry*, 3 How. 318).

g. No appeal lies from an order in proceedings for partition declaring the rights of the parties, and appointing commissioners to make partition; because it is not a final order (*Beebe* v. *Griffing*, 2 Selden, 465).

h. An order denying a motion to stay the trial of a cause until the decision of another cause, is not an order involving the merits, or necessarily affecting the judgment, and is not subject to review by the court of appeals on an appeal from the final judgment in the cause (*James* v. *Chalmers*, 2 Selden. 209; 1 Code Rep. N. S. 413).

i. If the court of appeals has the power to review a decision of the supreme court, denying an application to order an amended answer to stand as part of the pleadings in the cause, it can only be exercised after a final judgment in the action, (*Sackett's Harbor Bank* v. *Burwell*, 9 How. 95).

j. From an order of the supreme court, made at a general term, confirming the report of commissioners to appraise the compensation to be made for land proposed to be taken under the General Railroad Act, and refusing to direct a new appraisal (*Re N. Y. Cent. R. R. Co.* v. *Marvin*, 1 Kernan, 276).

k. Reading the sentence (sub. 3 of § 11) in connection with the other parts of the section, it is evident that it contemplates a proceeding based upon the judgment, and which assumes its validity; and this is the construction which has been put upon it by the court of appeals (*Sherman* v. *Felt*, 3 How. 425; *Dunlop* v. *Edwards*, 3 Coms. 341; see 16 N. Y. 296). It is not the policy of the code to allow a review in the court of appeals of interlocutory orders in an action, unless they are such as put an end to the suit, and prevent the rendering of a judgment from which an appeal will lie, or unless there is an appeal from the judgment (*Humphrey* v. *Chamberlain*, 1 Kernan, 275). Therefore no appeal lies from an order at special term, confirmed at general term,

ordering a judgment set aside, and re-entered to give a party an opportunity to appeal. Such an order can only be reviewed, if at all, on an appeal from the judgment. (*Ib.*)

a. No appeal lies from an order of the supreme court removing an action commenced therein to the United States court, on the ground that the defendant is a citizen of another State (*Illius* v. *N. Haven R. R. Co.*, 3 Kernan, 597; *Kanouse* v. *Martin*, 6 How. 240).

b. No review can be had in the court of appeals of the determination of the supreme court, on a question of fact in an equity suit, commenced since the code (*Newton* v. *Bronson*, 3 Kernan, 587),

c. An order vacating a judgment in an action to recover the possession of land, and granting a new trial pursuant to 2 R. S. 309, is not appealable (*Evans* v. *Millard*, 16 N. Y. 619).

d. That damages were assessed against the defendant in the court below, without any proof of his default to answer, is a matter of practice, not reviewable (*Catlin* v. *Billings*, 16 N. Y. 622).

e. An order at general term striking out of a judgment the costs therein (*Thompson* v. *Bullock*, 16 How. 213).

f. The plaintiff in an action to foreclose a mortgage, obtained an order for judgment at special term, on the ground of the frivolousness of a demurrer to the complaint. This order for judgment was affirmed on appeal to the general term. The plaintiff then obtained a computation of the amount due, and a judgment at special term of foreclosure and sale. From this judgment and the order at general term affirming the order for judgment, the defendant appealed to the court of appeals. On motion to dismiss, it was held that no such appeal would lie. The defendant, after the final judgment at the special term, should have appealed therefrom to the general term, when, in case of affirmance, he might have appealed to the court of appeals (*Hollister B'k of Buffalo* v. *Vail*, 15 N. Y. 593).

g. Where on the trial, the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which motion was denied and exception taken, and the complaint was defective in that it omitted certain facts essential to a cause of action, but which might have been supplied by amendment, yet the plaintiff proved such omitted facts, held that the defect in the complaint furnished no sufficient ground for an appeal (*Lounsbury* v. *Purdy*, 18 N. Y. 515).

h. A judgment for the sale of lands, and the disposition of the proceeds, in accordance with the report to be made upon a reference therein ordered, to ascertain the shares of the respective parties, is not *final*, so as to be the subject of an appeal to the court of appeals, though no provision is made in the judgment, for a review of the report, or for suspending the actual payment of the moneys, to give an opportunity for appeal (*Tompkins* v. *Hyatt*, 19 N. Y. 534).

i. A judgment is not *final* so long as there may be further litigation under its provisions; and it is for the court below to provide, as may be necessary to secure to the parties the practical fruit of such litigation. (*Id.*)

j. An order of the supreme court, refusing to set aside an execution issued without leave after five years, is not appealable to the court of appeals (*Bank of Genesee* v. *Spencer*, 18 N. Y. 150).

k. The defendant in a judgment was thereby declared to hold a lease for the use of the plaintiff, and was required to assign, upon being indemnified against its personal covenants, and being reimbursed by the plaintiff rent and taxes already paid; after proceeding to enforce the provisions in his favor, the defendant appealed from the residue of the judgment, held that all the provisions being connected and dependent, the right of appeal was waived by the appellant enforcing a portion of the judgment, and his appeal was dismissed (*Bennett* v. *Van Syckel*, 18 N. Y. 481).

l. An action commenced in the county court, or supreme court, under sections 55 and 56 of the code, upon the discontinuance of an action in a justice's

court, involving the title to land, is "an action originally commenced in a court of a justice of the peace" (*Cook* v. *Nellis*, 18 N. Y. 126).

a. The allowance or refusal of a common-law *certiorari* to review the proceedings of commissioners of assessment, &c., being matter of discretion in the supreme court, its determination to quash such writ will not be reviewed in the court of appeals (*The People* v. *Stillwell*, 19 N. Y. 531). It *seems*, however, that a formal judgment of the supreme court, affirming or annulling the proceedings below, would be appealable to the court of appeals. (*Id.*)

b. An appeal does not lie from a judgment on an award: it must be reviewed by a writ of error (*Isaacs* v. *Beth Hamedrash Society*, 19 N. Y. 584).

c. No appeal lies to the court of appeals from a decision at general term reversing an order amending a judgment (*N. Y. Ice Co.* v. *N. West. Ins. Co.*, 21 How. 296; 12 Abb. 414).

d. **An appeal lies to the court of appeals in the following cases.**—Where the supreme court on appeal reverses the judgment or decree of a subordinate court, although further proceedings were directed to be had in the court where the suit or proceeding originated; and, therefore, where a surrogate dismissed a proceeding instituted before him to bring executors to account, and the supreme court, on appeal, reversed his decree with costs, and directed him to proceed with the account, held, that an appeal would lie to the court of appeals (*Messerve* v. *Sutton*, 3 Code Rep. 198; 3 Coms. 546).

e. From a decree at a general term of the supreme court, reserving no questions, and nothing to be done but to compute the amount due, after the referee's report of the amout due had been confirmed (*Swarthout* v. *Curtis*, 3 Code Rep. 215; 4 Coms. 415).

f. A party against whom a judgment has been rendered in the court below, is not prevented from appealing to the court of appeals, by the fact that he has paid the judgment, unless such payment was by way of compromise and agreement to settle the controversy (*Wells* v. *Danforth*, 1 Code Rep. N. S. 415).

g. An appeal lies to the court of appeals from an order made by the supreme court, requiring a person beneficially interested in a recovery sought to be had in the name of another, to pay the costs of the defendant in the action (*Giles* v. *Halbert*, 2 Kernan, 32).

h. An application by petition to compel a specific performance by infant heirs of a contract for the sale of land made by the ancestor, is a special proceeding within section 11 of the code, and an appeal lies to the court of appeals from a final order at general term, made upon such application (*Hyatt* v. *Seeley*, 1 Kernan, 52).

i. An appeal lies from an order made after judgment rendered upon the striking out an answer as sham where such order vacates the judgment upon the ground that after striking out the answer, the plaintiff's cause of action had ceased to exist (*Edson* v. *Dillaye*, 17 N. Y. 158).

j. An appeal lies to the court of appeals from a judgment of the general term rendered upon argument, affirming a final judgment of any kind, if the latter is an actual determination and not merely rendered upon default (*Lahens* v. *Fielder*, 15 Abb. 177; and see *Beecher* v. *Conradt*, 11 How. 181), and where the supreme court at general term, on the request of a party moving for a new trial, the other party not appearing to oppose, takes the papers and examines the questions involved, its judgment thereon is an actual determination from which an appeal lies (*Seneca Indians* v. *Knight*, 19 N. Y. 587).

k. Where the general term has entertained an appeal from and reversed an order (not properly appealable) the court of appeals will review the order of the general term (*N. Y. Ice Co.* v. *N. West. Ins. Co.*, 12 Abb. 414; 21 How. 296).

l. An order merely directing the names of certain parties plaintiff to be stricken out, may not be reviewable in the court of appeals, but if such order goes further and orders the parties whose names are so stricken out to be made defendants and prescribes what amendments shall be made in the complaint it is appealable (*Lahens* v. *Fielder*, 15 Abb. 177).

a. An order of the supreme court dismissing an appeal from a judgment at special term, on the ground that it was too late, is appealable (*Bates* v. *Voorhies*, 20 N. Y. 525).

b. An appeal lies from an order of the supreme court vacating an entry of satisfaction, and restoring the judgment (*McGregor* v. *Comstock*, 19 N. Y. 581) An order otherwise appealable, is not the less so because it affects only costs (*Id.*)

c. An appeal lies from an order at general term affirming or reversing an order at special term upon an apportionment of the debts of an insolvent bank (*Re Hollister B'k.*, 23 N. Y. 508).

d. **Papers on the appeal.**—Where the case on an appeal served on the respondent is imperfect, his remedy is by motion on notice. A respondent is at liberty to move *ex parte* to dismiss the appeal in the court of appeals (Rule VII.) only where there is a total failure to serve any case (*Bowers* v. *Tallmadge*, 24 N. Y. 166).

e. A case or exceptions cannot form part of the papers on an appeal unless filed prior to entry of judgment, or unless an order be obtained authorizing the case or exceptions to be annexed to and to form part of the judgment roll (*Anderson* v. *Dickie*, 26 How. 199).

f. An appeal-book is insufficient if it does not contain a case or exceptions, presenting the conclusions of fact and of law, and a proper statement of the questions presented and exceptions to rulings. Such an appeal-book, although it contains the pleadings, the referee's report, the judgment and notice of appeal, presents no record into which the court can look for the reasons and grounds of the judgment, or to find errors, if any there were at the trial; and when those parts of such a record which have no relation to the trial, present no error, the court will affirm the judgment, if appealable (*Otis* v. *Spencer*, 6 Abb. 127; 16 N. Y. 610).

g. Where an order which the court of appeals has no jurisdiction to review, and the papers upon which such order was granted by the court below, are incorporated in the appeal-book, they will be stricken out, upon motion, in the court of appeals (*Smith* v. *Grant*, 15 N. Y. 590).

h. In *Smith* v. *Grant* (15 N. Y. 590) the cause was tried by the court without a jury, and decision in favor of the plaintiff. The decision contained a statement of facts found and and of conclusions of law. After judgment, defendant made a case, which set forth the history of the trial, but, instead of containing a statement of facts and conclusions of law, as found by the judge, it referred to his written decision, as contained in the judgment-roll. Instead, also, of containing the exceptions taken to the decision, it referred to a separate paper "annexed," which was a copy of the exceptions served by the defendant. On motion to dismiss the appeal on the ground that "the case did not contain a statement of facts, the conclusions of law and the exceptions thereto," the court permitted the appeal to stand, but observed that "the case was informally made up and settled."

i. Where a judgment on a trial by the court comes up for review without any finding of facts, nothing can be presumed against the correctness of the judge's decision (*Viele* v. *Troy and Boston R. R. Co.*, 20 N. Y. 184). The court never presume anything against the judgment, but if compelled by the imperfection in the statement of facts to resort to presumptions will adopt such only as will sustain the judgment (*Carman* v. *Pultz*, 21 N. Y. 547).

j. The court of appeals cannot look beyond the findings of fact contained in the case in order to draw any inference of fact bearing on the appeal (*Stewart* v. *Smith*, 14 Abb. 75).

k. The review in the court of appeals must be upon the same case as that upon which the cause was decided below, and therefore, except under peculiar circumstances, there cannot be a re-settlement of the case for the purposes of the appeal to the court of appeals (see *Catlin* v. *Cole*, 10 Abb. 387, and note *id.*)

l. On an appeal from the superior court of Buffalo, where no question as to its jurisdiction was raised, jurisdiction was assumed to have existed (*Bidwell* v. *Astor Mut. Ins. Co.*, 16 N. Y. 263).

See note to § 268, *ante*.

a. **Power of the court on appeal.**—This court cannot review those parts of a decree of a court below not appealed from (*Robertson* v. *Bullions*, 1 Kernan, 243; *Kelsey* v. *Western*, 2 Coms. 500).

b. The court will not reverse a judgment overruling a demurrer, where the defect in the pleading demurred to was formal and technical merely, and should have been amended by the court below (*McCormick* v. *Pickering*, 4 Coms. 276). A judgment ought not to be reversed on the ground merely, that the court below neglected to make a formal amendment, which might and ought to have been made (*Ib.* 282).

c. The court may refer to the evidence in the case, for the purpose of giving a construction to a finding of fact which will support the judgment (*Spencer* v. *Ballou*, 18 N. Y. 327).

d. In *Cady* v. *Allen*, 18 N. Y. 574, it is said "The appeal to this court is upon the law only, and we are to determine the law after all matters of fact are determined and embraced in a proper finding. Where we see that the judgment is fully supported by the facts as settled by the referee or judge, we do not grope through the evidence in order to see whether there may not be a ground of reversal."

e. Where the finding of a referee sets forth an agreement by the defendant reciting a good consideration, but states no other fact relating to that point, the court of appeals cannot examine the evidence, to determine whether or not such agreement is supported by a good consideration, although the case contains an exception, taken at the trial, to the referee's decision on that question. (*Id.*)

f. Where a referee reported that the defendant had received damage to the amount of "from $12 to $15," but which he did not allow to the defendant, although in the judgment of the court, he ought to have done so, the court of appeals on appeal from the judgment for the plaintiff, entered on such report, cannot determine the amount of defendant's damage, but is bound to order a new trial (*Moffet* v. *Sackett*, 18 N. Y. 522).

g. The court of appeals will not, in the absence of any other error, affirm a judgment ordered at general term upon exceptions heard there in the first instance under the stipulation of the parties, there having been no previous judgment, nor direction to suspend judgment, by the judge trying the cause. The error being merely formal, and amendable by the court below, and the judgment not being void for want of such amendment, held that it was unnecessary to reverse the judgment and remit the record, in order to have the amendment made (*Lake Ontario R. R. Co.* v. *Marvine*, 18 N. Y. 585).

h. After a return has been filed, and an order made which finally disposes of the appeal, whether upon the merits or not, it is proper to remit the proceedings to the court below (4 How. 184; *Langley* v. *Warner*, 2 Code Rep. 97).

i. "After a cause has been regularly remitted to the court below, the court of appeals has no jurisdiction to grant relief against any irregularity. The only remedy is a new appeal (*Newton* v. *Harris*, 1 Code Rep. N. S. 191; 8 Barb. 306)."

j. Where too much costs are charged on the dismissal of an appeal, the remedy is by motion to the court below (*Dresser* v. *Brooks*, 2 Code Rep. 130; 4 How. 207).

k. A remittitur cannot be made on the the dismissal of an appeal under rule 2 of the court of appeals, for the reason that no return has been filed; for if no return be filed there is nothing to *remit* (4 How. 211, note; see Rules, in Appendix). In *Doty* v. *Brown* (4 How. 429; 2 Code Rep. 3), where the plaintiff appealed to the court of appeals, but the bill of exceptions was alone returned to the court of appeals, without the judgment record, the appeal was dismissed for that cause.

l. After a remittitur filed in the court below, the court of appeals has no

further jurisdiction of the cause, and a motion in such a case for an amendment of the judgment, should be made in the court below (*Frazer* v. *Western*, 3 How. 235; *Martin* v. *Wilson*, 1 Coms. 240); but the court does not lose jurisdiction until the remittitur is actually filed, as until that be done, the court can order the remittitur to be sent back so as to restore jurisdiction (*Burkle* v. *Luce*, 3 How. 236; see also *Dresser* v. *Brooks*, 2 Code Rep. 130; 4 How. 207).

a. After an action has been remitted to the court below, and the remittitur filed, the court below will not, and cannot, entertain a motion to re-remit the remittitur to the appellate court, in order that a motion may be there made to amend alleged errors of that court (*Selden* v. *Vermilya*, 3 Sand. 683; 6 How. 41). Although where an appeal is regularly dismissed, and the remittitur sent down, the appellate court loses all control over the cause; yet where an order dismissing an appeal is *irregularly* obtained, or entered upon a false or garbled affidavit, the appellate court will doubtless grant relief by vacating the order of dismissal; but, so long as the order of the appellate court dismissing the appeal stands, the court below is bound by it, and has no power to make an order impairing its force (*Newton* v. *Harris*, 1 Code Rep. N. S. 191; 8 Barb. 306).

b, Where the order entered on the decision of a cause in the court of appeals does not correctly state the judgment pronounced by the court, it will be amended on motion, notwithstanding the remittitur may have been sent to the court below and filed there (*Palmer* v. *Lawrence*, 1 Selden, 455).

c. The court of appeals has the power to enforce a mutual stipulation made between the parties in the court below, by which they agreed that the decision in such case in the court below should be final, and that no appeal should be taken. The duty of hearing appeals involves the jurisdiction to determine whether a particular case is properly before the court on appeal, and to dismiss it if brought in violation of the agreement of the parties (*Townsend* v. *The Masterson Stone Dressing Co.*, 15 N. Y. 587).

d. **Proceedings after decision of the court of appeals.**—[After an appeal to the court of appeals has been dismissed or the judgment affirmed or reversed, the party in whose favor the decision is, obtains the remittitur from the clerk, and his next step is to obtain an order of the court from which the appeal was taken, that the decision or judgment of the court or appeals shall be and become the decision or judgment of the court below. This order is usually obtained *ex parte*, the remittitur filed, a copy of the order or judgment of the court of appeals served on the opposite party, with a copy of the costs and notice of adjustment].

e. The judgment of the court of appeals is to be remitted to the court below to be enforced according to law. It must therefore be brought *formally* to the notice of the court below, and be made one of its judgments. There is no other means of enforcing the judgment of the court of appeals, and until the court below orders the judgment of the appellate court to become a judgment of the court below, no proceedings can be taken to enforce the judgment. Filing the remittitur with the clerk, and his adjustment of costs thereupon, will not suffice (*Seacord* v. *Morgan*, 17 How. 394, and see note *id.* 398). But where the court of appeals had reversed the judgment below, and ordered a new trial, and the party who had obtained the reversal, and to whom the remittitur had been delivered, brought the cause to trial without filing the remittitur, held that he could not insist that the court below had no jurisdiction to try by reason of the remittitur not having been filed (*Judson* v. *Gray*, 17 How. 289).

f. After the decision of an appeal the court of appeals may before the remittitur is filed in the court below, amend any error therein, but after the remittitur is filed in the court below, the court of appeals loses all jurisdiction (*Burkle* v. *Luce*, 1 Coms. 239).

g. After an appeal has been determined in the court of appeals, the court below will not order a stay of filing the remittitur, to enable the applicant to move for a re-argument of the appeal (*Jarvis* v. *Shaw*, 16 Abb. 415). But

such a stay will be ordered after an order has been obtained from a judge of the court of appeals for the opposite party to show cause why a re-argument should not be had. (*Id.*)

a. The costs of an appeal to the court of appeals should be adjusted by the clerk of the court below and inserted in the entry of judgment in that court (*Union India Rubber Co.* v. *Babcock*, 1 Abb. 262).

b. Where an appeal is dismissed with costs, general costs follow whether the appeal be from an order or a judgment (*White* v. *Anthony*, 23 N. Y. 164). The court below cannot make any direction as to the costs in the court of appeals (*Whitbeck* v. *Patterson*, 22 Barb. 86).

c. As to entering judgment on remittitur, and for form of judgment, see *Union India Rubber Co.* v. *Babcock*, 1 Abb. 262.

d. Upon a remittitur from the court of appeals being filed in the court below, the latter court has no power to render any other judgment than one simply adopting that of the court of appeals as its own (*Macgregor* v. *Buel*, 17 Abb. 31).

e. The order making the judgment of the court of appeals the judgment of the court below, is an order of course, and the omission to enter it is a formal irregularity which the court below may amend and which will not be noticed in the court of appeals (*Chautauqua Co. B'k.* v. *White*, 23 N. Y. 347). The better practice is to move on notice in the court below on filing the remittitur to make the judgment of the court of appeals that of the court below. (*Id.*)

* § 334. [283.] *On appeal, security must be given or deposit made, unless waived.*

To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

f. An appeal without an undertaking is a nullity. It makes no change in the proceedings (*Kelsey* v. *Campbell*, 38 Barb. 238; 14 Abb. 368).

g. After an appeal which is a nullity the party may, if the time to appeal has not expired, disregard such appeal and prosecute another (*Kelsey* v. *Campbell*, 38 Barb. 238; 14 Abb. 368; and see *ante*, p. 638, *g*).

h. A purchaser at a judicial sale, who appeals to the court of appeals from an order requiring him to complete his purchase, cannot be required to file any other security than that prescribed by this section. Such security is also sufficient in such a case to stay the proceedings (*Griswold* v. *Fowler*, 15 Abb. 368, note).

i. The objection that an undertaking to stay proceedings on appeal is insufficient may be waived (*Halsey* v. *Flint*, 15 Abb. 368).

j. The affirmance mentioned in an undertaking on an appeal, means an affirmance by any tribunal having cognizance of the cause. So that on an undertaking upon an appeal from the special to the general term, if the judgment is reversed at the general term, but subsequently the decision at general term is reversed and the judgment at the special term affirmed, the sureties on the

* *Amended—See Appendix.*

undertaking on the appeal to the general term are liable (*Gardner* v. *Barney*, 24 How. 467).

a. Where an appeal is from a judgment against two defendants, the sureties upon a joint undertaking are liable if the judgment is affirmed against one (*Gardner* v. *Barney*, 24 How. 467).

b. Where in an action against several defendants who defended separately, the judgment of the court below was that one defendant (*Lynes*) recover against the plaintiff $2006 98, and that the other defendants recover against the plaintiff $412 93. There was but one judgment record. The plaintiff appealed to the court of appeals, and gave one undertaking to cover the two sums adjudged to the defendants, and another undertaking to pay all costs and damages which might be awarded against him on the appeal, not exceeding $250. On motion to dismiss the appeal on the ground that there should have been two undertakings in the sum of $250 each, one to Lynes, and one to the other defendants, the court denied the motion, and held, that as there was but one judgment, though it was for two sums, and as the appellant had given security for both those sums, and an undertaking for all costs, &c., not exceeding $250, there had been a full compliance with the statute (*Smith* v. *Lynes*, 4 How. 209; 2 Coms. 569; and see note to section 338).

c. On an appeal from two orders, an undertaking in the sum of $250 is not sufficient; but the undertaking may be amended (*Schermerhorn* v. *Anderson*, 2 Code Rep. 2; 1 Coms. 430).

d. Where an appellant from a judgment directing the payment of money, gave an undertaking to pay the amount of the judgment and "all damages awarded against the appellant upon the appeal," but made no mention of "*costs*," it was held, on motion to dismiss the appeal, that the undertaking did not comply with the requirement of this section (334), and that the appeal was not effectual for any purpose (*Langley* v. *Warner*, 1 Code Rep. 111; 3 How. 363; 1 Coms. 606; *Wilson* v. *Allen*, 3 How. 369).

e. Can the court allow a new undertaking to be filed *nunc pro tunc?* (*Id.*) Such a power was in effect, although not in express terms, exercised by the supreme court, in *Harris* v. *Bennett* (3 Code Rep. 23); where on a motion to dismiss an appeal for a defect in the undertaking, the court (Edmonds, J.) ordered a new undertaking to be filed (See section 339; *and Kissam* v. *Marshall*, 10 Abb. 424).

f. If the undertaking substantially complies with the statute, and secures to the respondent all that the law designed for him, it is sufficient (*Colman* v. *Rowe*, 4 Sme. & M. 747; *Smith* v. *Norval*, 2 Code Rep. 14). It is no objection to the undertaking that it is for a larger sum than is necessary (*Re Easterbrook*, 5 Cow. 27). But an undertaking not pursuant to the statute, and which expresses no consideration for the making thereof and which is not under seal, is void (*Robert* v. *O'Donnell*. 10 Abb. 454). Where the undertaking is pursuant to the statute it need not express any consideration on its face (*Thompson* v. *Blanchard*, 3 Coms. 335; *Seacord* v. *Morgan*. 17 How. 394). The undertaking is binding whether the judgment be affirmed in whole or in part. and the obligors are liable to pay a judgment of affirmance as to one of several parties, although there is a reversal as to the others. (*Id.*) The undertaking may be good for the purpose of sustaining the appeal, although it is wholly insufficient to stay the proceedings (*Coithe* v. *Crane*, 1 Barb. Ch. R. 21).

g. An affidavit of justification made by the sureties upon an appeal to the court of appeals, will be sufficient to render the appeal effectual, if it states that the sureties are each worth double the amount of the judgment; but in order to stay the proceedings upon the judgment, the sureties must also justify in double the amount ($250) required to be inserted in the undertaking to cover the costs of the appeal (*Newton* v. *Harris*, 1 Code Rep. N. S. 191; 8 Barb. 306; *Hoppock* v. *Cottrell*, 13 How. 461).

h. The undertaking only extends to the case of an affirmance of the judgment, and the sureties are not liable on the dismissal of the appeal (*Watson* v. *Husson*, 1 Duer, 242; affirmed on appeal, *Drummond* v. *Husson*, 4 Kernan, 60) See § 335.

a. "Perfecting an appeal from a judgment at special term to the general term, or from a judgment of affirmance by the general term to the court of appeals, by giving such an undertaking as stays all further proceedings in the court below upon the judgment appealed from, neither divests the lien of either of the judgments appealed from, nor discharges the sureties on the appeal first taken from the special to the general term" (*Parsons* v. *Travis*, 2 Duer, 662). Therefore, where, on an appeal from a judgment at special term to the general term, a sum of money was deposited in lieu of an undertaking to stay proceedings on the judgment, the judgment was affirmed at the general term, and an appeal was taken to the court of appeals, and perfected by giving an undertaking to stay proceedings on the judgment, the appellant will not be allowed to withdraw the sum deposited on the appeal to the general term. (*Ib.*) And where, pending the appeal, the money deposited is lost without any act of the respondent, the loss as between the respondent and appellant falls on the latter (*Parsons* v. *Travis*, 5 Duer, 650). See, *Infra.*

b. A defendant appealed to the court of appeals from a decision of the general term, affirming an order denying his motion to vacate a judgment against him. He filed an undertaking in the sum of $250 for costs and damages; held that the appeal was not *per se* a stay of proceedings, but that it was in the discretion of the court below to grant a stay in such a case (*Tiers* v. *Carnahan*, 3 Abb. 69; *Ford* v. *David*, 3 Abb. 385).

§ 335. [284.] (Am'd 1859, 1862, 1863.) *Existing suits. On judgment for money: security to stay execution. Sureties becoming insolvent. Deposit in lieu of undertaking.*

If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant, by at least two sureties, to the effect, that if the judgment appealed from or any part thereof be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it shall be made satisfactorily to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking as above; and in case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring such new undertaking, the appeal may, on motion to the court, be dismissed with costs. Whenever it shall be necessary for a party to any action or proceeding to give a bond or an undertaking, with surety or sureties, he may in lieu thereof deposit with the officer, or into court, as the case may require, money, to the amount for which such bond or undertaking is to be given. The court in which such

action or proceeding is pending may direct what disposition shall be made of such money, pending the action or proceeding. In any case where, by this section, the money is to be deposited with an officer, a judge of the court, at special term or at chambers, upon the application of either party, may, before such deposit is made, order it to be deposited in court instead of with such officer; and a deposit made pursuant to such order, shall be of the same effect as if made with such officer.

a. **Stay of proceedings.**—The undertaking required by this section must be filed and served with the notice of appeal and not afterwards. An undertaking pursuant to this section filed after the appeal has been perfected, will not operate as a stay of proceedings (*N. Y. Cent. Ins. Co.* v. *Safford*, 10 How. 344). See § 340, and *note*.

b. Where the undertaking to stay proceedings is irregular, but not void. the respondent cannot disregard the stay, but should move to set aside the undertaking (*Parfitt* v. *Warner*, 13 Abb. 471).

c An appellant who has given an undertaking intending to stay the proceedings, but insufficient for that purpose, may under section 327 be allowed time to file a further undertaking (*Sternhaus* v. *Schmidt*, 5 Abb. 66).

d. On an appeal to the court of appeals from an order of the general term granting a new trial, an undertaking in $250, under section 334, does not stay proceedings in the order in the court below. To obtain a stay a motion must be made in the court below (*McMahon* v. *Allen*, 22 How. 193; *Valton* v. *Nat Loan. Fund*, 19 *id.* 515; *Tiers* v. *Carnahan*, 2 Abb. 69).

e. All proceedings on a *judgment* ordering a new trial and awarding restitution are stayed by an appeal, and the giving an undertaking as prescribed by §§ 334, 335, for an amount sufficient to cover the amount adjudged to be restored, and costs (*Britton* v. *Phillips*, 17 Abb. 33); but where the restitution is ordered by order apart from and subsequent to the judgment, then an appeal from the judgment would not stay proceedings on such order. (*Id.*)

f. A judgment directing the payment of money out of a fund in court, is not a judgment directing the payment of money within this section (*Curtiss* v. *Leavitt*, 1 Abb. 274; 10 How. 481).

g. The undertaking should state the amount of the judgment appealed from (*Harris* v. *Bennett*, 2 Code Rep. 23). See section 339.

h. **Sureties becoming insolvent.**—The provision as to sureties becoming insolvent does not apply to the case of sureties in an undertaking given to secure a judgment as a condition of opening a default (*Eiseman* v. *Swan*, 11 Abb. 112).

i. Before the power was conferred by this section the court could not order a new undertaking because the sureties in the first had became insolvent (*Willett* v. *Stringer*, 15 How. 310.)

j. **Action on undertaking. Extent of liability of sureties.**—The provision as to actions on undertakings, &c., applies only to the class of undertakings specified; it does not apply to a bond or agreement to be answerable for a judgment (*Rice* v. *Whitlock*, 16 Abb. 225).

k. The provision prohibiting actions on undertakings pending an appeal is retrospective (*Wolfkiel* v. *Mason*, 16 Abb. 221).

l. On affirmance of a judgment the sureties on the appeal become liable, and no leave of the court is neccessary before suing on the undertaking (*N. Y. Cent. Ins. Co.* v. *Nat. Pro. Ins. Co.* 10 How. 344); nor is it necessary to take the undertaking off the file of the court. (*Id.*)

a. The sureties on an appeal from an order made at a special term of the supreme court which was reversed at general term, are not thereby discharged, but are liable upon the affirmance of the first order, by the court of appeals, on an appeal to which they were strangers. It is immaterial that the judgment of the court of appeals was made the judgment of the supreme court at a special and not at a general term (*Robinson* v. *Plimpton*, 25 *N.* Y. 484).

b. Where the judgment is affirmed in part and reversed in part, the sureties on the appeal are liable to the extent of the reversal (*Seacord* v. *Morgan*, 17 How. 394).

c. An order to execute a new undertaking not complied with does not exonerate the sureties in the undertaking already executed (*Jewett* v. *Crane* 18 Abb. 97.)

d. **Letting in sureties to defend.**—Sureties may be let in to defend on the merits in the place of their principal even after a judgment against him (*Jewett* v. *Crane*, 18 Abb. 97).

§ 336. [285.] (Am'd 1849.) *Existing suits. If judgment be to deliver documents, &c., they must be deposited.*

If the judgment appealed from direct the assignment or delivery of documents, or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court, or a judge thereof, or county judge, shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

§ 337. [286.] *Existing suits. If to execute conveyance, it must be executed and deposited.*

If the judgment appealed from direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

e. Upon an appeal from a judgment directing the execution of an instrument, the proceedings can be stayed only by the execution and deposit of such instrument, and by giving the security required by section 334 (*Waring* v. *Ayres*, 12 Abb. 112).

f. A deed of land was deposited with a clerk in chancery for the purpose of staying proceedings on a decree for specific performance, and was lost. The decree was afterwards affirmed,—held that the appellant was bound to execute a new deed (*Worrall* v. *Munn*, 17 N. Y. 475).

§ 338. [287.] *Existing suits. Security, where judgment is to deliver real property or for a sale of mortgaged premises.*

If the judgment appealed from direct the sale or delivery of possession of real property the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

a. Where the judgment directs the sale of real estate, the court has no discretionary power, unless the appellant be an executor, administrator, trustee, or other person acting in another's right, to limit the amount of security (*Watt* v. *Watt*, 15 Abb. 367, *note*. See § 339).

b. On an appeal from a judgment for a sale of mortgaged premises, the appellant gave an undertaking pursuant to section 334, and it was held effectual to permit the appeal, but not to stay proceedings (*Fireman's Ins. Co. of Albany* v. *Bay*, 2 Code Rep. 3). See section 339.

§ 339. [288.] (Am'd 1849, 1851.) *Existing suits. Stay of proceedings, upon security given. When court may dispense with security.*

Whenever an appeal is perfected as provided by sections 335, 336, 337, and 338, it stays all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action, and not affected by the judgment appealed from. And the court below may in its discretion, dispense with or limit the security required by sections three hundred and thirty-five, three hundred and thirty-six, and three hundred and thirty-eight, when the appellant is an executor, administrator, trustee, or other person acting in another's right; and may also limit such security to an amount not less than fifty thousand dollars, in the cases mentioned in sections three hundred and thirty-six, three

hundred and thirty-seven, and three hundred and thirty-eight, where it would otherwise, according to those sections, exceed that sum.

a. An appeal is "perfected" when the proper undertaking, with an affidavit of the sureties, has been executed, and notice of the appeal has been served on the adverse party, and on the clerk with whom the judgment or order is entered; and the twenty days under Rule 2, and the forty days under Rule 7, commence running from that time (*Thompson* v. *Blanchard*, 4 How. 210).

b. An appeal from the judgment to the general term, though accompanied with the proper undertaking for the payment of the judgment and the costs of the appeal, does not, *per se*, supersede an execution previously issued and levied on personal property (*Cook* v. *Dickerson*, 1 Duer, 679). See *Infra*.

c. In construing a similar provision in Mississippi the court said, "An executor is entitled to an appeal without surety, when the judgment is to affect only the assets in his hands; *aliter*, where he is in a situation in which a personal judgment can be rendered against him" (*Ward* v. *American Colonization Soc.*, 4 Sme. & M. 670; *Scott* v. *Searles*, 1 *ib.* 590; *Linney* v. *Halliday*, 3 Ran. 1. See note to section 317).

d. On an appeal by executors a statement of the want of assets sufficient to pay the judgment, would no doubt be regarded as a good reason why the security should be limited, at least to the amount of assets disclosed applicable to the payment of the judgment appealed from (*Mills* v. *Forbes*, 12 How. 466); and this would be the case as well on an appeal to the general term as on an appeal to the court of appeals. (*Id.*)

e. Where, after an execution has been levied the defendant appeals to the court of appeals, and gives the security required for a stay of execution on the judgment, it does not remove the lien of the execution. The proceeding on the execution is suspended until the decision of the appellate court. If the appeal is dismissed or the judgment affirmed, the respondent is entitled to resume proceedings on his execution and will have priority over a subsequent execution (*Re Berry*, 26 Barb. 55). See *supra*, and note to § 357.

f. The effect of giving security is merely to stay proceedings on the judgment; it discharges nothing, but merely stops the judgment creditor where he was at the time of giving security. It gives the court no authority to vacate any proceeding, or release any right previously acquired, and therefore where an execution had been levied before the requisite undertaking to stay proceedings had been given, the court refused to supersede such execution (*Rathbone* v. *Morris*, 9 Abb. 213).

g. The taking an appeal and giving security to stay, do not, *per se*, operate to discharge a previous levy, nor supersede an execution issued before the appeal was taken (*Stricker* v. *Wakeman*, 13 Abb. 85). But where such an appeal is taken in good faith and ample security given, the court will ordinarily supersede a previous execution and discharge a previous levy. (*Id.*)

h. The giving an undertaking with security sufficient to stay the proceedings, is not a defence to an action previously commenced on the undertaking given on the appeal to the general term (*Burrall* v. *Vanderbilt*, 6 Abb. 70; 1 Bosw. 637). But *semble*, the defendant might on motion obtain a stay of the proceedings in such action until the decision on the appeal (see *Van Vleck* v. *Clark*, 24 How. 190; and see now section 348).

See note to § 338.

§ 340. [289.] (Am'd 1849.) *Existing suits. Undertakings may be in one instrument or several.*

The undertakings prescribed by sections 334, 335, 336 and

338, may be in one instrument or several, at the option of the appellant; and a copy, including the names and residence of the sureties, must be served on the adverse party with the notice of appeal, unless a deposit is made as provided in section 334, and notice thereof given.

a. This section in terms requires copies of *all* undertakings necessary; and which the appellant intends to give, to be served with the notice of appeal, and, therefore, where the notice of appeal was given on the 7th of August, and an undertaking under section 334 filed at the same time, and on the 4th of September following, an undertaking, pursuant to section 335 was filed, it was held, that it should have been filed with the notice of appeal, and as it was not, it did not stay the proceedings (*N. Y. Central Ins. Co.* v. *Safford*, 10 How. 344; *Cushman* v. *Martine*, 18 *id.* 402; *Smith* v. *Heermance*, 18 *id.* 261; and see *Mills* v. *Thursby*, 11 *id.* 129).

b. But if it be shown that the omitting to file the undertaking when notice of appeal was served, was the result of accident, the court has power to rectify the mistake, and stay the proceedings, under section 327 (*N. Y. Central Ins. Co.* v. *Safford*, supra).

c. The court will impose costs for any disregard of this section (*Beach* v. *Southworth*, 1 Code Rep. 99; 6 Barb. 173).

§ 341. [290.] (Am'd 1849.) *Existing suits. Sureties to justify.*

An undertaking upon an appeal shall be of no effect, unless it be accompanied by the affidavit of the sureties, that they are each worth double the amount specified therein. The respondent may, however, except to the sufficiency of the sureties, within ten days after notice of the appeal; and unless they or other sureties justify before a judge of the court below, or a county judge, as prescribed by sections 195 and 196, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

d. Where the notice of justifying is served by mail, it must be double time, or ten days (*Dresser* v. *Brooks*, 5 How. 75). Thus, where the respondent on the 6th of June served by mail a notice of exception, which was received by the appellant on the 10th of June, the appellant on the same day (the 10th) gave notice by mail that the sureties would justify on the 17th; and the sureties did justify on that day. The court on motion, held that the appellant was irregular, but, on ground being shown therefor, extended the time for the sureties to justify. (*Id.*)

e. The sureties need only justify to double the amount of the judgment (*Rich* v. *Beekman*, 2 Code Rep. 63).

f. The exception should be to the "sureties," not to the undertaking (*Young* v. *Colby*, 2 Code Rep. 68).

g. A notice of exception to sureties served within ten days after the undertaking is *filed*, is in time although more than ten days have elapsed since service of a copy of the undertaking and notice of appeal on the respondent

(*Webster* v. *Stephens*, 3 Abb. 227; 5 Duer, 690). Thus, where the notice of appeal and copy undertaking was served on August 18, but the undertaking was not filed until September 13, and on September 16 the respondent served notice of exception,—held that he was in time. (*Id*).

a. May the appellant's attorney be a surety? (*Studwell* v. *Palmer*, 5 Paige, 57). Where the sureties named in a bond given on a writ of error were excepted to, failed to justify, and the writ of error was in consequence superseded, it was held that the sureties were discharged (*Ward* v. *Syms*, 1 Code Rep. N. S. 266).

b. On an application for justification of sureties on an appeal, the merits of the appeal will not be considered (*Bradley* v. *Hall*, 1 Cal. R. 199).

c. Where sureties on appeal justified on notice to the respondent's attorneys, who refused to attend the justification, because the hour for which notice was given was gone by (the delay being excused), held, on an affidavit of the respondent that the sureties were irresponsible, that he was entitled to an order of dismissal of the appeal, unless the appellant served a new notice of justification and the sureties justified anew in pursuance of such notice, or unless new sureties should be substituted who should justify (*Hoes* v. *Snell*, 8 How. 185).

d. The benefit of an exception, duly taken to sureties on an appeal is waived by the failure of the respondent to attend the officer before whom the notice of justification is given, although the sureties also fail to attend. The party excepting is the actor in the proceeding, and no step is necessary to be taken except on his requisition (*Ballard* v. *Ballard*, 18 N. Y. 491).

e. When the sureties in an undertaking fail to justify, the notice of appeal and all proceedings on the appeal fall through, and the parties are in the same condition as though no appeal had been taken (*Kelsey* v. *Campbell*, 38 Barb. 238; 14 Abb. 368; *Chamberlain* v. *Dempsey*, 13 Abb. 421; 22 How. 356).

f. Under an order made on the rejection of proposed sureties, granting the appellant ten days' time to file a new undertaking with new sureties, and staying all proceedings on the part of the respondent during said ten days, the appellant must not only file a new undertaking, but procure the justification of his sureties within said ten days. The respondent need not except to such new sureties. Such new undertaking does not operate as a stay until the sureties justify (*Chamberlain* v. *Dempsey*, 13 Abb. 421; 22 How. 356).

§ 342. [291.] (Am'd 1849.) *Existing suits. Perishable property may be sold, notwithstanding appeal.*

In the cases not provided for in sections 335, 336, 337, 338, and 339, the perfecting of an appeal, by giving the undertaking mentioned in section 334, shall stay proceedings in the court below upon the judgment appealed from, except that where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

g. Where a surrogate's decree is appealed from to the supreme court, and the decision of the supreme court is appealed from to the court of appeals, the surrogate's court is the court below, within the meaning of this section (*Anon.* 3 Code Rep. 69).

See *ante*, p. 423, *a*.

h. On an appeal to the court of appeals from a judgment awarding a peremptory mandamus, the giving an undertaking pursuant to section 334 stays all

further proceedings in the court below (*The People* v. *Comm'rs of Highways of Milton*, 25 How. 257).

a. On an appeal from a judgment awarding plaintiff a perpetual injunction against certain acts by the defendant, an undertaking pursuant to section 334 operates as a stay of all proceedings upon the judgment (*Howe* v. *Searing*, 6 Bosw. 684).

b. An application to punish the defendant for a violation of said injunction is a proceeding on the judgment, and is stayed by such an appeal (*Id.*); but the injunction is not vacated. (*Id.*)

c. On appeal from a judgment directing the delivery of personal property, such as will depreciate by time and use, the court will not order a stay of proceedings or an undertaking to obey the order of the court upon the appeal, but will require the respondent to be indemnified against loss by the depreciation of the property (*Read* v. *Potter*, 11 Abb. 413).

* § 343. [292.] *Existing suits. Undertaking must be filed.*

The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered.

* *Amended—See Appendix.*

CHAPTER III.

Appeal to the Supreme Court from an inferior Court.

SECTION 344. Appeal, in what cases.
345. Security must be given as upon appeal to court of appeals.
346. Appeals, where heard.
347. Judgment on appeal, where entered and docketed.

§ 344. [293.] (Am'd 1849, 1858, 1860.) *Existing suits. Appeal, in what cases.*

An appeal may be taken to the supreme court, from the judgment rendered by a county court, or by the mayors' courts or the recorders' courts of cities.

An appeal also may be taken to the supreme court from any order affecting a substantial right, made by a county court, or a county judge, in any action or proceeding, and such appeal shall be heard on a copy of the papers on which the order appealed from was made.

e. Upon an appeal from an inferior court to the supreme court under this section, the supreme court possesses no other powers than formerly upon writ of error. Accordingly upon an appeal from a mayor's court to the supreme court, the latter cannot reverse the judgment, because the jury have given excessive damages; such errors are to be corrected in the court below (*Thurber* v. *Townsend*, 22 N. Y. 517; and see *Lynch* v. *McBeth*, 7 How. 113; *Dorr* v. *Birge*, 5 How. 323; 8 Barb. 351).

f. Appeal lies to the supreme court from orders made before judgment in actions in the city court of Brooklyn, when such orders involve the merits and will necessarily affect the judgment to be rendered (*Moore* v. *Wood*, 19 How. 405).

g. On an appeal from the city court of Brooklyn, the supreme court may order a new trial (*Von Latham* v. *Rowan*, 17 Abb. 238).

h. The granting a new trial in a suit before a justice of the peace, under section 366 of the Code is a matter of discretion, and where the county court has denied a new trial except upon terms, the supreme court cannot review the order (*Wavel* v. *Wiles*, 24 How. 635).

i. The supreme court can review only judgments actually made after hearing the parties in the county court (*Lynch* v. *McBeth*, 7 How. 113); and cannot review a judgment by default (*Dorr* v. *Birdge*, 8 Barb. 351; 5 How. 323); nor a judgment entered by stipulation, and to enable the party to appeal, before the disposal of all the issues on the record (*Perkins* v. *Farnham*, 10 How. 120).

§ 345. [294.] *Existing suits. Security must be given, as upon appeal to court of appeals.*

Security must be given upon such appeal, in the same manner, and to the same extent, as upon an appeal to the court of appeals.

a. Unless security be given as required by section 334, the appeal is ineffectual for any purpose (*Jones* v. *Decker*, 14 Abb. 391).

b. The undertaking must state the residences of the sureties (*Blood* v. *Wilder*, 6 How. 446; and see § 340).

§ 346. [295.] *Existing suits. Appeals, where heard.*

Appeals in the supreme court shall be heard at a general term, either in the district embracing the county where the judgment or order appealed from was entered, or in a county adjoining that county, except that where the judgment or order was entered in the city and county of New York, the appeal shall be heard in the first district.

c. An appeal from a surrogate's court admitting, or refusing to admit, a will to probate should, in the first instance, be heard at general term (*Watts* v. *Aiken*, 4 How. 439).

d. On an appeal from an inferior court to the supreme court, the date of issue is the day of filing the judgment roll in the appellate court (*Anon.* 2 Code Rep. 41).

e. Appeals to the county court which are transferred to the supreme court in pursuance of section 31 of the act amending the act in relation to the judiciary, passed December 14, 1847, are not such appeals as are provided for by section 346 of the Code, and *may* be heard and decided *at* a special term. Section 346 was intended to provide for an appeal from an inferior court to the supreme court (*Sheldon* v. *Albro*, 8 How. 305; and see *Comm'rs of Highways of Schroepel* v. *Oswego Plank R'd Co.*, 7 *id.* 94).

See *ante*, p. 41.

§ 347. [296.] (Am'd 1849.) *Existing suits. Judgment on appeal, where entered and docketed.*

Judgment upon the appeal shall be entered and docketed with the clerk in whose office the judgment roll is filed. When the appeal is heard in a county other than that where the judgment roll is filed, or is not from a judgment of a county court, the judgment upon the appeal shall be certified to the clerk with whom the roll is filed, to be there entered and docketed.

f. This section authorizes the entry of a new judgment on the appeal to the supreme court (*Eno* v. *Crooke*, 6 How. 462).

g. In all cases of appeal from the circuit, the judgment on the appeal should

be certified by the clerk with whom the roll is filed, to be there entered and docketed (*Andrews* v. *Durant*, 6 How. 191). Where the defendants entered judgment as of a nonsuit, and filed the roll in Ulster county, where the venue was laid, and on appeal to the general term at Albany, judgment was affirmed, and the defendant entered judgment, and filed another roll in Albany county, —it was held that the latter judgment was irregular. (*Ib.*)

a. Where the appeal is on the ground that the court below has no jurisdiction and the judgment is reversed on that ground, the reversal may be with costs (*Gormley* v. *McIntosh*, 22 Barb. 271; and see *ante*, p. 585, *f*).

CHAPTER IV.

Appeals in the Supreme Court, and the Superior Court and Court of Common Pleas of the city of New York, from a single judge to the general term.

SECTION 348. Appeals from circuit and special term to same court in general term. Security on appeals. Action on undertaking.
349. Appeals from orders at special term.
350. Appeals from orders at chambers.

§ 348. [297.] (Am'd 1849, 1851, 1852, 1859, 1862.) *Appeals from circuit and special term to same court in general term. Security on Appeal. Action on undertaking.*

In the supreme court, the superior court of the city of New York, and the court of common pleas for the city and county of New York, an appeal upon the law may be taken to the general term from a judgment entered upon the report of referees or the direction of a single judge of the same court, in all cases, and upon the fact when the trial is by the court or referees. Such an appeal, however, does not stay the proceedings, unless security be given as upon an appeal to the court of appeals, and such security be renewed as in cases required by section 335 on motion to the court at special term, or unless the court, or a judge thereof, so order, which order may be made upon such terms, as to security, or otherwise, as may be just, such security not to exceed the amount required on an appeal to the court of appeals. In the supreme court the appeal must be heard in the same manner as if it were an appeal from an inferior court.

No action shall be commenced upon any undertaking given or to be given in pursuance of the provisions of this section, until ten days after the service of notice on the adverse party of the entry of the order or judgment affirming the

judgment appealed from. And in case an appeal has been or shall be taken to the court of appeals from such order or judgment of affirmance, and security given according to law so as to stay the issuing of execution, no action shall be commenced or recovery had upon any undertaking given or to be given in pursuance of the provisions of this section until after the final determination of such appeal.

a. Whether the decision on a demurrer should be appealed from under this section or section 349, depends on whether such a decision is an order or a judgment, and as to this see note to section 400; and so of a decision under section 247.

b. **Appeal from judgment on frivolous demurrer.**—When a judgment is ordered for the plaintiff on a frivolous demurrer to the complaint, and such order is affirmed at general term, and then the plaintiff enters his judgment, such judgment may be appealed from to the general term, and it must be in order to have a review in the court of appeals (*Hollister B'k.* v. *Vail*, 15 N. Y. 593; see *ante* p. 453, *h*).

c. **Stay of proceedings. Security.**—The court may make an *ex parte* order staying proceedings on the judgment on the report of referees, pending an appeal from such judgment under this section. But a judge out of court is not authorized to make such an order; the most he can do is to grant an order to show cause, before himself or some other judge, or some court, why proceedings should be stayed, &c. (*Steam Navigation Co.* v. *Weed*, 8 How. 49) In a subsequent case (*Ottis* v. *Spencer*, 8 How. 171), held, that a county judge had power to make an order staying proceedings upon a judgment entered on a report of referees, but not to stay proceedings on a judgment after a verdict; that the expression "unless the court or a judge thereof so order," refers to the court in which the judgment appealed from was obtained, or a judge of that court; and that a county judge had no authority to make an order directing what security should be given in an action in the supreme court.

d. On an appeal to the general term, from a judgment entered on the report of a referee, or at special term, no security is required, unless the appellant desires a stay of proceedings (*Parsons* v. *Suydam*, 4 Abb. 184; *Niles* v. *Battershall*, 26 How. 93; *Halsey* v. *Flint*, 15 Abb. 367; *Kitching* v. *Diehl*, 40 Barb. 433; *Ten Brouck* v. *Hudson River R. R.*, 7 How. 137).) If he would have proceedings stayed upon the judgment, he must either give with his notice of appeal the security required on an appeal to the court of appeals, or obtain an order for a stay of proceedings from the court or a judge (*Niles* v. *Battershall*, 26 How. 93; *Smith* v. *Heermance*, 18 How. 261; *Staring* v. *Jones*, 13 How. 423).

e. On an appeal to the general term the court may order a stay although no undertaking has been filed (*Mills* v. *Thursby*, 11 How. 129; and see *Wright* v. *Delafield*, 11 How. 465; *Staring* v. *Jones*, 13 How. 423).

f. The court may, if it think fit, make the order without requiring notice to the adverse party; but when the application is made to a judge out of court, the most he is authorized to do is to make an order that the adverse party show cause, before himself or some other judge, or some court having authority to entertain the application, why the proceedings should not be stayed until the case can be heard and decided upon the appeal, and staying proceedings in the meantime. The last paragraph of the 401st section of the code is as applicable to such an order as any other (*Steam Navigation Co.* v. *Weed*, 8 How. 50). And in that case an *ex parte* order of a judge of the supreme court, made out of court, staying proceedings on the judgment, pending the appeal, was set aside as unauthorized. See *Lottimer* v. *Lord* (4 E. D. Smith, 184). The court refused a stay of proceedings on appeal where appellant had consented

to accept respondent's bond to return the amount collected on the judgment if the judgment should be reversed (*Mills* v. *Thursby*, 11 How. 124).

a. **Amount of security to stay proceedings under this section.**—On an appeal under this section, the undertaking, in order to stay proceedings, in the absence of any order on the subject, must provide for the payment of all the costs, *as well as* the damages which may be awarded against the appellant on the appeal, not exceeding $250; if the undertaking omit to provide for the damages on the appeal, it is good so far as it goes, but does not stay the proceedings (*Chemung Canal Bank* v. *Judson*, 10 How. 133; *Halsey* v. *Flint*, 15 Abb. 367).

b. **What judgments are appealable.**—The *judgment* from which an appeal may be taken to the *general term* means the same thing as a judgment from which an appeal may be taken to the court of appeals—a final judgment (*Lawrence* v. *Farmers' Loan and Trust Co.*, 15 How. 57; *D'Ivernois* v. *Leavitt*, 8 Abb. 59; *McMahon* v. *Allen*, 7 *id.* 1; *The People* v. *Haws*, 34 Barb. 69; *Griffin* v. *Cranston*, 5 Bosw. 658). And therefore where, on the decision of a cause by the court, a decision is made subject to an accounting, the party aggrieved cannot appeal from the decision until such accounting has been had. (*Id.*)

c. A judgment is to be deemed entered by the direction of a single judge when it is entered by the clerk at the circuit upon the verdict of a jury under section 264; from such a judgment an appeal upon the law as presented by exceptions may be taken to the general term without any motion previously made at special term for a new trial (*Morrison* v. *N. Y. & Harlem R. R. Co.*, 32 Barb. 568; *Morange* v. *Morris*, 12 Abb. 164; 32 Barb. 650; *Jackson* v. *Fassett*, 12 Abb. 281).

d. If the general term without objection from either party, entertain an appeal in a case not properly appealable, their decision on such appeal is binding on the parties (*D'Ivernois* v. *Leavitt*, 8 Abb. 59; *Griffin* v. *Cranston*, 5 Bosw. 658).

e. There can be no appeal in the first instance to the general term on a question of fact only. A motion for a new trial must first be made at the special term (*Collins* v. *Albany &c. R. R. Co.*, 5 How. 435; *Lobach* v. *Hotchkiss*, 17 Abb. 88).

f. Properly there can be no appeal to the general term from a judgment at special term deciding the matters in issue and ordering a reference to take an account, until after such reference has been terminated and a final judgment entered (*Griffin* v. *Cranston*, 5 Bosw. 658).

g. A judgment is deemed entered by the direction of a single judge when it is entered by the clerk at the circuit, upon the verdict of a jury, pursuant to section 264 (*Morrison* v. *New Haven R. R. Co.*, 32 Barb. 568; *Morange* v. *Morris*, 32 Barb. 650).

h. **Appeal from judgment for want of an answer.**—*Semble*, there cannot be an appeal from a judgment for want of an answer (*Jones* v. *Kip*, 1 Code Rep. 119; *Pope* v. *Dinsmore*, 8 Abb. 429; 29 Barb. 367; *Stewart* v. *Morton*, 8 Abb. 429, *note*; see, however, *Raynor* v. *Clark*, 3 *id.* 230; *Dutch Church* v. *Wood*, 8 Barb. 421).

i. **Noticing appeal for argument.**—*Semble*, the respondent may notice the appeal for argument immediately after the case or exceptions are settled (*Anderson* v. *Dickie*, 26 How. 199), or immediately after the appeal is perfected (*Forest* v. *Havens*, Superior Court, N. Y. Gen. T. Nov. 1863; but see *Donohue* v. *Hicks*, 21 How. 438).

j. **Order of appeal on calendar.**—There is no rule allowing an appeal to be heard out of its order on the calendar, on the ground that the appeal is frivolous (*Wilder* v. *Lane*, 34 Barb. 54; 12 Abb. 351).

k. **Motion to dismiss appeal.**—A motion to dismiss an appeal for irregularity must be made at the general term (*Barnum* v. *Seneca Co. B'k.*, 6 How. 82) before the appeal is called for argument; and where a party, instead of moving to dismiss an appeal immediately on its being brought, waits until

the hearing, before taking the objection, he will not be allowed his costs (*Williams* v. *Fitch*, 15 Barb. 654).

a. **Appeal book.**—An appeal book is not sufficient unless it contain a case or exception presenting the conclusions of fact and of law, and a proper statement of the questions presented and of the exceptions to rulings (*Otis* v. *Spencer*, 6 Abb. 127). The court will not look into the judgment roll to ascertain what if any errors were committed on the trial. (*Id.*)

b. **Failing to settle and serve the case.**—Where on an appeal to the general term, the appellant fails to serve a case, and the appeal is regularly noticed and reached on the calendar, the respondent may, if the appellant does not appear, take a judgment of affirmance. He is not limited to a motion to dismiss the appeal or to strike it from the calendar (*Orters* v. *Groupe*, 15 Abb. 263; see, however, *Warren* v. *Eddy*, 32 Barb. 664; 13 Abb. 28).

c. When an appeal is moved in its order on the calendar, the court will presume that the case therein has been settled, unless informed otherwise (*Frost* v. *Smith*, 7 Bosw. 108).

d. It is too late after commencing the argument of the appeal to object that the case has not been settled (*Seeley* v. *Chittenden*, 4 How. 265). The objecting party should have moved to strike the appeal from the calendar. (*Id.*)

e. **What questions may be raised on the appeal.**—On an appeal from a judgment the appellant cannot insist that the verdict was against evidence; that question could only be raised on a motion for a new trial (*Anthony* v. *Smith*, 4 Bosw. 503).

f. A question as to the jurisdiction of the court cannot be raised for the first time on appeal (*Mosselman* v. *Caen*, 21 How. 248).

g. "Generally the question in a court of review is whether the judgment of the subordinate tribunal was erroneous when pronounced upon the law as it then stood. This is so, I think, upon appeals arising under the code" (Denio, J., *Hartung* v. *The People*, 22 N. Y. 108).

h. Where on appeal from a judgment the case states that the cause was submitted, "counsel for the defendant admitting that defendants are liable for payment of a bill," being one of the bills on which plaintiffs sought to recover, the defendants on appeal cannot question the correctness of the decision (*Kohler* v. *Wright*, 7 Bosw. 318).

i. The court at general term cannot find the facts on which to base a final judgment. The facts must either be conceded on the trial or have been found by a jury (*Purchase* v. *Matteson*, 25 N. Y. 211).

j. On an appeal from a judgment on a verdict by a jury, the appellant cannot be heard upon the question whether the verdict is contrary to evidence (*Anthony* v. *Smith*, 4 Bosw. 503). That question can only be raised on a motion for a new trial or on an appeal from an order on such motion. (*Id.*)

k. Where the case states that the judge, among other things, charged the jury, &c., the court will presume that he charged correctly, unless the contrary appear (*Parsons* v. *Brown*, 15 Barb. 590).

l. The court at general term, on an appeal from a judgment at special term, cannot look into the question whether an order of arrest was properly granted (*Ross* v. *West*, 2 Bosw. 360).

m. Where the complaint does not state facts sufficient to constitute a cause of action, and the defect is not cured by proof on the trial, in that case, although the objection is not taken by demurrer, or on the trial, it may be taken on appeal from the judgment (*Cole* v. *Blunt*, 2 Bosw. 117; contra, see *Pope* v. *Dinsmore*, 8 Abb. 429; 29 Barb. 367); and *semble*, the court cannot review errors appearing on the face of the record where no exceptions have been taken (*Brewer* v. *Irish*, 12 How. 481).

n. Upon appeal to the general term, the court may treat the pleadings as having been amended so as to conform to the facts proved, in any respect, in which the court ought clearly to allow an amendment upon application at special term (*Bowdoin* v. *Coleman*, 3 Abb. 431).

a. The appellate court may and ought to take an objection apparent on the record and which goes to the merits although not taken in the court below, especially where infants are concerned (*Sandford* v. *Granger*, 12 Barb. 392).

b. An objection which was not raised at the trial, and which if it had been, might probably have been obviated, cannot be urged on appeal (*Stewart* v. *Smith*, 14 Abb. 75; *Crooke* v. *Mali*, 11 Barb. 205; see *Pepper* v. *Haight*, 20 Barb. 429; *Snell* v. *Snell*, 3 Abb. 430; *Jackson* v. *Smith*, 16 Abb. 201; *Smith* v. *Floyd*, 18 Barb. 523; *Colwell* v. *Lawrence*, 24 How. 324); and where the court is satisfied from the general scope and tenor of the proceedings on the trial, that a particular fact was not a matter of contest, nor ground of objection there, but was assumed or taken for granted in the conduct of the cause, the appellate court will conclude the fact was as it was assumed to be (*Paige* v. *Fazakerly*, 36 Barb. 392). For what is assumed as true on the trial cannot be questioned on the appeal (*Munson* v. *Hegeman*, 13 Barb. 213); and any fact assumed on the trial is as much in the case as if it were properly proved (*Paige* v. *Fazackerly*, 36 Barb. 395). For what is assumed as true on the trial cannot be questioned on the appeal (*Munson* v. *Hegeman*, 10 Barb. 112); and any fact assumed on the trial is as much in the case as if it were already proved (*Paige* v. *Fazackerly*, 36 Barb. 392).

c. Where no exception is taken by the successful party to a finding of the court below upon a question of fact, nor any attempt made to review such finding, such finding must on the appeal be taken as true (*Fake* v. *Whipple*, 39 Barb. 339).

d. On an appeal from a judgment entered on the verdict of a jury, the court will not consider whether or not the verdict is contrary to the evidence, that question can only be raised on a motion for a new trial, or on an appeal from the decision on such motion (*Anthony* v. *Smith*, 4 Bosw. 503).

e. Where special questions of fact are submitted to a jury and the charge of the judge in submitting them is not stated in the case, it will be presumed on appeal, nothing appearing to the contrary, that such instructions were correct (*Marine Bank* v. *Clements*, 6 Bosw. 166).

f. When the case made does not contain the charge of the judge, nor show any exception to the charge, it will be assumed that all questions of fact involved on the issues were fully submitted to the jury with all proper instructions (*Winterson* v. *Eighth Ave. R. R. Co.*, 2 Hilton, 389).

g. On appeal the respondents are entitled to the benefit of any presumption which will uphold their judgment, in the absence of evidence properly in the case, upon the point in question (*Lee B'k.* v. *Satterlee*, 17 Abb. 6).

h. Where evidence is objected to and excluded, and neither the grounds of objection nor the object of the proof is stated, and the appellate court can see that a good objection might have been taken, it will presume that the proper objection was taken and the decision made upon that ground. So where the evidence is admitted, after objection, appearing by the return to be a general objection, and the court sees that subject matter of the evidence was proper, and that only the matter of proof was objectionable, it will presume no objection was made to the manner of proof (*Bellows* v. *Sackett*, 15 Barb. 96).

i. **When judgment will be reversed.**—A judgment cannot be reversed because some counts in the complaint are bad, if the complaint contains good counts to which all the evidence applies (*Snell* v. *Snell*, 3 Abb. 426).

j. A judgment which is authorized by the facts found by the court or referee will not be reversed, for the reason that the court below or the referee has found errroneous conclusions of law (*Scott* v. *Pilkington*, 15 Abb. 280).

k. Admission of illegal or irrelevant testimony is error entitling to a reversal unless it be shown that no harm was done (*Ward* v. *Wash. Ins. Co.*, 6 Bosw. 230).

l. **Judgment on appeal.**—The judgment on appeal should be certified to the clerk with whom the roll is filed and the judgment is to be there entered (*Andrews* v. *Durant*, 6 How. 191).

m. The court on reversing a judgment cannot render judgment in favor of the

appellant. It should order a new trial (*Meyer* v. *City of Louisville*, 26 Barb. 609; 7 Abb. 6).

a The court on reversing a judgment has no power to order a re-trial, either wholly or in part, on the evidence given on the previous trial (*Bissell* v. *Hamlin*, 13 Abb. 22).

b. **Costs.**—Where a party in the action has no interest in a question which is brought up on an appeal by another party, the party who has no interest should not be allowed or charged costs (*Bulkley* v. *Van Wyck*, 5 Paige, 536).

See *ante*, § 306.

c. **Death of party pending an appeal.**—An order of affirmance by default, founded upon a notice of argument, addressed to and served upon the attorney of an appellant, after the death of the latter, and after such attorney had been notified of the death, is irregular (*Warren* v. *Eddy*, 32 Barb. 664; 13 Abb. 28).

d. Where a party dies after the argument of an appeal and before the decision and judgment against him is entered *nunc pro tunc* as of a day before his death the prevailing party may proceed to collect his judgment and the representatives of the deceased party, must at their peril cause themselves to be made parties or the judgment may be enforced against them (*Beach* v. *Gregory*, 2 Abb. 203).

e. If the personal representative of a deceased appellant is a non-resident, so that the action cannot be revived in his name, the proper course for the respondent, if he desires to prosecute the appeal after notice of the death of the appellant, and that his representative abandons the appeal, is to have an administrator appointed and then apply to have the action revived in the name of such administrator (*Warren* v. *Eddy*, 32 Barb. 664; 13 Abb. 28).

f. Foreign executors or administrators cannot either continue or dismiss an appeal by their testator or intestate pending at his decease in a court in this State (*Warren* v. *Eddy*, 13 Abb. 28; 32 Barb. 664).

g. **Re-argument.**—A motion for re-argument of an appeal denied where there was a conflict of evidence, the plaintiff and defendant being the only witnesses upon whose testimony judgment was rendered (*Fisher* v. *Merwin*, 25 How. 284).

h. **Opening judgment taken for default.**—Where a case had been settled by lapse of time and a judgment of affirmance taken by default, and there was a great delay in moving to open the default, the court refused any relief (*Whiting* v. *Kimball*, 6 Bosw. 690).

i. A motion to open a default at general term should be made at special term, but the court at general term also, has jurisdiction of such a motion (*Strong* v. *Hardenburgh*, 25 How. 438). It is no objection to such a motion that a notice of appeal to the court of appeals from such judgment has been served. (*Id.*)

j. It is the practice of the superior court of New York, at general term where a default is taken on the first day of the term, to open such default and permit the same to be argued upon terms if the application is made without delay at the same term, unless some bad faith appears or there is reason to believe the appeal is frivolous, or that the purpose is delay (*Bradford* v. *Greenwich Ins. Co.*, 8 Abb. 261).

§ 349. [299.] (Am'd 1849, 1851, 1852, 1862.) *Orders by a single judge may be appealed from in certain cases.*

An appeal may in like manner, and within the same time, be taken from an order made at a special term, by a single judge of the same court or county, or a special county judge, or by a recorder, or by any recorder's court of any city, in any stage of the action, including proceedings supplementary to

the execution; and may be thereupon reviewed in the following cases:

1. When the order grants or refuses, continues or modifies, a provisional remedy.

2. When it grants or refuses a new trial, or when it sustains or overrules a demurrer.

3. When it involves the merits of the action, or some part thereof, or affects a substantial right.

4. When the order in effect determines the action, and prevents a judgment from which an appeal may be taken.

5. When the order is made upon a summary application in an action after judgment, and affects a substantial right.

a. **Appeal in special proceedings.**—The 349th section of the code does not apply to appeals in special proceedings (*Re Cooperstown Plank Road Co.*, 3 Code Rep. 148; *Bedell* v. *Stickles*, 4 How. 433). But an appeal may be taken to the general term from any judgment, order, or final determination made at a special term in any special proceeding; such an appeal, however, shall not stay the proceedings unless the court or a judge thereof so order, which order may be upon such terms, as to security or otherwise, as may be just; such security not to exceed the amount required on an appeal to the court of appeals (Laws of 1854, p. 952, § 1).

b. Sections 327, 329, 330 and 332 of the code apply to appeals in special proceedings. (*Ib.* § 2).

c. In special proceedings and on appeals therefrom, costs may be allowed in the discretion of the court and when allowed shall be at the rate allowed for similar services in civil actions; and all appeals heretofore had or taken and undetermined in special proceedings, shall be as valid and effectual as though had or taken under the provisions of this act (*Ib.* § 3); see § 318, *ante.*

d. This act authorizes the review by an appeal to the general term of the supreme court of an order at special term confirming the report of commissioners of appraisal for lands taken for a railroad, and this where the appeal was taken and undetermined at the time of the passage of the act (*Rochester & Genesee Valley R. R. Co.* v. *Beckwith*, 10 How. 168). It also authorizes an appeal from an order directing a mandamus to issue (*The People* v. *Schoonmaker*, 19 Barb. 657). And an appeal from an order at special term denying a motion to set aside a report of a referee on a reference of a claim against executors (*Boyd* v. *Bigelow*, 14 How. 511).

e. As to appeals in cases of street-openings in New York city, see *Re the Bowery* (12 How. 96; 2 Abb. 368); *Pryor's appeal* (5 Abb. 272).

f. An appeal lies in proceedings to charge the stockholders of a bank (*Re Empire City B'k*, 8 Abb. 192). This provision does not authorize an appeal from an order entered by *consent* or *upon default* (*Boyd* v. *Bigelow*, 14 How. 511; but see 4 Abb. 98).

g. As to appeals from the decision of the county court in the matter of proceedings to change the location of a toll gate, see *McAllister* v. *Albion Plank R'd Co.* (11 Barb. 610).

h. The allowance of costs to the relator on awarding a peremptory mandamus is not the subject of review on appeal (*The People* v. *Albright*, 14 Abb. 305).

i. From an *ex parte* order of a county judge vacating an order of arrest granted by him an appeal lies to the general term of the supreme court (*Lancaster* v. *Boorman*, 20 How. 421).

a. An appeal will be entertained from an order granting judgment on account of the frivolousness of a demurrer, if the appeal is taken before the entry of judgment on such order (*Lee* v *Ainslee*, 1 Hilton, 277).

b. From a decision in supplementary proceedings the appeal must be to the general term of the district in which the judgment roll is filed (*Mallory* v. *Gulick*, 15 Abb. 307, *note*).

c. An order is not final so as to authorize an appeal where there is an order of reference outstanding and undetermined (*The People* v. *Hawe*, 21 How. 178).

d. An appeal from an order which grants a favor to the appellant "provided he complies with the terms within a certain specified time," does not operate to enlage the time for complying with such terms (*Ferry* v. *B'k of Cent. N. Y.* 9 Abb. 100).

e. **No appeal lies**—*From an order*—Granting or refusing an *ex-parte* order (*Savage* v. *Relyea*, 3 How. 276; 1 Code Rep. 42; *Nicholson* v. *Dunham*, 1 Code Rep. 119; *Lindsay* v. *Sherman*, 1 Code Rep. N. S. 25; 5 How. 308); or,—

f. Refusing leave to reply, after the time for replying had passed (*Thompson* v. *Starkweather*, 2 Code Rep. 41) or,—

g. Refusing to strike out immaterial or redundant averments (*Whitney* v. *Waterman*, 4 How. 313; *Bedell* v. *Stickles*, 3 Code Rep. 105; 4 How. 433); or—

h. Directing a bond of trustees appointed by the late court of chancery to be prosecuted (*Re White*, 3 Code Rep. 141); or,—

i. Granting a new trial and assessment of damages under the act relating to plank roads (*Re Cooperstown &c. Plank Road Co.*, 3 Code Rep. 148); or,—

j. Granting a new trial on the ground of newly discovered evidence (*Seeley* v. *Chittenden*, 10 Barb. 303); or,—

k. For temporary alimony (*Abbey* v. *Abbey*, 6 How. 340, *n.*); or,—

l. For an attachment for disobedience to an order granting temporary alimony (*Ib.*); or,—

m. For a reference (*Gray* v. *Fox*, 1 Code Rep. N. S. 334; *Bryan* v. *Brennon*, 7 How. 359; *Dean* v. *Empire Mut. Ins. Co.* 9 *ib.* 69; *Ubedell* v. *Root*, 3 Abb. 142; 1 Hilton, 173; *Smith* v. *Dodd*, 3 E. D. Smith, 348; *Oram* v. *Bradford*, 4 *id.* 193); or,—

n. Denying a motion to enter on the docket of a judgment the words "secured by appeal" (*Fitch* v. *Livingston*, 4 Sand. 712); or,—

o. Granting or refusing an extra allowance (*Dickson* v. *McElwain*, 7 How. 138; *Cook* v. *Dickinson*, 5 Sand. 663; *Dana* v. *Fielder*, 1 Code Rep. N. S. 224; *Wilkinson* v. *Tiffany*, 4 Abb. 98); or,—

p. Denying a motion to set aside a judgment, for irregularity, on the ground that no court is named in the summons (*Tallman* v. *Hinman*, 10 How. 89); or,—

q. Granting a commission with a stay of proceedings (*Thatcher* v. *Bennett*. MS.; *The People* v. *Stilman*, 7 Cal. 117); or,—

r. Allowing or denying costs of a motion (*Dennison* v. *Dennison*, 9 How. 246; *Perry* v. *Moore*, 2 E. D. Smith, 32; *Joyce* v. *Mayor of N. Y.* 20 How. 439); or,—

s. Imposing terms as a condition of relief from a default (*Gale* v. *Vernon*, 4 Sand. 790; *Merchants' B'k* v. *Mills*, 3 E. D. Smith, 210; *Jacobs* v. *Marshall*, 6 Duer, 689); or,—

t. Denying a motion to remove a referee after trial had before him, and the cause referred back for further testimony (*Perry* v. *Moore*, 2 E. D. Smith, 32; 3 Code Rep. 221); or,—

u. Giving time to a party to make a motion, and staying proceedings in the mean time (*Hunt* v. *Bennett*, 2 E. D. Smith 53); or,—

v. Denying an application of an assignee of an interest *pendente lite* to be made a party to the action (*McGown* v. *Leavenworth*, 2 *id.* 24); or,—

w. Made by a county judge in proceedings supplementary to execution in a cause originating in a justice's or county court (*Smith* v. *Hart*, 11 How. 203); or,—

a. At special term confirming the report of commissioners for opening streets in the city of New York (*In the Matter of the Bowery*, 12 How. 97; *Re 76th Street*, 12 Abb. 317; see however, *Pryor's appeal*, 5 Abb. 272); or,—

d. Where no papers are used, and the motion is made by consent (*Smith* v. *Dodd*, 3 E. D. Smith, 215; *Pierret* v. *Moller*, id. 574); or,—

c. A mere opinion of the court given upon deciding a motion to determine a party's right to costs upon a verdict (*Sneyder* v. *Beyer*, id. 235).

d. On a motion for a receiver (*Sheldon* v. *Weeks*, 2 Barb. 532).

e. On a motion to open a sale under a judgment, on the ground of misapprehension or any other circumstances not affecting the regularity of the proceedings (*Kingsland* v. *Bartlett*, 28 Barb. 480).

f. On a motion to open a default (*Whitaker* v. *Desfosse*, 7 Bosw. 678; *Millard* v. *Van Ranst*, 17 Abb. 319 *note*; see, however, *Leighton* v. *Wood*, 17 Abb. 177; *ante*, p. 464 *g*).

g. There is no appeal from an order setting aside a sale in foreclosure (*Buffalo Savings B'k* v. *Newton*, 28 N. Y. 160); or,—

h. Striking out an answer as snam or irrelevant (*Briggs* v. *Bergen*, 23 N. Y. 162); or,—

i. From an order granting an allowance under section 309, unless the amount allowed exceeds the limit prescibed, or the case is not one in which any allowance should be made (*Union B'k* v. *Mott*, 13 Abb. 247; *Wilkinson* v. *Tiffany*, 4 Abb. 98).

j. Denying leave to amend a pleading (*Macqueen* v. *Babcock*, 13 Abb. 268; *Saltus* v. *Genin*, 19 How. 233; 10 Abb. 478; *Hatfield* v. *Secor*, 1 Hilton, 535). unless the leave be denied on the ground of want of power to grant it (*McElwain* v. *Corning*, 12 Abb. 16; *Artisans' B'k.* v. *Treadwell*, 34 Barb. 553; *Russell* v. *Conn*, 20 N. Y. 81); or,—

k. Amending a judgment by granting leave to a party to amend his pleading and proceed in the action (*N. Y. Ice Co.* v. *N. West. Ins. Co.*, 21 How. 296; 12 Abb. 414); or,—

l. From taxation of costs of opening streets in the city of New York after the commissioners' report has been confirmed (*Re Sixty-fifth Street*, 23 How. 256; *Re Seventy-sixth Street*, 12 Abb. 317); or,—

m. Confirming report of commissions for opening streets in the City of New York (*Re Seventy-sixth Street*, 12 Abb. 317); or,—

n. Denying or allowing alimony or an allowance for expenses of the action in an action for a divorce (*Griffin* v. *Griffin*, 23 How. 189; *Moncrief* v. *Moncrief*, 10 Abb. 315); or,—

o. For production and discovery of books and papers (*White* v. *Munroe*, 33 Barb. 650; 12 Abb. 357); or,—

p. Granting defendants sued as bail, further time to render their principal (*B'k of Geneva* v. *Reynolds*, 20 How. 19); or,—

q. Denying or allowing a motion to open default and set aside an inquest (*Muldenor* v. *McDonogh*, 2 Hilton, 46; *Bolton* v. *Depeyster*, 3 Code Rep. 141; *Churchill* v. *Mallison*, 2 Hilton, 70; *Foshay* v. *Drost*, 4 Bosw. 664; *Leighton* v. *Wood*, 17 Abb. 177; *Lewis* v. *Graham*, 16 Abb. 126; *Mead* v. *Mead*, 2 E. D. Smith, 223); unless upon a certificate under rule of New York Common Pleas of March, 1852 (*id.* and see *Clark* v. *Lyon*, 2 Hilton, 91; *Quinn* v. *Case*, 2 Hilton, 467); or,—

r. For judgment debtor to apply property to the discharge of the judgment (*Joyce* v. *Holbrook*, 2 Hilton, 94); or,—

s. On an application to commit for contempt for disobeying order in supplementary proceedings (*Joyce* v. *Holbrook*, 2 Hilton 94; 7 Abb. 338; but see *Holstein* v. *Rice*, 15 Abb. 307; *Livingston* v. *Swift*, 23 How. 1); of reference made on a proceeding upon mandamus (*The People* v. *Hawes*, 12 Abb. 204); or,—

t. Reducing amount of bail on an order of arrest (*Hart* v. *Kennedy*, 15 Abb. 290).

a. Made on motion of bail for leave to surrender their principal after the time allowed by law therefor had expired (*B'k of Geneva* v. *Reynolds*, 12 Abb. 81); or,—

b. Denying a motion for re-sale on a foreclosure, on the ground of inadequate price (*Young* v. *Bloomer*, 22 How. 383); or,—

c. Refusing leave to amend at circuit (*McCarty* v. *Edwards*, 24 How. 236); or,—

d. Adjudging a witness examined before the trial to be in contempt (*The People* v. *Dyckman*, 24 How. 222); or,—

e. Denying a motion to dismiss the complaint on the ground that the plaintiff, a foreign corporation, had omitted to file security for costs (*Tyrone and Lock Haven R. R. Co.*, v. *Schenck*, 18 How. 275).

f. The refusal of the court to allow a party to serve a bill of particulars after his time to do so had expired cannot be reviewed (*Goings* v. *Patten*, 17 Abb. 339).

g. Applications for leave to amend are, in all cases, addressed to the discretion of the court; and no appeal lies from an order refusing leave to amend, in the N. Y. common pleas, unless a certificate is obtained pursuant to the rule of that court adopted 22d March, 1851 (*Hatfield* v. *Secor*, 1 Hilton, 535).

h. An appeal lies.—*From an order* allowing an attachment (*B'k of Lansingburg* v. *McKie*, 7 How. 364; *Conklin* v. *Dutcher*, 1 Code Rep. N. S. 49); or,—

i. For the plaintiff to pay the defendant's costs, in an action where an offer has been made, and the plaintiff has recovered less than the sum mentioned in the offer (*McGrath* v. *Van Wyck*, 1 Code Rep. N. S. 157); or,—

j. For a reference after judgment by default, in an action to recover personal property, to ascertain the plaintiff's damages occasioned by the taking and detaining (*Emerson* v. *Burney*, 1 Code Rep. N. S. 189); or,—

k. Directing a defendant to pay the amount admitted due by the answer (*Merritt* v. *Thompson*, 1 Abb. 223); or,—

l. Striking out portions of a pleading, if the portion stricken out may affect the rights of the party (*Whitney* v. *Waterman*, 4 How. 513; *Otis* v. *Ross*, 8 ib. 195); or—

m. In supplemental proceedings (*Hatch* v. *Weyburn*, 8 How. 163), the cases *contra*, *Lindsay* v. *Sherman* (5 id. 368), and *Conway* v. *Hitchins* (9 Barb. 378), were decided before the amendment made in 1851; or—

n. Denying a motion to set aside proceedings on the ground that no summons had been served (*Van Rensselaer* v. *Chadwick*, 7 How. 297); or—

o. Denying a motion to enter an exoneretur of bail (*Col. Ins. Co.* v. *Force*, 8 How. 358); or—

p. Directing a reference, in a case not authorized by law (*Whitaker* v. *Desfosse*, 7 Bosw. 678; *Kenedy* v. *Shilton*, 1 Hilton, 546; see *ante*, p. 495, *b*); or—

q. Opening a judgment against the city of New York on motion pursuant to the law of 1859 (*Joyce* v. *Mayor of N. Y.* 20 How. 439; 12 Abb. 309); or—

r. Of the supreme court, reversing a final decree of a surrogate in a proceeding for an account (*Wagener* v. *Reiley*, 4 How. 195); or—

s. Reversing a surrogate's decree admitting a will to probate for error in law (*Talbot* v. *Talbot*, 23 N. Y. 17); or—

t. Dismissing the proceedings to an attachment, to compel the appearance of the judgment debtor (*Holstein* v. *Rice*, 15 Abb. 307; 24 How. 135); or—

u. Denying motion to open judgment for default of an answer, defendant swearing to a defense on the merits (*Quinn* v. *Case*, 2 Hilton, 467); it is otherwise where the order is made as a mere favor (*Foshay* v. *Drost*, 4 Bosw. 664), or

v. Allowing an amendment of the complaint by the insertion of an additional and inconsistent cause of action (*Sheldon* v. *Adams*, 27 How. 179; *Union Bank* v. *Mott*, 19 How. 267; 11 Abb. 42; see *Salters* v. *Genin*, 10 Abb. 478; 19 How. 233); or—

w. Denying a motion to set aside a report of referees (*Matthews* v. *Jones*, 1 E. D. Smith, 423); or—

a. Denying a motion to enter satisfaction of a judgment, so as to enforce the lien of an attorney (*Ward* v. *Wordsworth*, 1 E D. Smith, 599); or,—

b. Allowing an action to be entertained in the name of surviving plaintiffs, and admitting others in place of a deceased plaintiff (*St. John* v. *Croel*, 10 How. 253); or,—

c. Denying a motion to set aside a judgment on the ground, amongst others, that the defendant, the moving party, had not been served with notice of trial (*Tracy* v. *N. Y. Steam Faucet Co.* 1 E. D. Smith, 357); or,—

d. Denying a motion to set aside a judgment on the ground that it was entered after a settlement and satisfaction of the cause of action (*Marquat* v. *Muley*, 9 How. 460); or,—

e. Denying a motion for leave to examine an adverse party before the trial (*Green* v. *Wood*, 7 Abb. 277); or,—

f. Confirming the report of commissioners of estimate and assessment in proceedings for a street improvement in the city of New York (*Pryor's Appeal*, 5 Abb. 272; see, however, *In the matter of the Bowery*, 12 How. 97; 2 Abb. 368); or—

g. Allowing a defendant to put in a supplemental answer, setting up a new defence, which, if established, will be fatal to the plaintiff's action (*Harrington* v. *Slade*, 22 Barb. 161;) or—

h. Denying a stay of proceedings until the return of a commission to examine witnesses abroad (*Thatcher* v. *Bennett*, MS.); that was an appeal from so much of an order for a commission as stayed the proceedings of the plaintiff until the return of the commission. The general term of the supreme court in the first district held that the staying the proceedings was in the discretion of the judge, and that they would not review that discretion where the order was for a stay; but where the judge refused a stay, there although it was still a matter in his discretion, yet inasmuch as an erroneous exercise of that discretion might deprive the defendant of a substantial right, they would in such a case entertain an appeal from the order.

i. A purchaser at a foreclosure sale may appeal to the general term from an order setting aside the sale (*Mortimer* v. *Nash*, 17 Abb. 229, *note*).

j. An order refusing an attachment against a witness disobeying a subpœna *duces tecum*, is appealable (so said in *La Farge* v. *La Farge Fire Ins. Co.* 14 How. 29).

k. An order denying a motion to set aside for irregularity and as a favor, a judgment taken by default upon the answer as sham, was held to be appealable (*Fussett* v. *Tallmadge*, 15 Abb. 205).

l. An order giving an allowance beyond what the law permits is appealable (*Wilkinson* v. *Tiffany*, 4 Abb. 98; *Union Bank* v. *Mott*, 13 Abb. 247). And where costs are allowed to which the party has no legal right, and which defendant cannot be required to pay without a violation of the statute, and the court at special term deny a motion to correct such adjustment, an appeal lies to the general term (*Stuyler* v. *Smith*, 2 Bosw. 673).

m. If a party to an action proceeds upon an order made in the cause, or accepts any benefit or advantage under it, he will be precluded from asking its review. Therefore where an order was granted that the defendant be allowed to answer on payment of costs, and plaintiff accepted the costs and received the answer, *Held*, that the acceptance of the costs, if they were received *before* the appeal, was a waiver of the right of appeal, and if received *after*, it was a waiver of the appeal (*Radway* v. *Graham*, 4 Abb. 468; and see *Lewis* v. *Irving Ins. Co.* 15 Abb. 140, *n*).

n. A moving party cannot appeal from an order denying his motion, where he has availed himself of a provision of the order giving him leave to renew the application (*Noble* v. *Prescott*, 4 E. D. Smith, 139).

o. Where after an appeal taken from an order denying a motion, an order is obtained for leave to renew such motion, the court will not hear the appeal while such order giving leave to renew remains in force (*Peel* v. *Elliott*, 16 How. 483).

a. No appeal can be had from an order until it is entered and the moving papers filed with the clerk (*Smith* v. *Dodd*, 3 E. D. Smith, 215; *McCunn* v. *Barnett*, 2 *id.* 521; *Marshall* v. *Francisco*, 10 How. 147; *Plato* v. *Kelly*, 16 Abb. 188; *Gallt* v. *Finch*, 24 How. 193). That there is at the foot of the order a written direction of the judge to enter it makes no difference (*Whitaker* v. *Desfosse*, 7 Bosw. 678). But where an appeal has been argued without any objection or suggestion that the order has not been entered, the court will not assume that it has not been entered, but will decide the appeal on its merits. (*Id.*)

b. **Subdivision 2.**—The provision allowing an appeal from an order when it sustains or overrules a demurrer, is applicable to all cases where leave to amend is given in connection with a decision on a demurrer, and also to decisions on demurrer to part of a pleading (*Bauman* v. *N. Y. Central R. R. Co.* 10 How. 208; *Cook* v. *Pomeroy*, ib. 221, reversing S. C. *ib.* 103). On the other hand, it has been held that this provision applies to every case of a decision on a demurrer where the appeal is taken before any judgment is actually entered (*Nolton* v. *The Western R. R. Co.* 10 How. 97; *Nellis* v. *DeForest*, 6 *ib.* 413; *Reynolds* v. *Freeman*, 4 Sand. 702; *Phipps* v. *Van Cott*, 4 Abb. 90; *Ives* v. *Miller*, 19 Barb. 197). Again, it has been held that in no case can a decision on a demurrer be appealed from as an order; that this provision is inoperative; and that the only mode of reviewing a decision on a demurrer is, to allow judgment to be entered, and then appeal from the judgment (*Lewis* v. *Acker*, 8 How. 414; *Bruce* v. *Pinckney*, ib. 397). These cases follow the decisions in *Bentley* v. *Jones* (3 Code Rep. 37; 4 How. 335), *King* v. *Stafford* (5 How. 30), that the decision on a demurrer is a judgment and not an order. (See note to section 400). In *Ford* v. *Turner* (5 Duer, 684; 3 Abb. 385; 13 How. 193); the superior court held that a decision at a special term overruling a demurrer to a complaint, *and giving leave to amend*, is not a judgment *while the privilege given to answer is continuing*, and the decision may be appealed from as an order. That the decision at general term on such an appeal is itself an order, when the complaint is one on which the court must subsequently decide at special term what is the nature and extent of the relief to be granted. The defendant's appealing from such order at general term to the court of appeals does not stay the proceedings in the action, and the court will not in such a case order a stay.

c. In *Martin* v. *Kanouse*, (2 Abb. 390), there was an order pronouncing the answer frivolous; from this order an appeal was taken. On motion to dismiss that appeal, Mitchell, J., said, "Another ground alleged for dismissing the appeal by Kanouse, is that the appeal is from the order of the judge pronouncing the answer frivolous, and not from the judgment entered on that order, and is without security for costs. There is one decision at general term sanctioning the defendant's course, when the order against the answer is made at chambers; and for that and other reasons already alluded to, it is not deemed expedient to resort to the summary proceeding of absolutely dismissing the appeal, although our impression is strong that the appeal should be from the judgment, as the order was made at special term, and not only pronounced the answer frivolous, but proceeded also to declare the appropriate judgment in the whole case. At all events, it is proper that the defendant file security for costs. If he does so the motion to dismiss the appeal is denied without costs."

d. **Merits.**—An order "involves the merits,"— means all orders in the progress of a cause, except such as relate merely to matters resting in the discretion of the court, or to mere matters of practice or form of proceeding. An application for the necessary process to enforce the judgment of the court, involves the merits (*Cruger* v. *Douglas*, 2 Code Rep. 123; and see *St. John* v. *West*, 4 How. 331; *Tallman* v. *Hinman*, 10 *id.* 90). In *Tracy* v. *New York Steam Faucet Co.* (1 E. D. Smith, 357), Woodruff, J., after approving of the definition of *merits* as found in *St. John* v. *West*, (supra), says, "Where a judgment has been obtained in violation of an express provision of the code, a motion to vacate it involves the merits." An order that a plaintiff recover costs on the ground that a claim of title to real property arose on the pleadings, or came in question on the trial, is an appealable order. "It involved a part of the

merits of the action. It was a matter of strict legal right as to the allowance of costs. The order did not relate to a matter of practice or procedure, or rest in the discretion of the court" (8 Barb. 329; *Burhans* v. *Tibbitts*, 7 How. 78).

a. **Substantial right.**—A party cannot be said to have a right to what a court has a discretion to grant or withhold. The legislature must have intended by a *substantial right*, a fixed, determined right, independent of the discretion of the court, and of some value. Such a right must exist and be injuriously affected by an order, to bring a case within the 3rd sub. of sect. 349 (*Tallman* v. *Hinman*, 10 How. 90). An order admitting, or refusing to admit, an action to be continued in the name of a surviving plaintiff, or in the names of the representatives in interest of a deceased plaintiff, affects a *substantial right* (*St. John* v. *Croel*, id. 253). An order denying a party the exclusive right to a large sum of money, affects a substantial right and is appealable (*Artisans' B'k* v. *Treadwell*, 34 Barb. 553).

b. **Review of order granting or refusing a new trial.**—The decision on a motion for a new trial, can be reviewed only on an appeal from the order denying the new trial (*Morange* v. *Morris*, 12 Abb. 164; 32 Barb. 650; *Morrison* v. *N. Y. & Harlem R. R. Co.*, 32 Barb. 568). An appeal may be taken from an order denying a motion for a new trial, although judgment has been entered where it was entered before the appeal taken, but after the order, appealed from was made (*Pumpelly* v. *Village of Owego*, 13 Abb. 387; 22 How. 385; see *Soverhill* v. *Post*, 22 How. 386); and an appeal lies to the supreme court from an order of the city court of Brooklyn denying a motion for a new trial (*Suydam* v. *Grand Street & Newtown R. R.*, 17 Abb. 305; *Bennet* v. *City of Brooklyn*, 19 How. 310).

c. Where an appeal is taken from the judgment and also from the order denying a new trial, the fact that the party had no right to move for a new trial does not prejudice his appeal from the judgment (*Jackson* v. *Fassett*, 12 Abb. 281).

d. To present a question of fact upon the evidence, or to obtain a new trial on the ground of surprise, newly discovered evidence or the like, a motion must be made at special term before judgment (*Morrison* v. *N. Y. & Harlem R. R. Co.*, 32 Barb. 568; *Morange* v. *Morris*, 12 Abb. 164; 32 Barb. 650).

e. An appeal to the court of appeals from an order denying a motion for a new trial, does not, *per se*, prevent the respondent entering judgment in the court below. Such judgment does not affect the appeal. The court below cannot stay the proceedings on the appeal from the order (*Valton* v. *Nat. Loan Fund Ass. Soc.*, 19 How. 515; see *McMahon* v. *Allen*, 22 How. 193).

f. **Review of order sustaining or overruling a demurrer.**—Where a demurrer is overruled or sustained, a party may appeal as from an order *before* judgment is actually entered, but not after judgment is entered (*Ives* v. *Miller*, 19 Barb. 197; *Sutherland* v. *Tyler*, 11 How. 251); and an appeal may be taken from an order overruling a demurrer to one of several defences with liberty to reply (*Mattoon* v. *Baker*, 24 How. 329).

g. Where, on a demurrer to the complaint, the court at special term ordered judgment for the defendant, that the complaint be dismissed, unless the plaintiff should amend and pay costs within twenty days. The plaintiff within twenty days took an appeal to the general term from the decision at special term, as from an order. On motion to dismiss that appeal on the ground that it should have been from a judgment, held that the appeal having been taken within the twenty days allowed the plaintiff in which to amend, it was properly brought as from an order (*Phipps* v. *Van Cott*, 15 How. 110).

h. **Security on appeal.**—On appeals from orders no security is required (*Beach* v. *Southworth*, 1 Code Rep. 99; 6 Barb. 173; *Nicholson* v. *Dunham*, 1 Code R. 119; *Allen* v. *Johnson*, 2 Sand. 629; *Emerson* v. *Burney*, 6 How. 32; *Cook* v. *Pomeroy*, 10 *ib.* 103); unless a stay of proceedings is desired (*Bacon* v. *Reading*, 1 Duer, 622).

i. **Stay of proceedings on an appeal.—Does an appeal from an order to the general term operate, per se, as a stay of proceedings?**—In *Emer-*

son v. *Burney*, (6 How. 32), it was held that an appeal from an order is, *per se*, a stay of proceeding; so in *Cook* v. *Pomeroy* (10 *id.* 108), *Trustees of Penn Yan* v. *Forbes*, (8 *id.* 286); the latter case was affirmed on appeal by the general term (*Stewart* v. *Saratoga R. R. Co.*, (12 *id.* 435). On the other hand, in *Story* v. *Duffy*, (8 *id.* 487), it was held that such an appeal is not, *per se*, a stay of proceedings; and held the same way in *Forbes* v. *Oaks* (2 Abb. 120); and all the justices of the superior court were said to be of opinion that the appeal is not, *per se*, a stay (*Bacon* v. *Reading*, 1 Duer, 622). In *Hicks* v. *Smith* (4 Abb. 285), Birdseye, J., at general term, reviewed all the previous decisions; and the conclusion arrived at, was that an appeal from an order is *not*, *per se*, a stay of proceedings. That learned judge had previously decided the same way at special term (*Johnson* v. *Scriven*, 3 Abb. 208; see *Valton* v. *Nat. Loan Fund Ass.* 19 How. 515).

a. On an appeal from an order granting an injunction, the court may grant a stay of proceedings on the order (*Genin* v. *Chadsey*, 12 Abb. 69). Security on stay of injunction against use of trade mark or sign. (*Id.*)

b. Where an undertaking is required as a condition of granting a stay of proceedings pending an appeal from an order, such undertaking is an available security to the respondent if the order be affirmed (*Winterhoff* v. *Siegert*, 13 Abb. 182).

c. **Hearing.**—On the hearing of the appeal, the motion papers must be produced to the court (*Smith* v. *Dodd*, 3 E. D. Smith, 215).

d. Where the necessary papers upon the appeal are not submitted to the court, the appeal will be dismissed. So held where the papers did not show whether the appeal was taken from a judgment upon a demurrer, or from an order striking out a demurrer as frivolous (*Sun Mut. Ins. Co.* v. *Dwight*, 1 Hilton, 50).

e. Formal and preliminary objections, not involving the merits of a motion, will not be considered upon appeal unless it affirmatively appears that they were taken and overruled when the motion was brought on for hearing (*Merritt* v. *Thompson*, 1 Hilton, 551).

f. Objection to motion papers which might have been remedied at specia. term by amendment if the objection had been there made, cannot be urged on the argument of the appeal (*Jackson* v. *Smith*, 16 Abb. 201).

g. On an appeal from an order on a motion where no affidavits were read in opposition to those in support of the motion, every intendment is in favor of the statements in those affidavits (*Jackson* v. *Smith*, 16 Abb. 201).

h. On an appeal from an order proper to be granted only as a matter of favor, the court at general term in support of the order will presume, till the contrary appears, that it was so granted (*Leighton* v. *Wood*, 17 Abb. 177).

i. Where on a motion to set aside proceedings for irregularity, the irregularity is not stated in the notice of motion, and the motion is denied, the court at general term on an appeal from the order denying such motion may presume the denial was for the defect in the notice (*Lewes* v. *Graham*, 16 Abb. 126; and see 14 Abb. 449).

j. On an appeal from an order the objection that the order does not conform in its terms to the decision actually made cannot be considered (*Ehle* v. *Haller*, 6 Bosw. 661).

k. The principle that the finding of fact of an inferior tribunal is not to be reversed by the appellate court, merely because it is against the weight of evidence, has no application to appeals to the general term from orders made in the progress of the action, upon affidavits (*Brodsky* v. *Ihms*, 16 Abb. 251; 25 How. 474).

l. **Costs.**—An appeal under this section is a motion, and the costs are in the discretion of the court; and if not awarded on the decision of the appeal, and the amount stated in the order, none can be obtained (*Savage* v. *Darrow*, 2 Code Rep. 57; *Nellis* v. *De Forrest*, 6 How. 413; and see section 315 and *note*).

On an appeal from an order granting or refusing a new trial, the costs are, before argument, $15; for argument, $30 (*Jackett* v. *Judd*, 18 How. 385).

a. In the superior court of New York, costs are always granted on the affirmance of an order (*Purchase* v. *Bellows*, 16 Abb. 105).

b. **New York Common Pleas.**—Appeals from orders on points of practice in this court are regulated by rules of court, which will be found in the Appendix.

§ 350. [300.] *Orders at chambers, to be entered before appeal.*

The last section shall include an order made out of court upon notice; but in such case, the order must be first entered with the clerk. And for the purpose of an appeal, any party affected by such order may require it to be entered with the clerk, and it shall be entered accordingly.

c. Orders granted by a justice at chambers, *ex parte*, under § 405 [366], need not be entered with the clerk (*Savage* v. *Relyea*, 3 How. 276; 1 Code Rep. 42). But upon motions made upon notice under section 401 [360], the affidavits, &c., used on the motion, must be filed with the clerk of the county where the venue is laid (*Id.*; and *Nicholson* v. *Dunham*, 1 Code Rep. 119); or if the place of trial has been changed, then with the clerk of the county to which the other papers in the cause are transferred. And the order or decision in such cases must be entered with the clerk of the county in which such papers are filed. It is the duty of the respective attorneys to file the papers used by them on such motion, and of the prevailing party to see that the order is entered conformably to the decision. (*Id.*) An order improperly entered will be struck out on motion (*Bedell* v. *Powell*, 3 Code Rep. 61).

See *ante*, p. 684, *a*.

CHAPTER V.*

Appeal to the Court of Common Pleas for the city and county of New York, or to a county court, from an inferior court.

SECTION 351. Existing laws repealed, and this chapter substituted.
352. By what courts judgments to be reviewed. New trial.
353. Appeal, when to be taken.
354. Notice of appeal to be served on justice, and costs of return to be paid.
355. Security to stay execution.
356. Form of undertaking.
357. Execution, how stayed.
358. In case of death of justice, undertaking to be filed.
359. Filing in lieu of service of notice of appeal.
360. Return, when and how made and compelled.
361. How made if justice be out of office.
362. Further return.
363. Justice dead, insane, or absent.
364. Hearing upon return. Dismissing appeal, if not brought on.
365. Appeal to be heard on the original papers.
366. Judgment on appeal. New trial.
367. Judgment-roll.
368. Costs, how awarded.
369. Restitution.
370. Setting off costs and recovery.
371. The costs on appeal.

§ 351. [301.] (Am'd 1849.) *Existing suits. Existing laws repealed, and this chapter substituted.*

All statutes, now in force, providing for the review of judgments in civil cases, rendered by courts of justices of the peace, by the marine court of the city of New York, by the justices'

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a. * **Regularity of proceedings in marine court.**—The court of common pleas will not examine upon motion, the regularity of proceedings whereby a judgment, of which a transcript is filed, has been obtained in the marine court. The remedy in the court of common pleas is by appeal; and in case the time for appealing has expired, the marine court is empowered by recent statutes to grant relief. An order of the marine court vacating a judgment, must be actually entered in that court, before the court of common pleas will entertain a motion to set aside an execution issued thereon. Where on a motion to set aside an execution, on the ground that a decision had been made in the marine court vacating the judgment whereon it was issued, it appeared that the decision had not been entered or reduced to the form of

courts in the city of New York, by the municipal court of the city of Brooklyn, and by the justices' courts of cities, and regulating the practice in relation to such review, are repealed; and hereafter, the only mode of reviewing such judgments shall be an appeal, as prescribed by this chapter.

* § 352. [302.] (Am'd 1849, 1857, 1862, 1863, 1864.) *Existing suits. By what courts judgments to be reviewed. New trial.*

When a judgment shall have been rendered by the general term of the marine court of the city of New York, or by a justice of a justice's court of that city, the appeal shall be to the court of common pleas for the city and county of New York.

The appeal from the general term of the marine court prescribed herein, shall be from an actual determination at such general term only, and shall be taken within twenty days after judgment by such general term.

In the city of Buffalo, the appeals from the courts of justices of said city shall be to the superior court of said city. And when the appeal is to the superior court of Buffalo, in the cases in which by the terms of this section a new trial may be had, such new trial shall be had in the said superior court.

When rendered by any of the other courts enumerated in section three hundred and fifty-one, the appeal shall be to the county court of the county where the judgment was rendered.

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an order, in consequence of the loss of papers, it was held, that the proper course was to renew the motion below, and apply in the mean time to the court of common pleas for a stay of proceedings upon the execution (*McCunn* v. *Barnett*, 2 E. D. Smith, 521).

a. **City of Buffalo.**—In cases arising in justices' courts in the city of Buffalo, an appeal lies from the county court to the superior court of that city only, and the decision of the latter court is final (*Burgart* v. *Stock*, 12 How. 559).

b. **Mechanics' liens.**—A judgment of a justice's court, in proceedings under the mechanics' lien law, is a judgment in a civil action, and is the subject of review on appeal to the county court, the same as other judgments (*The People* v. *County Judge of Rensselaer*, 13 How. 399).

c. **Justices' judgments.**—As the only mode of reviewing a judgment rendered in a justice's court, is that prescribed by the code (2 Sand. 684; 11 How. 83), if the provisions of the code are not complied with, the appellate court has no jurisdiction (*Tullock* v. *Bradshaw*, 1 Code Rep. 53; *Thompson* v. *Hopper*, id. 103; *Derby* v. *Hannin*, 15 How. 32. See note to section 354).

d. **Summary Proceedings.**—This chapter does not apply to summary proceedings to recover possession of land, which must still be reviewed by *certiorari* (*The People* v. *Bigelow*, 11 How. 83, *Duel* v. *Rust*, 24 Barb. 438; *The People* v. *Willis*, 5 Abb. 205; *Freeman* v. *Ogden*, 17 Abb. 326, *note*; contra *David* v. *Hudson*, 5 Abb. 61; *Romaine* v. *Kinshimer*, 2 Hilton, 519).

See Rules, in Appendix.

 * *Amended—See Appendix.*

On such appeal, when the amount of the claim or claims of either party litigated in the court below shall exceed fifty dollars, or when in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed fifty dollars, exclusive of costs, a new trial shall be had in the county court in the following cases:

1. When the judgment was rendered upon an issue of law joined between the parties.

2. When it was rendered upon an issue of fact joined between the parties, whether the defendant was present at the trial or not.

Provided, however, that the appellant may in cases where the amount litigated exceeds fifty dollars, state in the notice of appeal, that such appeal is taken upon questions of law only, in which case a new trial shall not be had in county court, but the appeal shall be heard and determined in the same manner as if the amount litigated in justices' court in said cause appealed was fifty dollars or under.

a. **New trial.**—The new trial is a matter of right of which the appellant cannot be deprived on the ground of any particularity in the statement in his notice of appeal, of the ground of appeal (*Fowler* v. *Westervelt*, 17 Abb. 59).

b. Where there is an application for a new trial the county court must hear and decide upon all the questions raised by the appellant as well those upon which the judgment is alleged to be erroneous, as those on which the appellant seeks a new trial (*Cook* v. *Swift* 10 Abb. 212).

Appeal by Infants, see *ante*, p. 128, *g*.

§ 353. [303.] (Am'd 1851, 1852.) *Existing suits. Appeal, when to be taken.*

The appellant shall, within twenty days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the defendant did not appear, he shall have twenty days, after personal notice of the judgment, to serve the notice of appeal provided for in this and the next section.

See note to sect. 354.

§ 354. [304.] (Am'd 1849, 1851, 1852, 1857, 1858.) *Existing suits. Notice of appeal to be served on justice, and costs paid. Undertaking or deposit.*

The notice of appeal must, within the same time, be served

on the justice, personally, if living and within the county, or on his clerk, if there be one, and on the respondent, personally, or by leaving it at his residence, with some person of suitable age and discretion; or in case the respondent is not a resident of such county, or cannot, after due diligence, be found therein, in the same manner on the attorney or agent, if any, who is a resident of such county, who appeared for the respondent on the trial; and if neither the respondent nor such agent or attorney can be found in the county, the notice may be served on the respondent by leaving it with the clerk of the appellate court, and the appellant must, at the time of the service of the notice of appeal on the justice, or on his clerk, as herein provided (except in cases of appeals from the district courts in the city of New York, and the general term of the marine court of the city of New York), pay to such justice or clerk the costs of the action, included in the judgment, together with two dollars, costs of the return, which shall be included in the judgment for costs on reversal. In all cases of appeal from the general term of the marine court of the city of New York, and from the district courts of the city of New York, to the court of common pleas for the city and county of New York, the appellant shall, at the time of the service of the notice of appeal, pay to the clerk of the marine court, or to the justice or clerk of the district court, two dollars, as costs of the return to such court of common pleas, which costs, so paid, shall be included in the judgment for costs, in case the judgment of the court below shall be reversed; and the appellant shall also execute, on the appeal, a written undertaking on his part, with one or more sufficient sureties, to the effect that the appellant will pay all costs, disbursements, and extra costs, awarded against him in the court below, if such judgment shall be affirmed by the appellate court, on such appeal, together with all costs and damages which may be awarded against him thereon; such sureties to justify in double the amount specified in the undertaking; such undertaking and the sufficiency of the sureties to be approved by the justice of the court below, or one of the judges of the court of common pleas, or the appellant may deposit, with the clerk of the court of common pleas, the costs, disbursements, and extra costs, included in the judgment in the court below, and the sum of fifteen dollars, to meet any costs that may be awarded against him in such appeal; and such

appeal from the general term of the marine court and the district court shall be ineffectual, unless, within the time specified for bringing the appeal, the appellant execute such undertaking or make such deposit; the undertaking, when executed and approved, to be filed with the clerk of the court of common pleas; the amount so deposited shall be repaid by said clerk, to the appellant, if he succeed on the appeal; and in case the judgment be affirmed, the said clerk shall, after execution is issued, pay over the amount so deposited, to the respondent, which shall be credited on the execution issued on the judgment of affirmance, to the extent thereof, and the balance, if any, on the execution issued on the judgment appealed from.

a. **Appeal from judgments in the marine and district courts in the city New York, in actions against the mayor, &c. of said city.**—On appeals by the mayor, &c. of New York, from judgments in the marine and district courts of said city against said mayor, &c. the service of the notice of appeal, without more and without any security, stays the proceedings on the judgment; and the said mayor, &c., is not required, in order to appeal, either to pay the costs of judgment or the fee for the return (Laws 1858, ch. 334).

b. Appeals by municipal Corporations.—See *ante*, p. 637, *e*.

c. Appeals by the People.—See *ante*, p. 637, *c*, *d*.

d. **Who may appeal.**—Both parties may appeal from one and the same judgment (*Glassner* v. *Wheaton*, 2 E. D. Smith, 352; *Robbins* v. *Codman*, 4 E. D. Smith, 316).

e. **What judgments are appealable.**—Where a justice dismisses an action before him without awarding any costs against the plaintiff, it is not a case in which an appeal can be brought. There is no judgment capable of being affirmed or reversed (*Haulenbeck* v. *Gillies*, 7 Abb. 421; 2 Hilton, 239); see however, *Gregory* v. *Trainor*, 4 E. D. Smith, 58, where such an appeal was allowed. A judgment in a proceeding to foreclose a mechanic's lien is appealable (*The People* v. *Rensselaer Co. Judge*, 18 How. 398).

f. There can be no appeal to the county court from the verdict of a jury given upon the laying out a private road (*The People* v. *Robinson*, 17 How. 534; 29 Barb. 77).

g. A party may appeal from a judgment in his favor (*Bissell* v. *Marshall*, 6 Johns. 100; *Slaman* v. *Buckley*, 29 Barb. 290).

h. The remedy by appeal applies as well to jurisdictional defects as to irregularities (*Fitch* v. *Devlin*, 15 Barb. 47).

i. There can be no appeal to the New York common pleas, from a judgment of a single judge of the marine court (*The People* v. *Marine Court*, 3 Abb. 57; 22 Barb. 502; *The People* v. *Marine Court*, 3 Abb. 5; *The People* v. *Marine Court* 2 Abb. 126). Nor from a judgment at the general term of the marine court, reversing a judgment of a single justice without ordering a new trial, or a final judgment, or otherwise determining the rights of the parties (*Hone* v. *Julien*, 9 Abb. 193; *Howe* v. *Julien*, 2 Hilton, 453).

j. The New York Common Pleas has no power *on motion* to reverse or vacate a judgment of the marine or district court (*Martin* v. *Mayor of N. Y.* 20 How. 87). It may however, where a transcript has been filed, perpetually enjoin the enforcement of such a judgment. (*id.*)

k. **When notice of appeal may be served.**—Notice of appeal may be served immediately after the justice renders judgment, without waiting for the clerk of the court below to docket the judgment (*Griswold* v. *Van Deusen*, 2 E. D. Smith, 178).

a. **Notice of appeal.**—The Notice of appeal must be in writing—a *verbal* notice is not sufficient (*The People* v. *Eldridge*, 7 How. 108). It must specify, with reasonable certainty, the alleged error, whether in the process, the pleading, the proceedings at the trial, or in the giving of judgment, so that the adverse party, as well as the justice, may be fairly apprised of the ground on which a reversal of the judgment is sought (*Lee* v. *Schmidt*, 6 Abb. 183; *Kelty* v. *Jenkins*, 1 Hilton, 73; *Irwin* v. *Muir*, 13 How. 409; 4 Abb. 133; *Williams* v. *Cunningham*, 2 Sand. 632; *Thompson* v. *Hopper*, 1 Code R. 108). This is necessary to enable the justice to make a proper return (*Webster* v. *Hopkins*, 11 How. 140), and to enable the respondent to prepare for argument, or procure an amended return, if the original return is defective as to any ground of appeal (*Morton* v. *Clark*, 11 How. 498). A notice of appeal not stating any grounds of appeal would probably be a nullity (*Christman* v. *Paul*, 16 How. 17; *Bush* v. *Dennison*, 14 How. 307). Where the grounds stated were "that material testimony offered on the trial was excluded;" that "material testimony was admitted which ought to have been excluded;" that "the evidence was insufficient on the question of damages; and that the judgment was against the law of the case;" held too vague, and presented no points for review (*Deuchars* v. *Wheaton*, 16 How. 471). A statement that "the judgment is clearly against the law and the evidence of the case," is not sufficient (*Derby* v. *Hannin*, 5 Abb. 150; 15 How. 32). And a general statement "that the judgment is unsustained by and contrary to law and evidence," is insufficient (*Kelty* v. *Jenkins*, 1 Hilton, 73). The notice must itself specify the grounds of objection to the judgment. A reference to the proceedings on the trial, as the place where the grounds of appeal will be found, is not sufficient (*Mayor of New York* v. *Green*, 1 Hilton, 393). The notice of appeal must distinctly specify the errors alleged, whether in the process, pleadings, proceedings at the trial, or in giving judgment, so that the respondent, the justice, and the appellate court may be fully apprised of the matter intended to be the subject of review (*Lee* v. *Schmidt*, 1 Hilton, 537). Where the errors are not distinctly pointed out in the notice, or where the notice states generally, as a ground of appeal, that the judgment is against law and evidence, specific objections will not be heard on the argument, but the judgment will be summarily affirmed. (*Id.*) A statement in the notice that the judgment is against the weight of evidence, is not sufficient to justify a review of the judgment as being contrary to evidence, or against evidence, each being a distinct ground of error, and, if relied on, must be stated. (*Id.*) Where the notice of appeal does not state any grounds of appeal, the judgment will be affirmed (*Davis* v. *N. Y. and Erie R. R. Co.*, 1 Hilton, 543). But as upon an appeal to the county court, where the amount litigated exceeds fifty dollars, the appellant is entitled to a new trial as a matter of right; there is no reason [except § 371 of the code] for requiring particularity in the statement of the grounds of appeal in the notice of appeal, hence in such a case a notice that the judgment was against law and evidence, was held sufficient (*Fowler* v. *Westervelt*, 40 Barb. 374).

b. Must the notice of appeal state "manifest injustice" has been done, to entitle the appellant to relief on that account? (*Silkman* v. *Boiger*, 4 E. D. Smith, 436).

c. **Effect of notice not stating the grounds of appeal.**—If the notice does not state *the* grounds of appeal, the appeal will be dismissed (*Swatz* v. *Bendall*, 2 E. D. Smith, 123; *Griswold* v. *Van Deusen*, id. 178; *Sullivan* v. *McDonald*, 2 Sand. 632, note; *Derby* v. *Hannin*, 15 How. 32; *Christman* v. *Paul*, 16 *id.* 17; *Bush* v. *Denison*, 14 *id.* 307); unless the court, as it may, give the appellant leave to amend his notice of appeal by inserting therein the grounds of appeal (*Irwin* v. *Muir*, 13 How. 409; 4 Abb. 133).

d. And where the appellant set forth various objections as having been taken at the trial and overruled, but did not state the grounds on which the party appealed, the court dismissed the appeal because of this omission (*Sullivan* v. *McDonald*, 2 Sand. 632, in note).

e Where a notice of appeal from a justice's judgment states a single ground of appeal, it confers jurisdiction on the county court to examine the whole case, as set forth in the justice's returns (*Forman* v. *Forman*, 17 How. 25

Sixth District; adverse to *Derby* v. *Hannin*, 15 How. 32; *Bush* v. *Dennison*, 14 How. 307).

a. The objection to the notice of appeal should be taken by motion to dismiss the appeal, not on the appeal being called for argument (*Irwin* v. *Muir*, 13 How. 409; 4 Abb. 133).

See section 371, *post*.

b. **Service of the notice.**—Notice cannot regularly be served on the attorney, if the respondent is *in fact* a resident [or can with due diligence be found within the county] (*Earle* v. *Chapman*, 3 E. D. Smith, 216), although in *Loescher* v. *Nordmeyer* (13 How. 146; 3 Abb. 244), Clerke, J., seemed to be of a different opinion; and where the notice was delivered to the attorney, who stated the respondent was a resident, and thereupon the party serving the notice took it back with a view to serve it on the respondent personally,—it afterwards turned out that the respondent was a non-resident, and no further service was made,—held there had been no sufficient service (*Earle* v. *Chapman*, supra).

c. On the motion by the plaintiff to dismiss an appeal upon the ground that no notice of appeal had been served, founded on affidavits of the plaintiff and of the attorney who appeared for him in the court below, denying generally that a service of such notice had been made, and not stating the place of residence of the plaintiff; the motion was resisted on an affidavit of the defendant, stating, *on information and belief*, that the plaintiff was a non-resident; held that such an affidavit was sufficient *prima facie* evidence of the plaintiff being a non-resident. The motion was decided on other grounds (*Earle* v. *Chapman*, 3 E. D. Smith, 216).

d. Where the notice of appeal was served on the respondent's attorney, on motion to dismiss the appeal on the ground that the notice was not served on the respondent, it appeared by the appellant's affidavit, that "he used great diligence to make the service on the respondent, that he called at the residence of the respondent, in the city of New York, and could not find her there; was referred to another house, where, it was said, she was gone to service, and on calling there was told they did not know where she was, and finally, that she could not be found," the court held this insufficient to show that the respondent was not a resident of the city of New York, and dismissed the appeal (*Duffy* v. *Morgan*, 2 Sand. 631). [At the time this decision was made the only case in which service could be made on the attorney, was where the respondent was a non-resident. Now service may be made on the attorney where the respondent cannot with due diligence be found.]

e. The notice of appeal may be served on the clerk of the court, and in that case need not be served on the justice (*Irwin* v. *Muir*, 13 How. 409; 4 Abb. 133); and the costs of the action and costs of the return may also be paid to the clerk (*Loescher* v. *Nordmeyer*, 13 How. 146; 3 Abb. 244).

f. Giving admission of *due* service of a notice of appeal held a waiver of the objection that it is not served in time (*Struver* v. *Ocean Ins. Co.*, 9 Abb. 23).

g. **Payment of fee for return.**—Where, on an appeal from a justice's judgment, the fee for the return was not paid at the time of the service of the notice of appeal, but was afterwards tendered and refused, the justice refused to make any return, the appeal was dismissed; and Harris, J., said, "If the fee for the return is not paid on the service of the notice of appeal, the justice is not bound to make a return; nor is it in the power of the appellate court, either to compel a return, or to hear the appeal in the absence of any return" (*Van Heusen* v. *Kirkpatrick*, 1 Code Rep. N. S. 74; 5 How. 422). See note to section 360.

h. **Appeal, when perfected.**—An appeal from a justice's court is perfected by the service of notice of appeal on the justice, and on the respondent, or his attorney, if the respondent is a non-resident; and when notice of appeal had been served on the justice, and no notice had been served on the respondent, it was held that no appeal had been perfected, and that the plaintiff should treat the service made as a nullity and issue execution on the judgment: and

a motion to set aside the appeal was dismissed (*Schermerhorn* v. *Gobief*, 1 Code Rep. N. S. 290; *The People* v. *Eldridge*, 7 How. 108). The appeal to the county court is not perfected until the appellant pays the costs of the action (*Griswold* v. *Van Deusen*, 2 E. D. Smith, 178).

a. **Deposit or undertaking.**—The deposit or undertaking required by this section is necessary to make an appeal effectual, but such undertaking or deposit does not stay the execution on the judgment; to obtain such a stay, an undertaking must be given pursuant to section 356 (*Onderdonk* v. *Emmons*, 2 Hilton, 504; 9 Abb. 187; 17 How. 545).

b. An undertaking pursuant to this section does not bind the sureties for the payment of the damages recovered by the judgment appealed from. The "damages" referred to in this section, are such sum as the court may award the respondent in addition to the judgment appealed from, and beyond the costs of appeal. (*Id.*)

c. The undertaking under this section does not stay proceedings on the judgment; to stay proceedings, an undertaking must be given pursuant to sections 355 and 356. (*Id.*)

d. The "damages" mentioned in this section applies to those cases where on an appeal a recovery is had by one party and costs are awarded to the other (§ 370), and a set-off is ordered and a judgment is given for the balance, such balance if against the appellant would be "damages." (*Id.*)

e. The appellant is not required to serve a copy of the undertaking on the respondent or his attorney (*Jackson* v. *Smith*, 25 How. 476; 16 Abb. 201).

f. The court may permit an amendment of any defect in the undertaking (*Wood* v. *Kelly*, 2 Hilton, 334; *Irwin* v. *Moore*, 13 How. 410).

g. The liability of sureties on an undertaking under this section is fixed the moment the judgment is affirmed (*Onderdonk* v. *Emmons*, 2 Hilton, 504; 9 Abb. 187; 17 How. 545).

h. **Objections to regularity of notice, or that it was not in time, when to be taken.**—An objection to the regularity of the notice of appeal will not be considered on the argument of the appeal. The remedy for any irregularity in that respect is by motion, upon notice to the appellant to dismiss the appeal (*Nye* v. *Ayres*, 1 E. D. Smith, 533; *Partridge* v. *Thayer*, 2 Sand. 228).

i. An objection that a notice of appeal has been served after the time prescribed by the statute, can be taken advantage of only by a motion to dismiss the appeal, when the fact of the service being too late, does not appear from the return (*Mills* v. *Shult*, 2 E. D. Smith, 139).

j. **Motion to dismiss appeal for not stating grounds of appeal in notice.**—The motion to dismiss an appeal because the notice does not state the grounds of an appeal should be made at a special term (*Griswold* v. *Van Deusen*, 2 E. D. Smith, 178; see *Irwin* v. *Muir*, 4 Abb. 133: 13 How. 409).

§ 355. [305.] (Am'd 1849, 1863.) *Existing suits. Security to stay execution.*

When by the terms of section three hundred and fifty-two, the appellant is entitled to a new trial, in the appellate court, he shall, at the time of taking his appeal, and in all other cases, if he desires a stay of execution of the judgment, give security as provided in the next section.

k. **Staying proceedings on the judgment.**—The appellate court is not justified in staying proceedings on the judgment appealed from, upon any other grounds than those prescribed by statute (*Hawkins* v. *Mayor of N. Y.*, 5 Abb. 344).

a. An appeal from the judgment of a justice of the peace, not followed up by the giving of the undertaking required by the code (§§ 355, 356, 357), will not operate as a stay of any further proceedings which the plaintiff may elect to pursue in order to enforce the collection of the judgment (*Conway* v. *Hitchins*, 9 Barb. 378).

b. The appeal to the county court does not *supersede* the justice's judgment (*Pruyn* v. *Tyler*, 18 How. 331).

c. Where the respondent has issued an execution and made a levy before the stay was perfected, the service of a certified copy of the undertaking on the officer arrests the proceedings at the point in which they were at the time of such service. The levy is not discharged, nor can the appellant have the goods returned to him until the appeal is disposed of (*Smith* v. *Allen*, 2 E. D Smith, 259).

§ 356. [306.] (Am'd 1849.) *Existing suits. Form of undertaking.*

The security shall be a written undertaking, executed by one or more sufficient sureties, approved by the county judge or by the court below, to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied.

d. Where proceedings have been stayed by an undertaking given pursuant to this section, on the judgment being affirmed, the stay ceases, and the respondent may proceed to collect his judgment (*Onderdonk* v. *Emmons*, 2 Hilton, 504).

e. Where the county court reversed the judgment of the justice and the supreme court reversed the judgment of the county court and affirmed that of the justice with costs, held that the sureties in an undertaking given pursuant to this section, were liable, not merely for the amount of the judgment in the county court, but for the amount recovered in the supreme court (*Smith* v. *Crouse*, 24 Barb. 433).

f. The liability of sureties on an undertaking under this section does not arise until the judgment is affirmed and execution therein is returned unsatisfied (*Onderdonk* v. *Emmons*, 2 Hilton, 504).

g. An action will not lie against a judge for an error in judgment in approving an invalid undertaking (*Chickering* v. *Robinson*, 3 Cushing, 543).

§ 357. [307.] (Am'd 1849.) *Existing suits. Execution, how stayed.*

The delivery of the undertaking to the court below shall stay the issuing of execution; or if it has been issued the service of a copy of the undertaking, certified by the court below, upon the officer holding the execution, shall stay further proceedings thereon.

h. On appeal from the judgment of the marine or one of the justices' courts, if an execution has been issued from that court, and the officer has levied upon the defendant's goods, the giving of an undertaking on appeal, pursuant to § 357 of the code, and the service of a certified copy on the officer, arrest the proceedings in the State in which they are at the time of such service.

But the levy is not thereby discharged, nor can the appellant require that the goods levied upon be returned to him before the appeal is disposed of (*Smith* v. *Allen*, 2 E. D. Smith, 259). But where an execution was handed to a constable on the 4th, and on the 5th the defendant perfected an appeal and served a copy of the undertaking on the plaintiff in the forenoon of the same day, and the plaintiff, on the same day, and before the constable was served with a copy of the undertaking, directed him to levy on a horse of the defendant, the court refused to sanction such a proceeding, and set aside the levy (*Jones* v. *McCarl*, 7 Abb. 418).

§ 358. [308.] (Am'd 1849.) *Existing suits. In case of death of justice, undertaking to be filed.*

Where, by reason of the death of a justice of the peace, or his removal from the county, or any other cause, the undertaking on the appeal cannot be delivered to him, it shall be filed with the clerk of the appellate court, and notice thereof given to the respondent, or his attorney, or agent, as provided in section three hundred and fifty-four; it shall, thereupon, have the same effect as if delivered to the justice.

§ 359. [309.] (Am'd 1849, 1852.) *Existing suits. Filing in lieu of service of notice of appeal.*

When by reason of the death of a justice of the peace, or his absence from the county, or any other cause, the notice of appeal cannot be served as provided by section three hundred and fifty-three, it may be served by leaving the same with the clerk of the county.

* § 360. [311.] (Am'd 1849, 1852, 1862.) *Existing suits. Return, when and how made and compelled.*

The court below shall, thereupon, after ten days, and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings, and judgment, and file the same in the appellate court. The return may be compelled by attachment. But no justice of the peace shall be bound to make a return, unless the fee, prescribed by the last section of this chapter, be paid on the service of the notice of appeal.

c. **The return.**—The justice, in making his return, acts ministerially, and is responsible to the party injured for any errors therein (*Houghton* v. *Swarthout*, 1 Denio, 509). The return should contain all the evidence used on the trial, documentary and oral (*Ogden* v. *Sanderson*, 3 E. D. Smith, 167; *Orcutt* v. *Cahill*, 24 N. Y. 578); and the pleadings; a statement of the testimony and judgment is not sufficient. It should also state when the process was returnable, the day issue was joined, the adjournments, if any, the date of the trial, and the day whereon judgment was rendered (*Peters* v. *Dicesy*, 3 E. D. Smith, 115; *Roulston*

* *Amended—See Appendix.*

v. *McClelland*, 2 *id.* 60). All the proceedings (*Belshaw* v. *Colie*, 3 Code R. 184; see *Denison* v. *Carnahan*, 1 E D. Smith, 144, 147, note; *McCafferty* v. *Kelly*, 2 Sand. 637). And the notice of appeal (*Bush* v. *Denison*, 14 How. 307). If the notice of appeal is not returned, the appellate court will dismiss the appeal (*id.*; *Cabre* v. *Sturgis*, 1 Hilton, 160. Where the return fails to show what judgment if any has been rendered the court will on that ground alone dismiss an appeal with costs (*Woodside* v. *Pender*, 2 E. D. Smith, 390; contra, see *Klenck* v. *DeForest*, 3 Code Rep. 185).

a. Where the return does not state that it contains all the evidence, the court will not presume there was evidence, not in the return sufficient to warrant the judgment (*Calligan* v. *Mix*, 12 How. 495; see 13 How. 96; see however *Prosser* v. *Secor*, 5 Barb. 607).

b. If the return is defective an amendment should be procured by application to the appellate court for an order upon the court below, to make a further or full return in relation to the matters alleged to be omitted or defectively set forth therein (*Rawson* v. *Grow*, 4 E. D. Smith, 18; *Fairbanks* v. *Corlies*, 3 *id.* 583). The motion may be on affidavit or other proof (*Capewell* v. *Waterman*, 2 *id.* 180; *Lynsky* v. *Pendegrast*, id. 43). Parties should not bring on the appeal for argument until the return is complete (*McAllister* v. *Sexton*, 4 E. D. Smith, 41); for on the argument the return is conclusive as to what transpired in the court below, and affidavits cannot be read to contradict or add to it (*Rawson* v. *Grow*, id. 18; *Trust* v. *Delaplaine*, 3 *id.* 216; *Kilpatrick* v. *Carr*, 3 Abb. 117); and this applies to the charge of the justice to the jury (*Garrison* v. *Pearce*, 3 E. D. Smith, 255). Whether an allegation that the amount of recovery as certified in the return is erroneous by reason of a clerical error of the justice, will be inquired into and determined upon affidavits produced on the appeal, without any preliminary movement to obtain a further or amended return? Query. (*Althause* v. *Rice*, 4 *id.* 347; *Capewell* v. *Ormsby*, 2 *id.* 180; *Kilpatrick* v. *Carr*, 3 Abb. 117; *Lynsky* v. *Pendegrast*, 2 E. D. Smith, 43; *Francois* v. *Oecks*, id.)

c. The return must be submitted on the argument (*Smith* v. *Van Brunt*, 2 E. D. Smith, 534; see section 362, and note.)

d. On the hearing of an appeal from a justice's court, the return of a justice cannot be contradicted or impeached by affidavit. It is conclusive in respect to the statements contained in it. If a return is erroneous, it can only be corrected by order on motion to the court (*Spencer* v. *Beck*, 1 Hilton, 276; *Kelly* v. *Brower*, *id.* 514; *Mitchell* v. *Menkle*, *id.* 142; *Kilpatrick* v. *Carr*, 3 Abb. 117.)

e. Where judgment is rendered in a justice's court without proof, and on default, upon a constable's return of the personal service of a summons and complaint, the statute must be strictly complied with. The justice's return in such a case should show that a copy of the complaint was served, verified by the party pleading, or his agent or attorney, as the case may be. A return which stated "that the summons was, by the return duly made thereon by R. G., one of the constables of the city and county of New York, certified to have been served with the complaint verified, on the defendant in person in the city of New-York, on," &c., that on the return-day plaintiff appeared, but defendant did not, whereupon judgment was rendered for plaintiff for the amount specified in the summons, was held to be insufficient, although a verified complaint was annexed to the return. The return did "not show that the complaint upon which the judgment was rendered was served with the summons, or upon what complaint the judgment was given;" and the judgment was reversed (*Spring* v. *Baker*, 1 Hilton. 526).

f. An original summons in a district court, made returnable at 9 A. M. and having been returned, personally served, a judgment rendered thereon by default, is regular, and cannot be impeached upon appeal to the court of common pleas by affidavits showing the copy summons, served upon the defendant, to have been made returnable at 10 A. M. If the constable did not serve a copy of the summons upon him (the defendant) he must seek his remedy by

an action for a false return. The return cannot be impeached on an appeal from the judgment (*Haughey* v. *Wilson*, 1 Hilton, 259).

e. A justice may refuse to make his return until his fees are paid, but if he makes his return, the non-payment of the fees is no ground for dismissing the appeal (*Bray* v. *Redman*, 6 Cal. 287).

§ 361. [312.] *Existing suits. How made if justice be out of office.*

When a justice of the peace, by whom a judgment appealed from was rendered, shall have gone out of office before a return is ordered, he shall nevertheless, make a return in the same manner, and with the like effect, as if he were still in office.

§ 362. [313.] (Am'd 1857.) *Existing suits. Further return.*

If the return be defective, the appellate court may direct a further or amended return as often as may be necessary, and may compel a compliance with its order, by attachment. And the court shall always be deemed open for these purposes.

o. Where an order for an *amended return* from a justice's court is granted at the first term of the county court after the filing of the original, it is improper to place the appeal upon the calendar of the county court until the return of the justice's court has been perfected by the filing of the amended return. Where the county court before the filing of the amended return, dismisses the appeal under and by the mandate of § 364 of the code, it acts *ministerially*, and the dismissal is a *nullity*, and a mandamus may issue in like manner as if the appeal had not been dismissed, requiring the county court to proceed to judgment (*The People* v. *Clinton County Judge*, 13 How. 277).

b. Exceptions and rulings of the court below not appearing in the return cannot be brought to the notice of the appellate court except by compelling a further or amended return (*Hyland* v. *Sherman*, 2 E. D. Smith, 285).

c. Where the return of a justice on appeal failed to show in what manner he had disposed of a material question touching the admissibility of evidence, the case was ordered to stand over for a further return, upon the coming in of which a final decision was rendered (*Matthews* v. *Fiestil*, 2 E. D. Smith, 91).

See note to section 361, and rule 53.

§ 363. [314.] *Existing suits. Justice dead, insane, or absent.*

If a justice of the peace, whose judgment is appealed from, shall die, become insane, or remove from the State, the appellate court may examine witnesses on oath, to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the justice. If he shall have removed to another county within the State, the appellate

court may compel him to make the return, as if he were still within the county where the judgment was rendered.

a. A return to a *certiorari* made by a judge who was out of office before the service of the *certiorari* upon him, held valid (*Conover* v. *Devlin*, 15 How. 470; *The People* v. *Conover*, 6 Abb. 228; *Harris* v. *Whitney*, 6 How. 175; overruling *Peck* v. *Foot*, 4 How. 425).

§ 364. [315]. (Am'd 1862, 1863.) *Existing suits. Noticing appeal for hearing. Dismissing appeal if not brought on. New trial.*

If a return be made, and the appeal is from a judgment where a new trial may not be had as provided by this chapter, it may be brought to a hearing at a general term of the appellate court, upon notice by either party of not less than eight days. It shall be placed upon the calendar, and continue thereon without further notice until finally disposed of. But if neither party bring it to a hearing before the end of the second term, the court shall dismiss the appeal, unless it continue the same by special order for cause shown. If the appeal is from a judgment where a new trial may be had, it may be brought to a hearing or trial at any term of the county court at which a petit jury shall be summoned to attend, upon the same notice as provided for actions in the supreme court; at least eight days before the court, the party desiring to bring on the appeal shall serve a note of issue on the clerk, and the clerk shall thereupon enter the cause on the calendar according to the date of the return. And the provisions of this chapter for a new trial shall apply as well to appeals heretofore taken and now pending, as those hereafter to be brought.

b. **Proceeding on hearing of appeal.**—On appeal from a justice's court, under sections 353 and 366, the appellate court must hear at the same time and pass upon all the questions, both those of error in law and of error in fact, and of a motion for a new trial (*Cook* v. *Swift*, 10 Abb. 212; 18 How. 454). Where the county court refused to hear argument upon the whole case, at the same time requiring the appellant to argue his motion for a new trial before proceeding with the case, or lose the benefit of it, the supreme court reversed the judgment, and left the cause pending upon the appeal, in the county court, to be proceeded with anew. (*Id.*)

c. The judgment appealed from will be reversed by default, if the respondent does not appear to argue the appeal (*Whitney* v. *Bayard*, 2 Sand. 634).

d. Where notice of hearing has been given by the appellant, the respondent may move for an affirmance of the judgment, *ex parte*, although he has given no notice of argument (*Constant* v. *Ward*, 1 Cal. 333; *Townshend* v. *Keenan*, per Hilton, J., 16 March, 1859).

§ 365. [316.] (Am'd 1849.) *Existing suits. To be heard on original papers.*

The appeal shall be heard on the original papers; and no copy thereof need be furnished for the use of the court.

* § 366. [317.] (Am'd 1849, 1851, 1862.) *Existing suits. Hearing on appeal. Judgment on appeal. Error in fact. Judgment by default. New trial.*

Upon the hearing of the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits.

In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact.

If the appeal is founded on an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the alleged error in fact on affidavits, and may in its discretion inquire into and determine the same upon examination of the witnesses

If the defendant failed to appear before the justice, and it is shown by the affidavits served, by the appellant or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment, and order a new trial before the same or any other justice in the same county, at such time and place and on such terms as the court may deem proper.

Where a new trial shall be ordered before a justice, the parties must appear before him according to the order of the court, and the same proceedings must thereupon be had in the action as on the return of a summons personally served. If the appeal shall be from a judgment in which a new trial may be had as in this chapter provided, the court shall proceed to the hearing of the cause, if the issue joined before the justice was an issue of law, or to the trial thereof by jury, if such issue was upon a question of fact.

1. If the issue joined before the justice was an issue of law, the court shall render judgment thereon according to the law of the case; and if such judgment be against the pleadings of either party, an amendment of such pleading may be allowed

* *Amended—See Appendix.*

on the same terms and in like case as pleadings in actions in the supreme court, and the court may thereupon require the opposite party to answer such amended pleading or join issue thereon, as the case may require summarily.

2. If, upon an appeal in an issue of law, the court should adjudge the pleading complained of to be valid, it shall in like manner require the opposite party summarily to answer such pleading or join issue thereon, as the case may require.

3. Upon an issue of fact being so joined, the court shall proceed to hear the same tried by a jury in the same manner as issues joined in the supreme court.

4. Every issue of fact so joined or brought upon an appeal shall be tried in the same manner as in actions commenced in the supreme court.

5. The court shall have the same power over its own determinations, the verdict of the jury, and shall render judgment thereon in the same manner as the supreme court in actions pending therein.

6. Either party may move for a new trial in said court on a case or exception, or otherwise, and such motion may be made before or after judgment has been entered; and the provisions of this act in relation to the proceedings on receiving the verdict of a jury, exceptions to the decisions of the court, making and settling case and exceptions, motions for new trials, and making up the judgment-roll in the supreme court, are hereby made applicable to all appeals brought up for trial as in this chapter provided.

a. **Exception not necessary.**—In a justice's court no exception is necessary to secure the right to appeal, objection is sufficient (*Meech* v. *Brown*, 4 Abb. 19). And where evidence offered on a trial before a justice is objected to and excluded, and neither the grounds of the objection nor the object of the proof is stated, and the court on appeal can see that a good objection might have been taken, it will presume that the proper objection was taken and the decision below made upon that ground (*Bellows* v. *Sackett*, 15 Barb. 96).

b. **Only the defects set out in the notice can be considered on the appeal** (*Lee* v. *Schmidt*, 6 Abb. 183; *Duffy* v. *Thompson*, 4 E. D. Smith. 178; *Bush* v. *Dennison*, 14 How. 307; *Damb* v. *Hoffman*, 8 E. D. Smith, 361; *Derby* v. *Hannin*, 5 Abb. 150; *Stern* v. *Drinker*, 2 E. D. Smith, 402; *Heim* v. *Wolf*, 1 *id.* 72).

c. **What questions are reviewable on appeal.**—As a general rule, the court upon appeals from inferior courts disregards all objections not taken at the trial, nor distinctly specified in the notice of appeal (*Desmond* v. *Rice*, 1 Hilton, 531). An exception to this rule was made where the plaintiff, without giving the bond required by the revised statutes, recovered judgment on two negotiable notes which had been lost, and no objection to his recovery on that ground was made at the trial. Held, nevertheless, that the giving a

bond was a *pre-requisite* to any recovery, and the return not showing affirmatively that a bond was given, the judgment must be reversed. (*Id.*)

a. The refusal of a justice to allow an amendment of a pleading, if in any case a ground of appeal, can only be so when no injustice would result from granting the application. Where a motion was made upon the trial to amend an answer, so as to add a new defence; held, on appeal, that it was properly refused (*Tattersall* v. *Hass*, 1 Hilton, 56). It is improper for a justice to allow an amendment in an action for false imprisonment, by adding a count for malicious prosecution (*Waldheim* v. *Sichel*, 1 Hilton, 45).

b. Objection to questions as leading should specify the ground of objection, so that the form of the question may be altered accordingly; otherwise, the objection will not be considered upon appeal. (*Id.*)

c. Whether the justice of a district court may open a judgment rendered by him on default through mistake, is doubtful; but if such a judgment be opened by consent of the parties, and the cause tried upon its merits, and on such trial a judgment similar to the one previously entered be rendered, it will not be deemed irregular, where it can be seen that the evidence justified the conclusion arrived at by the justice; and the power of the justice to open the default and proceed with the trial, will not be inquired into on appeal (*Scranton* v. *Levy*, 1 Hilton, 261).

d. Objections stated on the argument of an appeal, but not contained in the notice of appeal, will not be considered (*Moore* v. *Somerindyke*, 1 Hilton, 199).

e. The decisions of the marine court upon questions respecting its practice, and not affecting the merits of the action, are not the subject of review in the common pleas (*Brown* v. *Jones*, 1 Hilton, 204). Nor are matters resting in the discretion of the court below reviewable, unless they affect the substantial rights of the parties, although returned by the justice as part of the proceedings in the cause (*Mitchell* v. *Menkle*, 1 Hilton, 142).

f. The common pleas will review the decision of a justice of a district court, denying a jury trial, although no exception to the decision was taken (*Meech* v. *Brown*, 1 Hilton, 257).

g. An appeal will not lie to the common pleas from a judgment of the general term of the marine court, merely reversing a judgment rendered by one of its justices, without ordering a new trial, or giving final judgment, or in any way determining the rights of the parties to the action. If an appeal is taken in such a case, it should be dismissed, and the return sent back, that a proper judgment may be rendered (*Hone* v. *Julien*, or *Joslien*, 9 Abb. 198; 17 How. 338).

h. Where, in the marine court, judgment was ordered at special term, subject to the opinion of the court, at general term, and the general term gave judgment for the plaintiff, on appeal it was held that the judge should have suspended judgment at special term, subject to the opinion at general term (*Edgerton* v. *Fitzgerald*, 9 Abb. 198, *note*).

i. On appeal from a justice's judgment, the appellate court is restricted to the issues framed in the court below (*Rees* v. *Hamilton*, 3 Barb. 609). But the appellant may show the court below had not jurisdiction, although the point was not raised below (*Willins* v. *Wheeler*, 28 Barb. 669).

j. **What questions are not reviewable.**—The court will not review on appeal the propriety of an amendment granted on the appellant's motion (*Orser* v. *Grossman*, 4 E. D. Smith, 443). A decision on the relative credibility of two opposing witnesses (*McLaughlin* v. *Barnard*, 2 E. D. Smith, 372; *Heim* v. *Wolf*, 1 *id.* 72). Or on the competency of a witness to testify as an expert (*Wiggins* v. *Wallace*, 19 Barb. 338). Or a question on the form of the complaint in the court below (*Neff* v. *Clute*, 12 Barb. 466; see *Cushingham* v. *Phillips*, 1 E. D. Smith, 416). A decision on a motion to dismiss the summons for variance between that and the complaint (*Brown* v. *Jones*, 3 Abb. 80).

k. **What objections cannot be taken for the first time on appeal.**—A party cannot object for the first time on appeal, that a question put to a wit-

ness was leading (*Pollock* v. *Hoag*, 4 E. D. Smith, 473; *Pearson* v. *Fiske*, 7 Abb. 419). Or that when the alleged liability arose, she was a *feme covert*, without having set up that defence in her answer, or raised the objection when the fact appeared on the trial (*Castree* v. *Gavelle*, 4 E. D. Smith, 425). Or that there was no formal proof of the issuing of letters of administration to the plaintiff suing as an administrator (*Donohue* v. *Henry*, 4 E. D. Smith, 162). That certain evidence was incompetent or inadmissible (*Rouillier* v. *Wernicki*, 3 *id.* 310; *Ranney* v. *Gwynne*, 3 *id.* 59). That there was a misjoinder of parties plaintiff (*Tibbitts* v. *Percy*, 24 Barb. 39). Or a non-joinder of defendants (*Avogardo* v. *Bull*, 4 E. D. Smith, 384). Or that after the jury was sworn, the justice permitted some of them to withdraw and others to be substituted (*Cook* v. *Ritter*, 4 E. D. Smith, 253). Or to the competency of a witness (*Fenn* v. *Timpson*, id. 276). And generally a party cannot on appeal insist on an objection which might have been and was not taken in the court below (*Duffy* v. *Thompson*, 4 E. D. Smith, 178); which, if taken at the trial, might have been obviated by the respondent (*Hunt* v. *Hoboken Land and Improvement Co.* 1 Hilton, 161; *Lee* v. *Schmidt*, id. 537). Thus, the appellant cannot insist for the *first time* on an appeal from the judgment, that a question to a witness was improper because he was not shown to be an expert (*Hunt* v. *Hoboken Land and Improvement Co.* 1 Hilton, 161). Nor, in an action by several plaintiffs as partners, for goods sold and delivered, can the defendant, on the appeal, avail himself of the objection that the plaintiffs omitted to prove their partnership, the omission not having been pointed out on the trial (*Whitlock* v. *Bueno*, 1 Hilton, 72); and generally objections not taken in the court below cannot be taken on the appeal (*Willard* v. *Bridge*, 4 Barb. 361; *Austin* v. *Burns*, 16 *id.* 643; *Westbrook* v. *Douglass*, 21 id. 602; *Rice* v. *Hollenbeck*, 19 id. 664; *Smith* v. *Hill*, 22 id. 656). On the appeal the appellant cannot object to the form of the complaint (*Neff* v. *Clute*, 12 Barb. 466).

b. **Objection that judgment is against weight of evidence, when appropriate.**—The objection, that a judgment is against the weight of evidence, is only appropriate to the case of conflicting testimony unfairly weighed, and is not proper in the case of a judgment which is erroneous for the want of evidence, or for being contrary to evidence (*Lee* v. *Schmidt*, 6 Abb. 183).

c. **When the court will consider defences to have been waived.**—The appellate court may presume a party has waived any defence, he may waive, where the point is not taken either by the pleadings or at the trial (*Gastree* v. *Gavelle*, 4 E. D. Smith, 425). And is not specified in the notice of appeal (*Duffy* v. *Thompson*, id. 178).

d. **What objections are waived by pleading to the merits.**—An objection, that there is a variance between the cause of action stated in the summons, issued from the marine or district courts, and the complaint, is matter in abatement, and is waived by pleading to the merits (*Bandman* v. *Gamble*, 4 E. D. Smith, 463; *Andrews* v. *Thorp*, 1 id. 615; *Miln* v. *Russell*, 3 id. 303 and *note*; *Gossling* v. *Broach*, 1 Hilton, 49 *Brown* v. *Jones*, 3 Abb. 80; see however *Sweet* v. *Tuttle*, 4 Kernan, 465). An objection that defendant was improperly sued by a short summons (*Ingersoll* v. *Gillies*, 3 E. D. Smith, 119), or by warrant (*Dempsey* v. *Paige*, 4 id. 218), an objection that there is a variance between the summons served and that returned (*Avogardo* v. *Bull*, id 384), or a non-joinder of defendants (id.), or a misjoinder of plaintiffs (id.; *Tibbits* v. *Percy*, 24 Barb. 39), or a defect in the process (*Aldrich* v. *Ketcham*, 3 E. D. Smith, 577).

e. **What may be waived.**—The defendant may waive the defence of coverture (*Castree* v. *Gavelle*, 4 E. D. Smith, 425), or that plaintiff suing as administrator has not proved any grant of letters to him (*Donohue* v. *Henry*, 4 E. D. Smith, 162), or that plaintiff suing as assignee has not proved the assignment to him (*Austin* v. *Burns*, 16 Barb. 643); that an instrument was admitted without calling the attesting witness (*Ranney* v. *Gwinn*, 3 E. D. Smith, 59).

f. **Reversal for want of evidence to support judgment.**—The appellate court will order a reversal where there is no evidence to support the judgment whether defendant appeared on the trial or not, in actions in which the plaintiff has to prove his case (*Kasson* v. *Mills*, 8 How. 377; *Carter* v. *Dallimore*, 2

Sand. 222; *Alburtis* v. *McCready*, 2 E. D. Smith, 40; *Wiley* v. *Slater*, 22 Barb. 506; *Calligan* v. *Mix*, 18 How. 96; 12 id. 495; *Jones* v. *Pridham*, 3 E. D. Smith, 155; *Fox* v. *Decker*, id. 150; *Ely* v. *O'Leary*, 2 id. 355; *Hunt* v. *Westervelt*, 4 id. 325; *Storp* v. *Harbutt*, id. 464). But where the defendant does not appear in the court below, the court will not be astute to discover defects in evidence where it appears no injustice has been done (*Mayor of N. Y.* v. *Hyatt*, 3 E. D. Smith, 156).

a. **Reversal for admitting illegal testimony.**—The court will reverse a judgment for the cause that illegal testimony influencing the decision has been admitted, except in a very clear case that no injustice has been occasioned (*Main* v. *Eagle*, 1 E. D. Smith, 619).

b. Where evidence erroneously admitted tends directly to establish the plaintiff's case although the issue might have been determined in the same way upon the other testimony, the error is not a *technical* one, but affects the merits and cannot be disregarded in reviewing the judgment (*Hahn* v. *Van Doren*, 1 E. D. Smith, 411). But for admitting or rejecting testimony which the court can see could not affect the result, the court will not reverse (*Harper* v. *Leal*, 10 How. 276; *Persee* v. *Cole*, 1 Cal. 369); nor will it reverse where the return shows a special finding of fact upon sufficient evidence, exclusively of testimony objected to and improperly received, and such finding is expressly and solely placed upon such proper evidence (*Martin* v. *Garrett*, 4 E. D. Smith, 346). Although on appeal, the court may be of opinion, that evidence which has been improperly rejected in the court below, would not have changed the verdict of the jury, yet, if it might have influenced their minds in considering the facts, and was competent, the court is not at liberty to overlook the erroneous rejection and affirm the judgment (*McAllister* v. *Sexton*, 4 E. D. Smith, 41). And where improper testimony is received in the court below, which not only *may* have influenced the judgment, but which the return in terms states was taken into consideration in finding the facts, the appellate court cannot disregard the error, although there appears to be evidence in the cause which would have been sufficient to sustain the same finding, had the illegal testimony been rejected (*Belden* v. *Nicolay*, 4 E. D. Smith, 14).

c. **Reversal in other cases.**—A judgment will be reversed for an error in excluding proper and material evidence (*Raymond* v. *Richardson*, 4 E. D. Smith, 171): or where the damages are obviously excessive (*Althouse* v. *Rice*, id. 347); or for improperly nonsuiting a plaintiff (*Gregory* v. *Trainor*, 4 E. D. Smith, 58; see, however, *Haulenbeck* v. *Gillies*, 7 Abb. 421; *ante*, p. 692, *e*; or for not non-suiting a plaintiff suing by a short summons without giving security (*Allen* v. *Stone*, 9 Barb. 60; (or for the justice omitting to wait an hour after the time when the summons was returnable before proceeding in the cause (*id.*); or when the judgment is against the clear weight of evidence (*Heim* v. *Wolf*, 1 E. D. Smith, 72). And where the testimony is direct, unequivocal and consistent, and the witnesses stand unimpeached and uncontradicted, the court below cannot unreasonably discredit them; and if it does, the jugdment will be reversed for that cause (*Jacks* v. *Darrin*, 3 *id.* 558; *Baker* v. *Bonesteel*, 2 Hilton, 397; or the judgment will be treated as founded on some erroneous view of the law applicable to it, and reversed on that ground (*Goldsmith* v. *Obermeier*, 3 E. D. Smith, 121).

d. **Reversal for errors of fact not appearing on the record.**—The words *errors of fact*, as used in this section, have no reference to an erroneous finding of the court or jury upon the evidence, but it refers to those errors of fact not appearing from the record or evidence, such as the infancy, coverture, &c., of some of the parties who have not properly appeared (*Kasson* v. *Mills*, 8 How. 377; *Bigelow* v. *Sanders*, 22 Barb. 147; and see *Adsit* v. *Wilson*, 7 How. 64; *Hurd* v. *Beeman*, 8 *id.* 256). On such appeals affidavits are necessarily received to "show the commission of the error in fact, not affecting the merits and not within the knowledge of the justice" (*Beebe* v. *Roberts*, 3 E. D. Smith, 195).

e. Where a summons was, during the absence of the defendant from home, served upon his son and returned by the constable personally served, and the justice, without any appearance by the defendant, rendered judgment for the

plaintiff,—held that the judgment might be reversed on appeal, on the error as to the service being clearly shown to the appellate court (*Fitch* v. *Devlin*, 15 Barb. 47; see, however, *Carroll* v. *Goslin*, 2 E. D. Smith, 376: *post*, p. 710, *j*). Where a non-resident was sued by a long summons, on the return-day he appeared before the justice and stated he did not appear in the action, but attended only to inform the court he was a non-resident; he did nothing more, and left the court. The plaintiff took judgment. On the appeal to the county court, defendant offered affidavits to show his non-residency; that court rejected them, and affirmed the judgment. On appeal the supreme court held, that the affidavits should have been received, and reversed the judgment of the county court and of the justice (*Willins* v. *Wheeler*, 8 Abb. 116; 17 How. 93).

a. **When the judgment will not be reversed.**—A judgment will not be disturbed on the ground of the reception of immaterial testimony, where the ground of the alleged immateriality is that the fact intended to be proved thereby, is already sufficiently established by other evidence (*Crane* v. *Hardman*, 4 E. D. Smith, 448); nor for permitting an improper answer to be given by a witness, there being enough to sustain the judgment without such answer (*Buck* v. *Waterbury*, 13 Barb. 116); nor on the ground that it should be more favorable than it is to the party who has not appealed (*Robins* v. *Codman*, 4 E. D. Smith, 316; *Glassner* v. *Wheaton*, 2 id. 352); nor for a variance between the pleading and proof where no injustice has been done (*Briggs* v. *Evans*, 1 id. 196); nor for disregarding testimony; for it is competent for a justice to entirely disregard the testimony of a witness, if his manner of testifying and other circumstances developed in the case, render him, in the opinion of the court below, unworthy of belief (*Donohue* v. *Henry*, 4 E. D. Smith, 162); nor where there is a conflict of testimony, except in cases of evident mistake, prejudice, passion or partiality (*Dempsey* v. *Paige*, 4 E. D. Smith, 218; *Pearson* v. *Fiske*, 7 Abb. 419; *Galoupeau* v. *Ketchum*, 3 E. D. Smith, 175; *Wilson* v. *Cook*, id. 252; *Easton* v. *Smith*, 1 id. 319; *Kasson* v. *Mills*, 8 How. 377; *Carter* v. *Dallimore*, 2 Sand. 222; *Bennett* v. *Scutt*, 18 Barb. 347; *Mendell* v. *French*, 2 Hilton, 178; *Pearson* v. *Fiske*, id. 146; *Justison* v. *Crawford*, 25 How. 465); although the appellate court may consider that a different finding would have been warranted (*Poezoni* v. *Henderson*, 2 E. D. Smith, 146; *Biglow* v. *Sanders*, 22 Barb. 147; *Wiley* v. *Slater*, id. 506); nor for admitting irrelevant testimony (*Spencer* v. *Saratoga R. R. Co.* 12 Barb. 382; *Harper* v. *Leal*, 10 How. 276; *Persee* v. *Cole*, 1 Cal. 369). Nor is it ground for reversal, that there is an error to the prejudice of a party who has not appealed (*Robbins* v. *Codman*, 4 E. D. Smith, 316; *Glassner* v. *Wheaton*, 2 id. 352; *Orser* v. *Grossman*, 4 id. 443); or that additional evidence was admitted after the parties had once rested, but before the case had been *finally* submitted, and while the parties and their witnesses were all present (*Harpel* v. *Curtis*, 1 E. D. Smith, 78; *Lambert* v. *Seely*, 2 Hilton, 429); or that the justice refused to allow additional evidence to be given after a motion for a nonsuit (*Reed* v. *Barber*, 8 Code Rep. 160); or refused a motion to adjourn (*Irroy* v. *Nathan*, 4 E. D. Smith, 68). And the mere fact that it was proved that a former trial had been had between the same parties, when the return does not show how such trial terminated, will not warrant the reversal of a judgment for a plaintiff upon an issue, on a plea of "former judgment" (*Morrill* v. *Whitehead*, id. 239).

b. A judgment will not be reversed because of the admission of immaterial evidence at the trial, when it can be seen that no harm resulted from the admission (*Moore* v. *Somerindyke*, 1 Hilton, 199). Nor will a judgment be reversed for a defect in the complaint, although such as would have been good ground of demurrer, when such defects were supplied by the evidence, and no harm has been occasioned by such defect (*Mayor of N. Y.* v. *Green*, 1 Hilton, 393). A judgment will not be reversed where the cause was tried upon the assumption of the existence of a fact which was not proven, but which was incumbent on the plaintiff to have shown, and might have been established if objection had been taken at the trial (*Lee* v. *Schmidt*, 1 Hilton, 537). Nor will a judgment be reversed for defect of proof, when, if objection had been taken

at the trial, it could or might have been obviated. (*Id.*; see *Paige* v. *Fazackerly*, 36 Barb. 392).

a. Where the action was for a conversion of chattels, and on the trial, the plaintiff amended the complaint by adding the words "waiving the tort and claiming judgment in assumpsit," and the evidence showed a cause of action for a tort *only*, held—the defendant not having been misled—no ground for reversing a judgment for the plaintiff (*Doughty* v. *Crozier*, 9 Abb. 411).

b. The court will not, on appeal, interfere with the finding of a justice unless for such an obvious disregard of the weight of evidence as to create a conviction that it must have proceeded from passion, prejudice, corruption, or palpable mistake (*Tracy* v. *Hartman*, 1 Hilton, 350). Where the justice returned that the testimony of two of the defendant's witnesses was given in a manner to deprive it of any weight, the appellate court refused to disturb the judgment, although, from the testimony returned, it probably would have come to a different conclusion as to the facts, from that arrived at by the justice. (*Id.*) The court refused to reverse a judgment in an action for damages, sustained by a nuisance, on the ground that the damages were excessive (*Cropsey* v. *Murphy*, 1 Hilton, 126).

c. The judgment of a district court will not be reversed on the ground that the court below allowed an amendment of the complaint from breach of contract to tort (*Doughty* v. *Crozier*, 9 Abb. 411).

d. **When the judgment will be reversed.**—Where, after a motion for a nonsuit, the defendant supplies the omission of proof, *only in part*, the judgment will be reversed (*Lambert* v. *Seely*, 17 How. 432).

e. On the day to which the action was adjourned, the justice was engaged in the trial of another cause. Upon the plaintiff's statement that the defendant did not intend to appear, the justice suspended the trial in which he was engaged, and took testimony and rendered judgment in such adjourned case. Shortly thereafter, and before the time usually allowed by the justice before entering judgment by default, the defendant appeared for the purpose of trying the cause held that the judgment should be reversed, the inquest having been taken out of the usual time, in consequence of plaintiff's mis-statement (*Beach* v. *McCann*, 1 Hilton, 256).

f. It seems that the mere fact that the justice suspended the trial of one cause to take an inquest in another, forms no objection to the regularity of the judgment entered on such inquest. (*Id.*)

g. The failure of a justice of a district court to give judgment within four [now eight] days after the cause is submitted to him, deprives him of jurisdiction and renders the judgment a nullity (*Wiseman* v. *Panama R. R. Co.* 1 Hilton, 300). Whether the consent of the parties to the cause extending the time for giving judgment relieves the difficulty, query? (*Id.*)

h. The practice of entering judgment, *pro forma*, by stipulation, and without prejudice to the rights of the parties, in the marine or a district court, is improper, and cannot be sanctioned by the common pleas. In all such cases the judgment will be considered final and conclusive upon questions of fact, unless clearly against the weight of evidence (*Wing* v. *N. Y. & Erie R. R. Co.* 1 Hilton, 235).

i. A judgment of the marine court will be reversed when the action has been commenced by a short summons, and there is no proof returned to the common pleas of the defendant's non-residence (*Davidson* v. *Rushmore*, 1 Hilton, 123).

j. An infant plaintiff in a justice's court, appearing by *next friend*, instead of by *guardian*, if erroneous, can only be taken advantage of by an appeal from the judgment; it is not such an error as renders the judgment void. Such a judgment, until reversed, is a bar to another action for the same cause (*Wilkinsing* v. *Schmale*, 1 Hilton, 263).

k. Where, after the justice had disposed of the business before him, and a defendant who was in attendance asked him for the cause in which he had been summoned, and was informed by the justice that he had no such cause, and the defendant thereupon left the court—held that the plaintiff could not

afterwards proceed in the cause in the defendant's absence (*Murling* v. *Grote*, 1 Hilton, 116).

a. A judgment was reversed because it was rendered while counsel was summing up and before he had concluded (*Prentice* v. *Sprague*, 1 Hilton, 428).

b. **When judgment of affirmance will be rendered.**—The judgment will be affirmed where the only ground of appeal specified in the notice is that it is against law and evidence (*Lee* v. *Schmidt*, 6 Abb. 183; *Derby* v. *Hannin*, 15 How. 32); or where the notice states the objection to be that the judgment is *against the weight of evidence*, and the return shows no such defect, although it shows the judgment is defective for want of evidence (*id.*); or where the return shows errors sufficient to authorize the reversal of the judgment if the points had been properly raised and presented for decision; if other grounds of error not sufficient to authorize a reversal are stated in the notice (*Derby* v. *Hannin*, 15 How. 32; 5 Abb. 150); if there are no other grounds of error alleged in the notice, then the appeal is dismissed. (*Id.*) See however, *Forman* v. *Forman*, (17 How. 255).

c. **When the court can only affirm the judgment.**—Where the grounds of an appeal, prosecuted by one party, are insufficient, the appellate court, unless the other party has also appealed, can only affirm the judgment, although the case would have justified a recovery for a larger amount than is awarded in the judgment (*Glassner* v. *Wheaton*, 2 E. D. Smith, 352). Thus, where the plaintiff had judgment for $30, from which judgment the defendant alone appealed, the appellate court thought the judgment should have been for $70 instead of $30; but as the plaintiff had not appealed, it was held that the appellate court could do no more than affirm the judgment. And see *Berrian* v. *Olmstead*, (4 *id.* 279). On an appeal from a justice's judgment for the plaintiff in an action for the wrongful detention of personal property, the ground specified in the notice was, that the judgment was against the weight of evidence, but the only evidence disclosed by the justice's return was that of a witness for the plaintiff, who testified as to the value of the property; and it did not appear from the return that any evidence was given on either side as to the detention,—*held*, that upon such a notice the judgment must be affirmed (*Lee* v. *Schmidt*, 6 Abb. 183; *ante*, p. 704, *b*).

d. **Mistakes can only be corrected by a reversal of the judgment.**—Where a justice by mistake entered judgment for $13 instead of $36, and the defendant would not consent to have it amended, the plaintiff appealed. It was held that the appellate court could not correct the error: they had power only to reverse the judgment (*Hardy* v. *Seelye*, 3 Abb. 103; 1 Hilton, 90; and see *Bunker* v. *Latson*, 1 E. D. Smith, 410; *Edwards* v. *Drew*, 2 *id.* 55; contra, *Fields* v. *Moul*, 15 Abb. 7; *Lewis* v. *Fox*, 11 Abb. 134; 261; 19 How. 561; 20 How. 96). Where both parties appear, and a trial is had, the court cannot reverse, except for error (*Story* v. *Bishop*, 4 E. D. Smith, 423). Where the judgment appeared to be plainly erroneous, being in form against two defendants when the return showed that the plaintiff at the trial discontinued as to one of them, the court doubting its power to correct the error, reversed the judgment (*Fanning* v. *Lent*, 3 *id.* 206).

e. **Reducing the amount of the judgment.**—If the appellate court think the judgment is for the right party, but for too large an amount, *semble*, it cannot reduce the amount (*Kasson* v. *Mills*, 8 How. 377). But where the evidence wholly fails to support a judgment for the damages awarded, but would sustain a judgment for a less amount, the court, on appeal, may suffer the plaintiff to retain the judgment for such sum as appears just, and may reverse as to the excess, if the plaintiff so elect (*La Motte* v. *Archer*, 4 E. D. Smith, 46).

f. **Power of the court on reversal to order the proper judgment.**—Where a judgment of one of the lower courts is reversed on appeal, *query*, whether the court has the power to go further than a mere reversal, and give the judgment which should have been awarded below (*Fraser* v. *Child*, 4 E. D. Smith, 243).

g. **New trial—Power of the court to order where defendant appeared.**—The New York common pleas has not a general discretionary power to order a new trial upon appeal from one of the lower courts, merely because it seems

that the ends of justice would be thereby promoted (*Story* v. *Bishop*, 4 E. D. Smith, 423); nor for newly discovered evidence (*Schwartz* v. *Bendall*, 2 E. D. Smith, 123); nor because the defendant neglected to produce evidence, but did not at the trial think it necessary (*Bunker* v. *Latson*, 1 E. D. Smith 410; *Edwards* v. *Drew*, 2 *id.* 55).

a. **New trial—Power of the court to order, where defendant did not appear, and manifest injustice has been done.**—This provision only applies to cases where the defendant does not appear on the trial (*Bunker* v. *Latson*, 1 E. D. Smith, 410; *Edwards* v. *Drew*, 2 *id.* 55; *Rawson* v. *Grow*, 4 *id.* 18; *Hunt Westervelt*, id. 225). Whether when defendant does appear at the return of the summons, and afterwards at successive adjournments, but finally fails to attend on the trial, he can be said to have "failed to appear before the justice," —*query* (*Beebe* v. *Roberts*, 3 *id.* 194). He cannot (*Williams* v. *McAuley*, id. 120). It has, however, been held that if a defendant honestly believes that an adjournment has been agreed upon between him and the plaintiff, and in consequence of such belief is induced to absent himself from the trial and to make no preparation for it, this furnishes a sufficient excuse for his default (*Armstrong* v. *Craig*, 18 Barb. 387).

b. The defendant, to entitle himself to relief, must not only satisfactorily excuse his default, but he must go further. He must show that manifest injustice has been done. A bare affidavit of merits is not sufficient. Facts must be stated and not conclusions, to enable the court to see that such injustice exists (*Armstrong* v. *Craig*, 18 Barb. 387; *Fowler* v. *Colyer*, 2 E. D. Smith, 125). And the appellant's (defendant's) affidavit merely, will not be sufficient when contradicted by the affidavit of the plaintiff, and of a witness who proved the claim on the trial (*Gottsberger* v. *Harned*, 2 E. D. Smith, 128). Where a party seeks to procure a new trial under such circumstances, he should furnish, in addition to his own affidavit, the testimony of a witness to establish his defence (*Gottsberger* v. *Harned*, 2 E. D. Smith, 128). And in *Van Wyck* v. *Kelly* (id., note *b*); *Gardner* v. *Wight*, (3 *id.* 334); *Silkman* v. *Boiger*, (4 *id.* 236); *Lent* v. *Jones*, (id. 52); it was held distinctly that, where the defendant's affidavit is fully and particularly contradicted by the affidavit of the plaintiff alone, or a disinterested party, the defendant must be corroborated to authorize the court to interfere on the ground of "manifest injustice," except perhaps that where the defendant states facts and circumstances showing that injustice has been in fact done, and that such facts and circumstances are within the knowledge of witnesses who refuse to make their affidavits, but who might be compelled to testify on a new trial; *it seems* that such affidavit might be deemed sufficient (*Lent* v. *Jones*, supra).

c. Whether, when the default is sufficiently excused, and the appellant's affidavits show that manifest injustice has been done, counter-affidavits should be received from the respondents,—? (*Camp* v. *Stewart*, 2 E. D. Smith, 88; *Lent* v. *Jones*, 4 *id.* 52).

d. The fact that the defendant *mistook* the return day of the summons, may form sufficient ground for directing a new trial (*Gottsberger* v. *Harned*, 2 E. D. Smith, 128; *Gardner* v. *Wight*, 3 *id.* 334). But the mere fact that the defendant "forgot the time of trial" unaccompanied by any circumstances explaining or excusing his forgetfulness is not satisfactorily excusing his default. (*Id.*; *Ball* v. *Mander*, 19 How. 468; *Beebe* v. *Roberts*, 3 E. D. Smith, 194).

e. Where it was shown that the defendant had employed an attorney, who set out for the court-room in proper time to reach there at the hour when the summons was returnable; that he was delayed in the street by another client, and arrived fifteen minutes after the hour, finding that the case had been called and a default taken, but that the plaintiff, with his witness and counsel, was still in court, and refused to open the case,—it was *held*, that the default was "satisfactorily excused," and that a new trial should be ordered upon terms (*Seymour* v. *Elmer*, 4 E. D. Smith, 199; 1 Abb. 412).

f. Where a defendant handed the summons to his attorney, who promised to appear, but being called from town placed it in charge of another attorney, and the latter having lost the key to his desk wherein the summons was

deposited, proceeded, under a mistaken impression, to another court; *held*, that the defendant's default was sufficiently excused (*Lent* v. *Jones*, 4 E. D. Smith, 52).

a. Where on the return day the defendant appeared and answered, and the cause was adjourned, and on the adjourned day the plaintiff, in the absence of the defendant, proved his case and had judgment, and it appeared the defendant's absence was occasioned by his attorney mistaking the day to which the cause stood adjourned; the defendant did not swear to having any defence,—held, that it not appearing that manifest injustice had been done, the court would not reverse the judgment; and query, whether in any case after the defendant has appeared and answered, the court can relieve him on the ground that he mistook the day to which the cause was adjourned (*Mix* v. *White*, 1 *id.* 614).

b. It is not sufficient excuse, that the defendant relied on the assignor of the claim to stay proceedings (*Travis* v. *Bassett*, 3 E. D. Smith, 171). A party may excuse his default by showing that he paid before suit a portion of the demand sued for (attorney and counsel fees), and supposed the action was simply for the balance (*Bissel* v. *Dean*, id. 172).

c. The existence of a valid set-off, for which the appellant may still maintain an action, does not show that manifest injustice will be done (*Travis* v. *Bassett*, 3 E. D. Smith, 171).

d. Where it appeared by affidavits offered in behalf of the defendant on appeal from a judgment rendered against him in the marine court, that after the summons was served he was called out of town, but prepared his defence with proper instructions, and gave the matter in charge to a young man, especially enjoined to deliver the instructions to his attorney, and request his attendance on the return day,—it was held, that the young man having neglected to inform the attorney and permitted the cause to proceed without an appearance for the defendant, a new trial should be awarded to prevent injustice (*Camp* v. *Stewart*, 2 E. D. Smith, 88).

e. The voluntary absence of the defendant or his attorney to attend to other business is not a sufficient excuse (*Fowler* v. *Colyer*, 2 E. D. Smith, 125; *Mulhern* v. *Hyde*, 3 *id.* 177).

f. Upon the application to open a default, the applicant must establish that injustice has been done him by the default. It is not enough that his affidavit shows a defence. If the allegations of his affidavit are denied by the plaintiff, the appellant must furnish, in addition to his own affidavit, proof by some other person of the truth of his defence (*Forster* v. *Capewell*, 1 Hilton, 47). Whether the failure of the defendant to hear his case when called, although he was in attendance in the court-room at the time, is sufficient excuse for the default. (*Id.*)

g. The court of common pleas cannot relieve a defendant under this section from a judgment taken by default in a justice's court, if he has once appeared in the action (*Wilde* v. *N. Y. & Harlem R. R. Co.*, 1 Hilton, 302).

h. The allegation of the defendant that he is ignorant of law proceedings, is not a sufficient excuse for his non-attendance at the time and place mentioned in the copy summons served on him (*Mayor of N. Y.* v. *Green*, 1 Hilton, 393). Nor is his mere general denial of the allegations in the complaint sufficient evidence that injustice has been done him. The defendant should point out the mode in which injustice has been done. (*Id.*)

i. The common pleas will not, upon appeal, set aside a regular judgment entered on default in a district court, although the defendant excuses his default, and swears to a defence, if the ground of appeal, as specified in the notice, is simply for error in the judgment, not for relief upon the merits (*Haughey* v. *Wilson*, 1 Hilton, 260).

j. Although a judgment rendered by default, upon the return of a constable that the process was duly served, cannot be impeached collaterally by showing that the return was false, yet, on appeal by a defendant who did not appear, the court will inquire into the service of the process, and if satisfied that

it was not served at all, or so improperly or defectively that the defendant was not duly apprised of its nature or effect, the defendant may be relieved (*Carroll* v. *Goslin*, 2 E. D. Smith, 376). See *ante*, 705, *c*.

o. Although a party, who has suffered judgment in the court below by default, presents to the appellate court a satisfactory excuse for his non-appearance, the respondent will not be charged with costs for having refused to accept such excuse, or to consent to a new trial on payment of the disbursements and costs of suit (*Camp* v. *Stewart*, 2 E. D. Smith, 88).

a. **Appeal upon error in fact.**—On an appeal founded on error in fact, the appellant should serve before or with the notice of the argument of the appeal, the affidavits of the facts relied on as constituting the error (*Hurd* v. *Beeman*, 8 How. 254; approved, *Cook* v. *Swift*, 10 How. 215). Where there are conflicting affidavits as to an alleged error in fact, the return of the justice will in certain cases govern (*Kelly* v. *Brower*, 1 Hilton, 514).

b. **Argument of appeal.**—Appeals to the New York common pleas are heard orally at the general term appointed for the submission thereof. The court requires both parties to be ready when the appeal is called. Engagement of counsel elsewhere is not a sufficient ground for a postponement (*Tryon* v. *Jennings*, 12 Abb. 33; 22 How. 421). The parties will be confined on the argument to a brief statement of the facts and points involved and authorities relied on, unless the court shall otherwise direct. (Rule Oct. 1857). The return must be submitted (*Smith* v. *Van Brunt*, 2 E. D. Smith, 178), and suitable points should be furnished by counsel on the submission of an appeal, and the appellate court be referred to such authorities and statutory enactments as are relied on by the respondent to sustain the judgment (*De Agreda* v. *Faulberg*, 3 E. D. Smith, 178). And where no notice of appeal or other papers specifying the grounds of appeal is submitted, and no points or arguments are presented on behalf of the appellant, calling the attention of the court to any grounds for sustaining the appeal, the court, if it sees that justice has apparently been done, will not be ingenious to discover errors in the proceedings below, but will rather assume that if the appellant or his counsel cannot discover and point out errors, none exist (*Suydam* v. *Munson*, 2 *id*. 198).

c. **When the appeal will be dismissed on the argument.**—Where the objection stated in the notice of appeal, states no sufficient ground of error, the appeal will be dismissed on the argument (*Derby* v. *Hannin*, 15 How. 32; 5 Abb. 150).

d. **Judgment of affirmance.**—On affirmance of a judgment, judgment is to be entered of affirmance and for the costs of the appeal, nothing more. These costs may be collected by execution (*Onderdonk* v. *Emmons*, 2 Hilton, 504).

e. **Opening judgment of affirmance by default.**—On an application to open a judgment of affirmance taken by default, the court requires the appellant to show a meritorious ground of appeal, and this ascertained by the statement of the case without argument, or by inspection of the return (*Tryon* v. *Jennings*, 12 Abb. 33; 22 How. 421).

f. **Reversal in part.**—The appellate court may reverse a justice's judgment as to one defendant and affirm it as to another (*Fields* v. *Moul*, 15 Abb. 6).

g. **Conditions on reversal.**—The appellate court cannot engraft on a judgment of reversal, any provision for preserving the testimony of a witness taken on the trial, although such witness has left the State, and his testimony cannot be procured on a new trial (*Norris* v. *Bleakley*, 3 Abb. 107: 1 Hilton. 90).

o. **Effect of reversal.**—Where a judgment for the plaintiff is reversed without an award of judgment for the defendant upon the merits, such reversal is not conclusive of the rights of the parties (*Ellert* v. *Kelly*, 4 E. D. Smith, 12; 10 How. 392). A judgment reversed on technical grounds is not a bar to a subsequent action (*Onderdonk* v. *Ranlett*, 3 Hill, 323), nor is a judgment in a case in which the justice had no jurisdiction (*Blin* v. *Campbell*, 14 Johns. 432; *Kintz* v. *McNeal*, 1 Denio, 436). After reversal of a judgment of non-suit, plaintiff's course is to proceed *de novo* (*Anon*. 9 Wend. 503).

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o. Although a party, who has suffered judgment in the court below by default, presents to the appellate court a satisfactory excuse for his non-appearance, the respondent will not be charged with costs for having refused to accept such excuse, or to consent to a new trial on payment of the disbursements and costs of suit (*Camp* v. *Stewart*, 2 E. D. Smith, 88).

a. **Appeal upon error in fact.**—On an appeal founded on error in fact, the appellant should serve before or with the notice of the argument of the appeal, the affidavits of the facts relied on as constituting the error (*Hurd* v. *Beeman*, 8 How. 254; approved, *Cook* v. *Swift*, 10 How. 215). Where there are conflicting affidavits as to an alleged error in fact, the return of the justice will in certain cases govern (*Kelly* v. *Brower*, 1 Hilton, 514).

b. **Argument of appeal.**—Appeals to the New York common pleas are heard orally at the general term appointed for the submission thereof. The court requires both parties to be ready when the appeal is called. Engagement of counsel elsewhere is not a sufficient ground for a postponement (*Tryon* v. *Jennings*, 12 Abb. 33; 22 How. 421). The parties will be confined on the argument to a brief statement of the facts and points involved and authorities relied on, unless the court shall otherwise direct. (Rule Oct. 1857). The return must be submitted (*Smith* v. *Van Brunt*, 2 E. D. Smith, 178), and suitable points should be furnished by counsel on the submission of an appeal, and the appellate court be referred to such authorities and statutory enactments as are relied on by the respondent to sustain the judgment (*De Agreda* v. *Faulberg*, 3 E. D. Smith, 178). And where no notice of appeal or other papers specifying the grounds of appeal is submitted, and no points or arguments are presented on behalf of the appellant, calling the attention of the court to any grounds for sustaining the appeal, the court, if it sees that justice has apparently been done, will not be ingenious to discover errors in the proceedings below, but will rather assume that if the appellant or his counsel cannot discover and point out errors, none exist (*Suydam* v. *Munson*, 2 *id*. 198).

c. **When the appeal will be dismissed on the argument.**—Where the objection stated in the notice of appeal, states no sufficient ground of error, the appeal will be dismissed on the argument (*Derby* v. *Hannin*, 15 How. 32; 5 Abb. 150).

d. **Judgment of affirmance.**—On affirmance of a judgment, judgment is to be entered of affirmance and for the costs of the appeal, nothing more. These costs may be collected by execution (*Onderdonk* v. *Emmons*, 2 Hilton, 504).

e. **Opening judgment of affirmance by default.**—On an application to open a judgment of affirmance taken by default, the court requires the appellant to show a meritorious ground of appeal, and this ascertained by the statement of the case without argument, or by inspection of the return (*Tryon* v. *Jennings*, 12 Abb. 33; 22 How. 421).

f. **Reversal in part.**—The appellate court may reverse a justice's judgment as to one defendant and affirm it as to another (*Fields* v. *Moul*, 15 Abb. 6).

g. **Conditions on reversal.**—The appellate court cannot engraft on a judgment of reversal, any provision for preserving the testimony of a witness taken on the trial, although such witness has left the State, and his testimony cannot be procured on a new trial (*Norris* v. *Bleakley*, 3 Abb. 107: 1 Hilton. 90).

o. **Effect of reversal.**—Where a judgment for the plaintiff is reversed without an award of judgment for the defendant upon the merits, such reversal is not conclusive of the rights of the parties (*Ellert* v. *Kelly*, 4 E. D. Smith, 12; 10 How. 392). A judgment reversed on technical grounds is not a bar to a subsequent action (*Onderdonk* v. *Ranlett*, 3 Hill, 323), nor is a judgment in a case in which the justice had no jurisdiction (*Blin* v. *Campbell*, 14 Johns. 432; *Kintz* v. *McNeal*, 1 Denio, 436). After reversal of a judgment of non-suit, plaintiff's course is to proceed *de novo* (*Anon*. 9 Wend. 503).

a. **Amending judgment.**—The New York court of common pleas has power to allow an amendment of the entry of judgment of affirmance, ordered on appeal from the inferior courts, where erroneously entered through mistake; and the power will be exercised when no injustice is caused thereby (*Bagley* v. *Brown*, 3 E. D. Smith, 66; and see *Fields* v. *Moul*, 15 Abb. 7).

b. **Re-hearing of appeal.**—A rehearing of appeal will not be granted where no advantage could result from it, as where the court are satisfied that a re-hearing would lead to the same result as had been already arrived at (*Teas* v. *Chrystie*, 2 Abb. 259; 2 Hilton, 135).

c. **New trial.**—The granting a new trial under section 366 is a matter of mere discretion not reviewable in the court of appeals (*Wavel* v. *Wiles*, 24 N. Y. 635).

* § 367. [318.] (Am'd 1852.) *Existing suits. Judgment-roll.*

To every judgment upon an appeal there shall be annexed the return on which it was heard, which shall be filed with the clerk of the court, and shall constitute the judgment-roll.

§ 368. [321.] (Am'd 1849.) *Existing suits. Costs, how awarded.*

If the judgment be affirmed, costs shall be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant. If it be affirmed in part, the costs or such part as to the court shall seem just, may be awarded to either party.

d. **Costs on partial affirmance.**—Where a judgment was affirmed in part and reversed in part, the respondent was allowed his costs in the court below, but was required to pay the costs of the appeal (*Cole* v. *Swanston*, 1 Cal. 51).

e. **When the court must award costs.**—In affirming a judgment, the appellate court is compelled by statute to award costs to the respondent, and has no power to relieve from the payment of those costs (*Logue* v. *Gillick*, 1 E. D. Smith, 398); and on reversing a judgment the court has no discretion as to costs. The reversal must be with costs (*Hahn* v. *Van Doren*, id. 411; *Main* v. *Eagle*, ib. 621; *Chapin* v. *Churchill*, 12 How. 367; *Snyder* v. *Goodrich*, 2 E. D. Smith, 85; see now however, § 371, *post*). But if a reversal without costs is ordered, the clerk with whom the judgment is docketed has no power to enter a judgment of reversal with costs (*Chapin* v. *Churchill*, supra).

f. **Costs of court below.**—Where a judgment for plaintiff is reversed without an award of judgment for the defendant, the defendant's cost in the court below cannot be allowed to him and included in the judgment of reversal (*Ellert* v. *Kelly*, 4 E. D. Smith, 12). Whether such costs should be allowed to the appellant, where the appellate court not only reverses the judgment below, but also orders judgment final for the appellant upon the merits,—*query?* (*Id.*; see *Lewis* v. *Fox*, 19 How. 561, 281; 20 How. 96, *note*; 11 Abb. 134).

g. A respondent who succeeds on an appeal is entitled to the judgment of the appellate court in affirmance of his judgment. Whether the whole judgment with the costs of appeal, can be collected by execution issued out of the appellate court, when the transcript of the original judgment has not been filed with the county clerk, query? It seems that the respondent on affirmance is not required to issue execution out of this court to collect the amount of the original judgment, and that there is no difference between the marine and justices'

* *Amended—See Appendix.*

courts and any other in respect to the effect of an appeal upon the power of the court below to enforce its own judgment (*Smith* v. *Allen*, 2 E. D. Smith, 259; see *Onderdonk* v. *Emmons*, 2 Hilton, 504).

a. **Payment of judgment pending the appeal.**—Pending an appeal from a judgment obtained in a justice's court in favor of the plaintiff, the defendant paid the judgment without costs of appeal, to a son of the plaintiff, who was not shown to have had any authority to receive the payment. The judgment was afterwards affirmed by default—the defendant not appearing; and the plaintiff issued execution directing a levy simply for the cost of appeal. Held that an order at special term setting aside the judgment and execution was irregular and improper. If a party who was appealed from a judgment relies upon a payment thereof as a reason for a stay of proceedings, he should appear and apply for an order accordingly, before judgment of affirmance is entered. Whether an order for judgment on appeal at the general term can in any case be set aside by an order of a single judge at special term, *query*? (*Adams* v. *Kearney*, 2 E. D. Smith, 42).

§ 369. [322.] (Am'd 1849, 1857). *Existing suits. Restitution.*

If the judgment below, or any part thereof, be paid or collected, and the judgment be afterwards reversed, the appellate court shall order the amount paid or collected to be restored with interest from the time of such payment or collection. The order may be obtained on proof of the facts made at or after the hearing, upon a previous notice of six days; and if the order shall be made before the judgment is entered, the amount may be included in the judgment.

b. **When restitution will be ordered.**—Where, upon a reversal, it appears by a transcript from the docket, that the judgment has been satisfied, restitution will be ordered (*Hunt* v. *Westervelt*, 4 E. D. Smith, 225).

c. Where a judgment of the court below has been paid before writ of error brought, but not satisfied *of record*, on reversal thereof the plaintiff in error cannot enter a suggestion and award of restitution of payment in his record of reversal, without leave of the court. It is otherwise where the judgment below is satisfied of record. There the evidence of payment comes up with the record, and restitution is a matter of course (*Sheridan* v. *Mann*, 5 How. 201; 3 Code Rep. 213).

d. The proper course where a party appealing is entitled to a restoration, is a motion in the appellate court for restoration; and on that motion being granted, it becomes a part of the judgment in the appellate court, and the amount can be collected by execution with the costs (*Kennedy* v. *O'Brien*, 2 E. D. Smith, 41).

See *ante*, p. 447, *g*.

§ 370. [323.] *Existing suits. Setting off costs and recovery.*

If, upon an appeal, a recovery be had by one party, and costs be awarded to the other, the appellate court shall set off the one against the other, and render judgment for the balance.

* § 371. [324.] (Am'd 1849, 1851, 1862, 1863, 1864.) *Exist-*

* *Amended—See Appendix.*

ing suits. Notice of appeal. Offer to allow judgment to be corrected. Costs on appeal. Set off of costs.

Costs shall be allowed to the prevailing party in judgments rendered on appeal in all cases, with the following exceptions and limitations:

In the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him.

Within fifteen days after the service of the notice of appeal, the respondent may serve upon the appellant and justice an offer, in writing, to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may, thereupon, and within five days thereafter, file with the justice a written acceptance of such offer, who shall thereupon make a minute thereof in his docket, and correct such judgment accordingly, and the same so corrected shall stand as his judgment, and be enforced accordingly; and any execution which has been issued upon the judgment appealed from shall be amended by the justice to correspond with the amended judgment; and no undertaking given to stay execution shall be enforced for more than the amount of the corrected judgment.

If such offer be not made, and the judgment in the appellate court be more favorable to the appellant than the judgment in the court below, or if such offer be made and not accepted, and the judgment of the appellate court be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs.

If the offer be made, and accepted by the appellant, the appellant shall recover all his disbursements on appeal, and all his costs, in the court below.

But the appellant shall not recover costs except as provided in this chapter.

The respondent shall be entitled to recover costs where the appellant is not.

Whenever costs are awarded to the appellant, he shall be allowed to tax as part thereof the costs and fees paid to the justice on making the appeal, as disbursements, in addition to the costs in the appellate court; and when the judgment in the suit before the justice was against such appellant, he shall further be allowed to tax the costs incurred by him which he

would have been entitled to recover in case the judgment below had been rendered in his favor.

If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the court shall set off such costs against such debt or damages, and render judgment for the balance. [a]

The following fees and costs, and no other, except fees of officers, disbursements, and witnesses' fees, shall be allowed on appeal to the party entitled to costs as herein provided, when the new trial is in the county court:

For proceedings before notice of trial, ten dollars.

For all subsequent proceedings before trial, seven dollars.

For trial of an issue of law, ten dollars.

For every trial of an issue of fact, fifteen dollars.

For argument of a motion for a new trial on a case or bill of exceptions, ten dollars.

In all cases, to either party, for every term, not exceeding five, at which the appeal is necessarily on the calendar and is not tried or is not postponed by the court, seven dollars.

In other appeals the costs shall be as follows:—

To the appellant, on reversal, fifteen dollars:

To the respondent, on the affirmance, twelve dollars.

If the judgment appealed from be reversed in part and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the appellate court may award, not exceeding ten dollars.

If the appeal be dismissed for want of prosecution, as provided by section 364, no costs shall be allowed to either party.

In every appeal, the justice of the peace before whom the judgment appealed from was rendered, shall receive two dollars for his return.

If the judgment be reversed for an error of fact in the proceedings not affecting the merits, costs shall be in the discretion of the court.

If in the notice of appeal the appellant shall not state in what particular or particulars he claims the judgment should have been made more favorable to him, he shall not be entitled to costs unless the judgment appealed from be wholly reversed.

a. On the reversal of a judgment of a district court the appellant is entitled to those costs of the court below, to which he would have been entitled if the proper judgment had been rendered there (*Jacks* v. *Darrin*, 1 Abb. 232).

a. Plaintiff recovered judgment for $140, the defendant appealed and claimed that judgment should have been in his favor. On a new trial in the county court plaintiff recovered $62 59; held that the plaintiff was entitled to costs of appeal (*Wynkoop* v. *Holbert*, 25 How. 158).

b. The plaintiff recovered judgment for $159 50; defendant appealed and stated that judgment at most should have been only for $5; the plaintiff did not offer to allow the judgment to be corrected, and on a new trial in the county court recovered judgment for $130; held that defendant was entitled to costs (*Fox* v. *Nellis*, 25 How. 144).

c. The costs to the appellant, on a new trial, do not depend solely on the fact that he has recovered a more favorable judgment, but on the fact whether his notice of appeal was sufficient (*Forsyth* v. *Ferguson*, 27 How. 67).

d. Set off of costs against recovery (*Evans* v. *Vance*, 2 Barb. 596; *Johnson* v. *Farrell*, 10 Abb. 384).

e. Costs on appeal in the marine court (*Lewis* v. *Fox*, 11 Abb. 134; 281; 19 How. 561; 20 How. 96, *note*).

f. **Costs when appeal heard in the supreme court.**—Where an appeal from a judgment rendered by a justice of the peace is heard by the supreme court, because of the incompetency of the county judge to hear the appeal, the successful party will recover the same costs as if the appeal had been decided by the county judge (*Taylor* v. *Seeley*, 4 How. 314; 3 Code Rep. 84; *O'Callaghan* v. *Carroll*, 16 How. 327).

g. **What sections govern the allowance of costs.**—Whether the costs to be awarded to the appellant, on appeals from the marine and district courts, are governed exclusively by sections 354 and 371 of the Code, and whether section 330 also applies thereto, query? (*Ellert* v. *Kelly*, 4 E. D. Smith, 12; 10 How 392).

TITLE XII.

Of the Miscellaneous Proceedings in Civil Actions, and General Provisions.

CHAPTER I. SUBMITTING A CONTROVERSY WITHOUT ACTION.
II. PROCEEDINGS AGAINST JOINT DEBTORS, HEIRS, LEGATEES, DEVISEES AND TENANTS HOLDING UNDER A JUDGMENT DEBTOR.
III. CONFESSION OF JUDGMENT WITHOUT ACTION.
IV. OFFERS OF THE DEFENDANT TO COMPROMISE THE WHOLE OR A PART OF THE ACTION.
V. ADMISSION OR INSPECTION OF WRITINGS.
VI. EXAMINATION OF PARTIES.
VII. EXAMINATION OF WITNESSES.
VIII. MOTIONS AND ORDERS.
IX. ENTITLING AFFIDAVITS.
X. COMPUTATION OF TIME.
XI. NOTICES, AND FILING AND SERVICE OF PAPERS
XII. DUTIES OF SHERIFFS AND CORONERS.
XIII. ACCOUNTABILITY OF GUARDIANS.
XIV. POWERS OF REFEREES.
XV. MISCELLANEOUS PROVISIONS.

CHAPTER I.

Submitting a Controversy without Action.

SECTION 372. Controversy, how submitted without action.
373. Judgment, how entered.
374. Judgment, how enforced or appealed from.

§ 372. [325.] *Controversy, how submitted without action.*

Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the pro-

ceeding in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case, at a general term, and render judgment thereon, as if an action were depending.

a. A proceeding under this section is not an action (*Lang* v. *Ropke*, 1 Duer, 702). No authority is contained in this section for the submission of actions; it relates solely to the submission of questions of difference without action; and where an action was commenced, and a case, containing the facts upon which the controversy depended, was agreed upon and submitted, it was held that if the action was not thereby discontinued, it must be when a submission is followed by a judgment (*Van Sickle* v. *Van Sickle*, 8 How. 265).

b. There is no authority for the appointment of a guardian for an infant, for the purpose of submitting a controversy without action; and an infant cannot consent to such submission (*Fisher* v. *Stilson*, 9 Abb. 33).

c. The court can only determine the questions of law that arise upon the facts agreed upon, and has no power to send the cause to a jury for the determination of questions of fact that, upon the face of the submission, may appear to be doubtful. The court must itself construe the submission (*Neilson* v. *Com. Mut. Ins. Co.* 3 Duer, 455).

d. On judgment at general term in favor of defendant, he is not entitled to costs for any proceeding before notice of trial, nor to a fee before argument, nor for argument; but he is entitled to a trial fee (*Id.* 683).

e. The plaintiff must furnish the necessary papers for argument. *Rule* 43.

§ 373. [326.] *Judgment.*

Judgment shall be entered in the judgment-book, as in other cases, but without costs, for any proceeding prior to notice of trial. The case, the submission, and a copy of the judgment shall constitute the judgment-roll.

§ 374. [327.] *Judgment, how enforced or appealed from.*

The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be subject to appeal in like manner.

CHAPTER II.*

Proceedings against Joint Debtors, Heirs, Devisees, Legatees, and Tenants holding under a judgment debtor.

SECTION. 375. Parties not summoned in action on joint contract, may be summoned after judgment.
376. If judgment debtor die, his representatives may be summoned.
377. Form of summons.
378. Summons to be accompanied by affidavit of amount due.
379. Party summoned may answer and defend.
380. Subsequent pleadings and proceedings the same as in an action.
381. Answer and reply to be verified as in an action.

§ 375. [328.] (Am'd 1849.) *Parties not summoned in action on joint contract, may be summoned after judgment.*

When a judgment shall be recovered against one or more, of several persons jointly indebted upon a contract, by proceeding as provided in section 136, those who were not originally summoned to answer the complaint, may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

a. In a proceeding under this section does the cause of action or right to proceed arise upon judgment or the original demand? (*Oakley* v. *Aspinwall*, 4 Coms. 513; *Johnson* v. *Smith*, 14 Abb. 428).

b. Where the plaintiff recovers judgment on contract against three out of four joint debtors, the action being against all four, but the summons having been served only on the three against whom the recovery was had, he may proceed under this section against the defendant not served (*Harper* v. *Bangs*, 18 How. 457).

c. Does this section apply to a judgment in a justice's court of which a transcript has been filed with the county clerk (see *Johnson* v. *Smith*, 14 Abb. 428).

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* As to costs of proceedings under this chapter, see section 307, sub. 7.

d. The proceedings provided by this chapter, bear a strong similarity to the action of *scire facias* to obtain execution upon final judgment, after the death of the judgment debtor, and was, no doubt, intended as a substitute therefor (*Alden* v. *Clark*, 11 How. 213; *post*, § 428; and as to suits against heirs, see Laws 1859, ch. 110).

a. A proceeding under this section is not a new action, and the party served cannot have the action removed into a federal court (*Fairchild* v. *Durand*, 8 Abb. 305).

§ 376. [329.] (Am'd 1849.) *If judgment debtor die, his representatives may be summoned.*

In case of the death of a judgment debtor after judgment, the heirs, devisees, or legatees, of the judgment debtor, or the tenants of real property owned by him and affected by the judgment, may, after the expiration of three years from the time of granting letters testamentary, or of administration upon the estate of the testator or intestate, be summoned to show cause why the judgment should not be enforced against the estate of the judgment debtor in their hands respectively; and the personal representatives of a deceased judgment debtor may be so summoned, at any time within one year after their appointment.

b. The provisions of this and the following sections to section 381 inclusive, do not authorize proceedings against executors personally (*Mills* v. *Thursby*, 11 How. 131; 12 id. 385; 2 Abb. 482).

c. The heirs, &c., must be proceeded against jointly and not separately, but that does not make them jointly liable as joint debtors (*Kellogg* v. *Olmsted*, 6 How. 487).

d. No suit can be brought against heirs to charge them with the debt of their ancestor within three years from the granting letters testamentary or of administration upon the estate of their ancestor (*Roe* v. *Swezey*, 10 Barb. 247).

e. In proceedings by *Scire facias* to revive a judgment, remainder men must be parties or they are not bound (*Campbell* v. *Rawdon*, 18 N. Y. 412).

§ 377. [330.] *Forms of summons.*

The summons provided in the last two sections shall be subscribed by the judgment creditor, his representatives, or attorney; shall describe the judgment, and require the person summoned to show cause within twenty days after the service of the summons; and shall be served in like manner as the original summons.

f. The defendant against whom judgment has already been obtained need not be named as a defendant in the summons issued pursuant to this section (*Johnson* v. *Smith*, 14 Abb. 421).

g. The summons need not specify any time or place to show cause, but specifying a time and place would not vitiate the summons (*Townsend* v. *Newell*, 14 Abb. 340).

§ 378. [331.] *To be accompanied by affidavit of amount due.*

The summons shall be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, to his knowledge or information and belief, and shall specify the amount due thereon.

* § 379. [332.] (Am'd 1849.) *Party summoned may answer and defend.*

Upon such summons, the party summoned may answer within the time specified therein, denying the judgment, or setting up any defence which may have arisen subsequently; and in addition thereto, if he be proceeded against according to section 375 he may make the same defence which he might have originally made to the action, except the statute of limitations.

a. In proceedings under section 375, the defendant *cannot* set up any defence which he might have interposed to the original action, or which existed before the judgment; and this rule applies whether the judgment was obtained by confession or default, or upon plea (*McFarland* v. *Irwin*, 8 Johns. 78).

§ 380. [333.] (Am'd 1849.) *Subsequent pleadings and proceedings same as in action.*

The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply; and the issues may be tried, and judgment may be given in the same manner as in an action, and enforced by execution, or the application of the property charged to the payment of the judgment may be compelled by attachment, if necessary.

§ 381. [334.] (Am'd 1849.) *Answer and reply to be verified as in an action.*

The answer and reply shall be verified in the like cases and manner, and be subject to the same rules, as the answer and reply in an action.

* *Amended—See Appendix.*

CHAPTER III.*

Confession of judgment without action.

SECTION 382. Judgment may be confessed for debt due or for contingent liability.
383. Statement in writing, and form thereof.
384. Judgment and execution.

§ 382. [335.] *Judgment may be confessed for debt due, or contingent liability.*

A judgment by confession may be entered, without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

a. **Confession out of court.**—It has been held that a confession of judgment out of court in an action of tort is not within or authorized by the code (*Boutette* v. *Owen*, 2 Code Rep. 40; 2 Sand. 625). A confession of judgment by a defendant in custody at the suit of the person in whose favor the judgment is confessed, made without the presence of counsel or the advice of some attorney named by the defendant, and attending at his request, to inform him of the nature and effect of the confession before he signs it, is void, and will be set aside on motion. (*Ib.*) And see *Merrill* v. *Baker*, 11 How. 456).

b. **Future Advances.**—A judgment may be confessed as security for future advances, and will be an effectual security for such advances against subsequent incumbrancers having notice of the judgment (*Truscott* v. *King*, 6 Barb. 346; 2 Selden, 147; *Marks* v. *Reynolds*, 12 Abb. 408; *Averill* v. *Loucks*, 6 Barb. 19).

c. **Joint debtors.**—A judgment by confession without action can only be entered against the person who signs the confession. One of two persons, or joint debtors, cannot confess judgment for both (*Stoughtenburg* v. *Vandenburg*, 7 How. 229). The party confessing such a judgment makes the debt his individual debt. (*Ib.*) Where the confession was to bind the defendant "as one of the firm," held, that it meant not only to bind the defendant individually, but the partnership property, and that on such a confession, judgment was properly entered against both partners (*Von Keller* v. *Muller*, 3 Abb. 375 note; see *Graser* v. *Stellwagen*, 25 N. Y. 315).

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d. * "This chapter, with section 424, abrogates in effect the old declaration in debt for a penalty, and the judgment for the penalty, and the power of an attorney to appear on an old bond and warrant of attorney to confess suit or judgment" (*Allen.* v. *Smillie*, 1 Abb. 358; 12 How. 156).

e. A. confession of judgment under this chapter, is analogous to the confession by bond and warrant of attorney under the former practice (*Ross* v. *Bridge*, 15 Abb. 150).

f. The court may set aside a judgment entered on an offer pursuant to section 385; when made to avoid the provisions of this chapter. (*Id.*)

d. **Public officer.**—A public officer who is liable to be sued for services rendered for the public at his request, may confess a judgment in his individual capacity for the amount (*Gere* v. *Supervisors of Cayuga*, 7 How. 255).

e. **Irregularity.**—The provision of the revised statutes, forbidding the setting aside a judgment for irregularity after one year (2 R. S., 282, § 2,) does not prevent the setting aside a judgment by confession after that period, for the want of a sufficient statement (*Manufac. B'k.* v. *St. John*, 5 Hill, 497; *Manufac. B'k.* v. *Boyd*, 3 Denio, 257; *Bonnell* v. *Henry*, 13 How. 142; but see *Park* v. *Church*, 1 Code Rep. N. S. 47).

f. **Married women.**—Prior to the law of 1860, a confession of judgment by husband and wife for the debt of the husband, and the judgment entered thereon in *personam* was void as to the wife (*Watkyns* v. *Abrahams*, 14 How. 121; 24 N. Y. 72; but the court was not bound to set aside such a judgment; see *Knickerbacker* v. *Smith*, 16 Abb. 241).

g. **Trustee.**—A trustee cannot confess a judgment without action so as to bind the trust estate (*Mallory* v. *Clark*, 20 How. 418; 9 Abb. 358; and see *Marks* v. *Reynolds*, 12 Abb. 403; rev'g *S. C.* 20 How. 538).

g. **Partners.**—Confession by partners (*Averill* v. *Loucks*, 6 Barb. 19; *Leahey* v. *Kingon*, 22 How. 209; 13 Abb. 192; *Lambert* v. *Converse*, 22 How. 265).

h. **Confession by persons of unsound mind.**—A bond and warrant of attorney [confession of judgment] executed by a person who is subsequently found by inquisition to have been at the time of unsound mind, so that he was incapable of governing himself or managing his affairs, &c., and a judgment entered thereon by confession are not absolutely void, and will not be set aside unconditionally where it appears from the evidence that the alleged lunatic was, for several years prior to the execution of the bond and warrant, permitted by his friends to exchange lands, to buy and sell real and personal property, and to give notes, bonds and mortgages, and there is no notice, fraud, or want of good faith alleged in the pleadings. But such judgment, and all subsequent proceedings, may be set aside on terms in the discretion of the court (*Person* v. *Warren*, 14 Barb. 488).

i. **To what cases this chapter is applicable.**—There is nothing in this chapter limiting it to cases of disputed or unsettled demand, or indicating an intention that it should be thus restricted in its operation. It applies to all cases to which its language is applicable, and this mode of obtaining judgment may be pursued in *all* cases where the parties choose to resort to it (*Hill* v. *Northrup*, 9 How. 526).

j. **Not a disposing of property.**—A mere confession of judgment is not a violation of an injunction restraining the defendant from disposing of or in any manner interfering with his property; but a confession of judgment may be a violation of such an injunction, if accompanied by acts of the defendant showing an intent to dispose of his property (*Ross* v. *Chuseman*, 1 Code Rep. N. S. 91; see *Ireland* v. *Smith*, 1 Barb. 419).

See sec. 53, sub. 8.

§ 383. [336.] *Statement in writing, and form thereof.*

A statement in writing must be made, signed by the defendant and verified by his oath, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor;

2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due;

3. If it be for the purpose of securing the plaintiff against a

contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed therefor does not exceed the same.

a. **The following statements have been held sufficient.**—The sum of two hundred and thirty dollars is for grain purchased of the said plaintiff, William W. Healy, by the said Othniel Preston, on or about the first of April, 1856, and the sum of one thousand dollars is to indemnify the said William W. Healy against all liabilities on a note made by said Othniel Preston, for one thousand dollars, payable at the Bank of Bath, and dated on or about the 1st of April, 1856, and payable in ninety days from date, which said note was endorsed by the said plaintiff, William W. Healy, for the benefit of the said defendant, Othniel Preston (*Manchester* v. *Preston*, 14 How. 21, Munroe Gen'l Term).

b. "The above indebtedness has arisen for goods, wares, and merchandise sold and delivered to me by the said plaintiffs, in the month of May, 1853, and afterwards shows that the amount is justly due, without any fraud, is sufficient (*Delaware* v. *Ensign*, 21 Barb. 85, Bockes, J.)

c. That the indebtedness arose on a balance of an account for merchandise, purchased by the defendant of the plaintiffs, on various bills, commencing Feb. 27, 1855, the last bill being dated November 28, 1856, amounting in the total to $8,360 56; which total sum had been reduced by payments made by the defendant, commencing June 12th, 1855; and last payment December 16, 1856, the sum total of which payments amount to $5,015 28, leaving a balance without making any calculation of interest on the items of account purchased on time of six and eight months, of $3,348 28; that there was at least due to the plaintiffs, and to become due when the time should have expired on the last purchases, the sum of $3,300 (*Mott* v. *Davis*, 15 How. 67; and see *McKee* v. *Tyson*, 10 Abb. 395).

d. "One promissory note given by me to said *L.* on the 8th of Dec. 1854 for $100, borrowed money on which is endorsed $11, said note due when given, also one promissory note of $340 made by me and dated Oct. 17, 1853, due when given and now owned by said *L.* the same being given for borrowed money, also for said *L.* assuming the payment of the sum of $1000 at the Bank of Havana on 14 July, 1855, by which a note of $1000 made by me payable to the order of *S. C.* at said Bank dated 31st May 1855, and endorsed by said *S. C.* was paid and taken up," (*Lanning* v. *Carpenter*, 20 N. Y. 448).

d. "The above indebtedness arose on a promissory note, made by the defendant to the plaintiff, dated June, 21st 1854, in the sum of $700, with interest, that amount of money being had by the defendants of the plaintiff, and upon which there is this day due the sum of $782, with $90 now due from defendants to plaintiff, as costs in an action on said note" (*Freligh* v. *Brink*, 22 N. Y. 418; affirming *S. C.* 18 How. 89; and reversing *S. C.* 16 How. 272; 30 Barb. 144).

f. "The plaintiff has this day endorsed my notes, payable at bank for $6000 in all for my accommodation, and to enable me to negotiate said notes," without any further description of the notes (*Hopkins* v. *Nelson*, 24 N. Y. 518).

g. A statement that "the judgment is confessed for a debt justly due to the plaintiff arising upon the following facts: On or about the 18th day of December, 1858, the plaintiff lent or advanced to the defendant in cash the sum of $2,000, which said sum, with interest thereon from the said 18th day of December, 1858, amounting to $80 24, is now justly due by the defendant to the plaintiff,"—is sufficient (*Johnston* v. *McAusland*, 9 Abb. 214).

h. A statement to secure plaintiff's contingent liability as indorser for the accommodation of defendant is sufficient if it describes the notes, naming the respective parties, the dates, amounts and times places of payment. The con-

sideration need not be stated nor that the notes had been discounted (*Marks* v. *Reynolds*, 12 Abb. 403; see *Winnebrenner* v. *Edgerton*, 8 Abb. 419; 17 How. 363; 30 Barb. 185).

a. A statement that the indebtedness arose for money advanced by plaintiff for defendant at a time mentioned, including interest thereon to date, held sufficient (*Lyon* v. *Sherman*, 14 Abb. 393; contra, *Clements* v. *Gerow*, 30 Barb. 325).

b. A statement that the plaintiff sold the defendant a quantity of meat in the years 1854 and 1855, and that there was justly due to the plaintiff upon such sale a certain specified balance, is sufficient (*Newsbaum* v. *Keim*, 24 N. Y. 325; rev's'g 1 Hilton, 520; 7 Abb. 23, and see *Curtis* v. *Corbitt*, 25 How. 58).

c. It is not necessary that the statement should in terms state that the sum confessed is justly due or to besome due. The facts must be set forth in such a manner as to show a just debt and the amount thereof, but where the creation of a just debt is averred it is unnecessary in terms to negative that it has been paid or otherwise discharged (*Lanning* v. *Carpenter*, 20 N. Y. 447; reversing 23 Barb. 402).

d. The statement is sufficient if it sets forth that the judgment is confessed to secure the plaintiff for a debt justly to become due upon his endorsement as the surety of the defendant, and for his benefit, of bills and notes which are fully described, as to names, dates, amounts, and times of payment (*Dow* v. *Platner*, 16 N. Y. 563).

e. The other cases in which statements were held sufficient, viz. *Schoolcraft* v. *Thomson*, 9 How; 61; 7 *id.* 447; *Munn* v. *Brooks*, 7 *id.* 49; 8 *id.* 40; *Whitney* v. *Kenyon*, 7 *id.* 459; *Parks* v. *Church*, 5 *id.* 301; *Post* v. *Coleman*, 9 *id.* 64, and referred to at length in the fourth edition of this work, have all been ovrruled by the decision in *Chappel* v. *Chappel* (2 Kernan, 215).

f. **The following statements have been held insufficient.**—Since the 10th day of December, 1845, the said A— B—(plaintiff) has lent and advanced to the said defendant the sum of two thousand one hundred and thirty dollars, to pay off and discharge the debts of said defendant, and which has been used for the purpose of paying off said debts, no part of which has since been repaid to said A— B—, and the defendant is now justly indebted to said A— B— in that sum (*Stebbins* v. *Society of the M. E. Church, Rochester*, 12 How. 410, Monroe General Term).

g. In *Chappel* v. *Chappel* (2 Kernan, 215), the statement was as follows: "This confession is for a debt, justly due to the said plaintiff, arising upon the following facts, viz.: a promissory note, payable to the said plaintiff or bearer, for $825, dated April 16, 1849, and payable one day from date, with use; and a promissory note, payable to the said plaintiff or bearer, for $75, dated May 16, 1849. The said sum of $1,088, being the amount of said notes, principal, and interest, up to this date, and is justly due to the said plaintiff from the said defendant." The court of appeals affirmed the order of the supreme court vacating the judgment on such statement.

h. "We do hereby confess judgment in this cause for the sum of $2,822 75, and authorize judgment to be entered therefor against us. This confession is for a debt justly owing, and now due to the plaintiff, upon the following facts, that we, A. H. H. and A. H., are indebted to the said A. B., upon a certain promissory note, of which the following is a copy,"—then followed a copy of the note.—Harris, J. (*Bonnell* v. *Henry*, 13 How. 142).

i. Where the statement was in general terms that money "was lent and advanced, at divers times, from the 1st December, 1859, to date," held not sufficient (*Davis* v. *Morris*, 21 Barb. 152, General Term, First District; and see *Moody* v. *Townsend*, 3 Abb. 376). So where the indebtedness was stated to be "for goods sold and delivered, and upon an accounting had on the day when the confession was made" (*Boyden* v. *Bradstreet*, 11 How. 503; and see *Winnebrenner* v. *Edgerton*, 30 Barb. 185; 18 Abb, 419; 17 How 361). The cases of *Claflin* v. *Sanger* (11 Abb. 338; 31 Barb. 36); *Moody* v. *Townsend* (3 Abb. 375); and *Davis* v *Morris* (21 Barb 152); said to be overruled by *Freligh* v.

Brink (22 N. Y. 418); and *Lanning* v. *Carpenter* (20 N. Y. 447). See *Lyon* v. *Sherman* (14 Abb. 393).

a. "The above indebtedness arose on account for goods, wares, and merchandise, and property sold and delivered to me by the plaintiffs, for which I have not paid, and the sum above confessed is justly due to the plaintiffs, without any fraud whatever." It was held insufficient. Also, a statement as follows: "The above indebtedness arose on account of goods, wares, and merchandise, sold and delivered by said plaintiff to me since the first day of January, 1855, and the sum above confessed is justly due to the said plaintiff, without any fraud whatever" (Rosekrans J. *Gandall* v. *Finn*, 13 How. 418; 23 Barb. 652).

b. In *Von Beck* v. *Shuman* (13 How. 472), a statement was held insufficient which was as follows: "I, Francis C. Shuman, the above-named defendant, hereby confess myself indebted to George F. Von Beck, the above plaintiff, in the sum of two thousand and seventy dollars, and interest thereon, from the 4th day of April, 1855, and hereby authorize him or his executors, administrators, attorney, or assigns, to enter a judgment against me for that amount. The above indebtedness arose on *promissory notes*, given by me for value received to the said plaintiff, liabilities incurred by said plaintiff for me by his endorsement of my notes, which the said Von Beck is to pay or has paid. Also, for an account for beer sold and delivered by him to me, and money paid, laid out and expended for my benefit. And I hereby declare that the sum by me confessed as above, is justly due the plaintiff, without any fraud whatever."

c. Where the statement expressed the amount to be $300, and that "it is justly due," and then set forth that the indebtedness arose upon the following facts: "For lumber and building materials furnished by the plaintiff to the defendant,"—Brown, J., held it insufficient (*Purdy* v. *Upton*, 10 How. 494).

d. Where the statement was for "goods and groceries, and for one horse and one cow, delivered to the said George Upton [the defendant], the payment of which, to the amount of $300, is now due to said Marshall [the plaintiff]," Brown, J. held it insufficient, because it did not state how much for the goods and groceries, how much for the horse, and how much for the cow, nor under what circumstances they were delivered to Upton, nor that the property was delivered by Marshall (*Marshall* v. *Upton*, 10 How. 497).

e. "This confession is for a debt justly due to the plaintiff, arising upon the following facts: a promissory note, payable to the plaintiff, for the sum of $250, dated on or about the 14th of January, 1850, and payable one year after date, with interest;" the judgment entered on such confession was held to be fraudulent and void (*Park* v. *Church*, 5 How. 381; 1 Code Rep. N. S., 47).

f. "A promissory note made by me, bearing date the 22d day of August, 1851, was given by me to said plaintiffs, on settlement of account between them and me, on the 22d day of that month; whereon, for value received, I promised to pay to the order of said plaintiffs said sum of," &c. (*Dunham* v. *Waterman*, 6 Abb. 357; 17 N. Y. 9).

g. "Judgment is hereby confessed in this cause for the sum of $2,540 85. This confession is for a debt justly and legally due to the plaintiffs, arising upon the following facts: 1. A note for $400 and interest and protest fees, dated February 28, 1855, discounted by said bank, and now owned by them" (*B'k of Kinderhook* v. *Jennison*, 15 How. 41. Harris, J.)

h. "The indebtedness arose on a judgment in the supreme court, in favor of W. B. against W. K., and assigned to plaintiff; and also on a bond, executed by W. K. to W. B., dated, &c., for the sum of $2000, both of which securities were given for money borrowed by the defendant: and the sum confessed is justly due to the plaintiff, without any fraud" (*Beekman* v. *Kirk*, 15 How. 228).

i. "The above indebtedness arose on the sale and conveyance, by the plaintiff to the defendant, of his right, title, and interest in the boats, property, and

efforts of W. M. & Co., in January, 1854; and I hereby state that the sum above by me confessed, is justly due to the said M. S., plaintiff, without any fraud whatever" (*Thompson* v. *Van Vechten*, 5 Abb. 459; Hoffman, J).

a. "That heretofore, at, &c., I, John H., made my promissory note for $2000, payable on demand, and that I have not paid said note, and that I am justly indebted to the plaintiff thereon in the sum of $2000" (*Kendall* v. *Hodgins*, 1 Bosw. 659; and see *Norris* v. *Denton*, 30 Barb. 117).

b. For "cash loaned to the defendant for his use in 1854, and there is unpaid on said loan $1070" (*McDowell* v. *Daniels*, 38 Barb. 143).

c. Amount due from defendant to plaintiff for plaintiff's liability and guarantee, now past due, to R. S. W., as President of the M. Bank, $8,000; amount of one promissory note indorsed by plaintiff for defendant, due July 10, 1858, and held by C. D., $2,000 (*Winnebrenner* v. *Edgerton*, 8 Abb. 419; 17 How. 363; 30 Barb. 185).

d. For cash loaned to the defendant, paid for his use and at his request, and interest thereon, stating various items with dates and amounts, making the sum of $1224, but not stating which items were for money loaned and which for money paid, nor to whom paid (*McDowell* v. *Daniels*, 38 Barb. 143).

e. "For a debt justly due plaintiff from me arising upon the following facts: A promissory note made by me to the plaintiff for $100, dated Oct. 29, 1853, and payable one year from date with interest, said note was given for money had and received by me of plaintiff at my request, also for $19 money received by me of plaintiff at different times, for which no note or security was taken from me by plaintiff: also for $108, being a book account for goods, groceries and provisions heretofore sold and delivered to me at my request by plaintiff, for which he had not received pay (*Daly* v. *Matthews*, 20 How. 267).

f. "We are indebted to said A. B. on a promissory note of which the following is a copy" (copy of note, *Bonnell* v. *Henry*, 13 How. 142).

g. A confession to secure liabilities mentioned in a schedule annexed held insufficient (*Hamann* v. *Keinhart*, 11 Abb. 132); and so where a schedule was referred to but not annexed (*Clements* v. *Gerow*, 30 Barb. 325).

h. A statement as follows: A promissory note (describing it), which note was given by L. W. & Co., for goods and merchandise theretofore purchased of L. W. & Co. by the defendant, which note was indorsed by the debtor, and came into the hands of the plaintiff for a valuable consideration—held insufficient against creditors (*Claflin* v. *Sanger*, 9 Abb. 214, *note*; 17 How. 574; 11 Abb. 388; 31 Barb 36, supposed to be overruled by *Freligh* v. *Brink*, 22 N. Y. 418; and see *Lyon* v. *Sherman*, 14 Abb. 393).

i. "This confession is for a debt justly due to the plaintiff, arising upon the following facts, to wit: A promissory note given by said E. J. (the defendant) to said A. S. (the plaintiff) for $1800;" doubtful if sufficient (*Murray* v. *Judson*, 5 Selden, 73).

j. **Statement good in part and bad in part.**—When the confession was for "the sum of $521 60, it being for goods and merchandise heretofore delivered to me, the said defendant, and which is now due: and also the sum of $500, being the amount of a bill of goods this day purchased of him, the said plaintiff,—it was held by Bacon, J., that the confession was sufficient as to the item of $500, but insufficient as to the item of $521 60; and on motion of a subsequent judgment creditor, it was ordered that the judgment should stand and have precedence as to the item of $500, and be postponed to the lien of the subsequent judgment as to the item of $521 60" (*Hoppock* v. *Donaldson*, 12 How. 141; and see *Marks* v. *Reynolds*, 12 Abb. 403).

k. **Statement may be sufficient as to judgment debtor although insufficient as to creditors.**—A statement for judgment may be sufficient as against the defendant himself, which would not be sufficient as against a creditor; this was expressly held in *Von Kellar* v. *Muller*, at special term, and affirmed on appeal to the general term (8 Abb. 375: *Ely* v. *Cook*, 2 Hilton, 406). In that case the defendant moved to vacate the judgment; and although it was held by the court that the statement was insufficient as against a creditor, yet

it was sufficient as against the defendant; and denied the motion; (see *Purdy* v. *Upton*, 10 How. 497; *Miller* v. *Earle*, 24 N. Y. 110; *Neusbaum* v. *Keim*, 24 N. Y. 325).

a. **Amendment of statement.**—Where the statement was held insufficient, but the good faith of the indebtedness was not questioned, and no superior equities existed in favor of other creditors, an amendment was permitted "in order to preserve the lien and priority of the judgment" (*Davis* v. *Morris*, 21 Barb. 152, General Term First District; and in *Johnson* v. *Fellerman*, 13 How. 21), Clerke, J., held the statement insufficient, but following the case of *Lawless* v. *Hackett*, (16 Johns 149), ordered "an amendent, but so as not to interfere with the rights of any judgment creditors which may have in the mean time attached; and the same was held *Hammond* v. *Bush* (8 Abb. 152; and see *McKee* v. *Tyson*, 10 Abb. 392; *McDowell* v. *Daniels*, 38 Barb. 143); but Harris, J., in *Von Beck* v. *Shuman* (13 How. 472) held that a judgment entered on a defective statement is absolutely void, and that the court has no right to authorize a new judgment, under the form of an amendment. If the judgment was irregular, it may be amended; if fraudulent, it is absolutely void '*Whitney* v. *Kenyon*, 7 How. 459; see *Richards* v. *McMillam*, 6 Cal. 419).

b. **Verification of statement.**—A verification by which the debtor swears that "he believes the above statement of confession is true," is sufficient (*Delaware* v. *Ensign*, 21 Barb. 85). The verification may, it seems, be made before one of the plaintiff's attorneys (*Post* v. *Coleman*, 9 How. 64).

c. **Signature to statement.**—Where the affidavit and statement were written on the same page, and the signature of the defendant was to the affidavit only, it was held to be a substantial compliance with the requirements of the statute (*Purdy* v. *Upton*, 10 How. 494; *Post* v. *Coleman*, 9 *ib.* 64).

d. **Time of entering judgment after confession.**—There is nothing in the code requiring the judgment to be entered at any particular time after the confession and statement are made. It was held to be no objection to the judgment, that the statement was verified nearly one year before the entry of the judgment (*Curtis* v. *Corbitt*, 25 How. 66).

e. **Construction of confession.**—A judgment confessed to several persons to secure an actual indebtedness, is presumed to be in favor of all the parties equally (*Rathbone* v. *Stocking*, 2 Barb. 135). This presumption may be rebutted. (*Id.*)

f. **Authority to enter judgment.**—"It is said that there was an irregularity in the confession of judgment. The particular irregularity relied on is that the confession does not contain any authority pursuant to the first subdivision of section 383. The confession of the judgment commences with the title of the cause, and then proceeds thus: 'Judgment is hereby confessed in this cause for the sum $1413," &c. It is difficult to state the authority in a more direct manner than is done here, especially when we remember that the defendants both swear to this statement, and that in every other respect the confession is admitted to conform to the statute. Again, this part of the statute is *directory* merely; and the defendants cannot be heard to object to it, especially after the lapse of more than a year: one year bars all relief for irregularity (2 R. S. 282, § 2; see also *Griffin* v. *Mitchell*, 2 Cow. 548)." *Park* v. *Church*, 5 How. 381; 1 Code Rep. N. S. 47).

g. **How judgment may be set aside.**—Judgment entered without action may be set aside for defect in the statement upon which it is entered, at the instance of a junior judgment creditor, on motion (*Chappel* v. *Chappel*, 2 Kernan, 215; *Rae* v. *Lawser*, 9 Abb. 380, *note;* 18 How. 23). And this too, although the judgment is on a bond secured by mortgage of all the real estate on which the judgment is a lien (*Bonnell* v. *Henry*, 18 How. 145, Harris J). So, it may be set aside on the motion of a subsequent *bona-fide* purchaser of real estate, against which estate the judgment is an apparent lien (*Kendall* v. *Hodgins*, 1 Bosw. 659); or on the motion of an assignee for the benefit of creditors (*Beekman* v. *Kirk*, 15 How. 228); or it may be set aside by a decree in an action in the nature of a creditor's bill at the suit of a subsequent judg-

ment creditor (*Dunham* v. *Waterman*, 6 Abb. 357; 17 N. Y. 9). By any party interested in impeaching it (*Daly* v. *Matthews*, 12 Abb. 403 *note*, see however, *Norris* v. *Benton*, 30 Barb. 117)

a. An attaching creditor is not within the class of persons who can impeach the bona-fides of such a judgment confessed before the attachment was levied. To enable a party to question such a judgment, it must appear that he was a judgment creditor of the party confessing it, at the time of the confession (*Bentley* v. *Goodwin*, 15 Abb. 82).

b. A creditor at large has no right to move to set the judgment aside (*Lowber* v. *Mayor of N. Y.*, 15 How. 123; *Beekman* v. *Kirk*, id. 231; and see *Miller* v. *Earle*, 24 N. Y. 110).

c. One claiming to be a judgment creditor on a judgmeat by confession, entered on a defective statement, cannot be heard to set aside a judgment by confession subsequently entered (*Rae* v. *Lawser*, 18 How. 23; 6 Abb. 380, *n.*)

d. A judgment by confession although voidable cannot be impeached collaterally (*Sheldon* v. *Stryker*, 34 Barb. 116; 21 How. 329).

e. A motion by a creditor to vacate a judgment entered by confession against his debtor, on the ground that the statement is insufficient, is not a motion for irregularity within the rule requiring the notice or order to show cause to specify the irregularity complained of (*Winnebrenner* v. *Edgerton*, 8 Abb. 419; 17 How. 363; 30 Barb. 185).

f. **Compelling debtor to give a new confession.**—Whether the court has power in any case to compel one who has confessed judgment upon an insufficient statement to sign and verify an amended one,—*Hammond* v. *Bush*, (8 Abb. 152). [Is it not well to insert in the statement a stipulation in the nature of a covenant for further assurance, and to the effect that the debtor will on request make and execute such other document as may be necessary to give effect to the confession?]

§ 384. [337.] (Am'd 1849, 1851.) *Judgment and execution.* The statement may be filed with a county clerk, or with a clerk of the superior court of the city of New York; who shall endorse upon it, and enter in the judgment-book, a judgment of the supreme or said superior court, for the amount confessed, with five dollars costs, together with disbursements. The statement and affidavit, with the judgment endorsed, shall thenceforth become the judgment roll. Executions may be issued and enforced thereon, in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form, but shall have endorsed thereon, by the attorney or person issuing the same, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and the costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment shall remain as security for the

instalments thereafter to become due; and whenever any further instalments become due, execution may, in like manner, be issued for the collection and enforcement of the same.

a. **Amending entry of judgment.**—Where two written statements, duly verified, were filed by an attorney with the clerk of the county, for the purpose of having judgments entered by confession (against the same defendant), without action; and the clerk entered in the judgment-book, judgments of the supreme court for the respective amounts confessed, with costs, but omitted to endorse the same upon the statements as directed by this section. On a subsequent day another written statement against the same defendant, by a different attorney, was filed by the same clerk, and judgment by confession thereon was perfected regularly in all respects, pursuant to the code aforesaid, the last-mentioned attorney knowing of the omissions in the two first causes. On a day subsequent to the entry of this last judgment, the attorney in the two first causes consented that the clerk *re-enter* the two first-named judgments by making the proper endorsements, &c., to perfect the same regularly, which was done, making them subsequent in entry and lien to the judgment first regularly entered. On a motion on behalf of the plaintiffs in the two causes first mentioned for an order requiring the clerk to endorse on the statements as of the time they were *originally filed*, and that the judgments be entered in the judgment-book and docketed as of the same day, the order was granted and the re-entry vacated (4 How. 16; and see *Daly* v. *Matthews*, 20 How. 267).

b. **Judgment, when perfected.**—Until the clerk enters and records the judgment, there is no judgment, nothing of the existence of which a notice can be given, so as to affect a subsequent mortgagee or grantee. There is not only no lien, because that is in all respects the creation of the statute, but there is no judgment at all (Emott, J., *Blydenburgh* v. *Northrup*, 13 How. 290).

CHAPTER IV.

*Offer of the defendant to compromise the whole or a part of the action.**

SECTION 385. Offer of compromise.
386. Defendant may offer to liquidate damages conditionally.
387. Effect of acceptance or refusal of offer.

* § 385. [338.] (Am'd 1851.) *Offer of compromise.*

The defendant may at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing, within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance; and the clerk must there-

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* *a.* It seems that the code has not repealed the provisions of the revised statutes relative to a tender after suit brought (2 R. S. 553, §§ 20, 21, 22). See note to section 322.

b. Payment into court.—Where a plaintiff in bad faith, and to make costs, prevented a tender before action, for which defendant was prepared, defendant was allowed to pay money into court and have a discontinuance without costs (*The People* v. *N. Y. Superior Court*, 19 Wend. 104).

c. Payment into court is a payment *pro tanto* (*Murray* v. *Bethune*, 1 Wend. 191); it admits plaintiff's cause of action to the amount of the payment (*Spalding* v. *Vandercook*, 2 Wend. 431; *Johnston* v. *Columbian Ins. Co.*, 7 Johns. 315); and plaintiff is entitled to that amount in any event (*Slack* v. *Brown*, 13 Wend. 390). If the amount is sufficient to carry costs, defendant must pay costs to the time of payment (*Aikins* v. *Colton*, 3 Wend. 326); if plaintiff does not prove a cause of action for more than the sum paid in, the verdict should be for the defendant (*Dakin* v. *Dunning*, 7 Hill, 30) and is liable for costs (*Logan* v. *Gilleck*, 1 E. D. Smith, 398); even if plaintiff does not prove a cause of action for as much as the sum paid into court, he cannot be made to refund (*Read* v. *Mut. Safety Ins. Co.* 3 Sand. 54). Where the plaintiff proves a cause of action for more than the amount paid into court, he is entitled to a verdict and judgment for the whole amount, but must credit the amount paid into court on his execution (*Dakin* v. *Dunning*, 7 Hill, 30). Money cannot be paid into court without an order (*Baker* v. *Hunt*, 1 Wend. 103).

d. Bond conditioned for payment of money by instalments is not within 2 R. S. 353, § 12, permitting defendant to discontinue on bringing the amount due into court, with costs (see *The People* v. *N. Y. Superior Court*, 19 Wend. 104).

* *Amended—See Appendix.*

upon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.

a **In what cases.**—The offer may be made in any and every action (*Bridenbecker* v. *Mason*, 16 How. 203; *Keese* v. *Wyman*, 8 *id.* 88; *Hill* v. *Northrup*, 9 *id.* 525).

b. **Form.**—It need not be signed by the defendant in person, the signature of his attorney is sufficient (*Sterne* v. *Bentley*, 1 Code R. 109; 3 How. 331). It should be so distinctly made as to leave no doubt as to its meaning or its extent (*Post* v. *N. Y. Cent. R. R. Co.* 12 How. 552). An offer served with a copy of the answer (which answer claimed a set-off in respect of two promissory notes), stating that the defendant offered to allow the plaintiff to take judgment for the amount claimed in the summons, less the amount of the two notes set up in the third and fourth defences in the answer, with costs, was held sufficient. The balance between the amount claimed and the amount of the notes was ascertainable by computation (*Burnett* v. *Westfall*, 15 How. 420). It must expressly state that judgment for the sum offered may be taken *with* costs, or it will be of no avail whatever (*Ranney* v. *Russell*, 3 Duer, 689). It must be unconditional and leave nothing to be ascertained or determined before the entry of the judgment (*Pinkney* v. *Childs*, 7 Bosw. 660; 15 Abb. 137, *note*). Thus an offer for a certain sum "without costs, this offer being subject to the covenant for a stay of proceedings entered into between the parties" was held not to be within the statute (*id.*; and see *Hanna* v. *Dexter*, 15 Abb. 137).

c. It may be for the full amount demanded by the complaint (*Ross* v. *Bridge*, 15 Abb. 150; 24 How. 163). It should be in behalf of all the defendants or at least in behalf of all as to whom the plaintiff is in a situation on filing the offer to perfect judgment (*Griffiths* v. *De Forest*, 16 Abb. 292; 25 How. 336; and see below, *Joint debtors—Partners*).

d. **When it may be served.**—It may be served immedately after the action is commenced and before any complaint is served (*Kilts* v. *Seeber*, 10 How. 270.) It should be served more than ten days before the trial, if served within ten days of the trial the plaintiff may proceed, and if the trial is actually had before the expiration of the ten days, in which the plaintiff may elect to accept or reject it, the defendant can have no benefit from it (*Pomeroy* v. *Hulin*, 7 How. 161; *Walker* v. *Johnson*, 8 *id.* 240).

e. **Amendment by plaintiff.**—An amendment by plaintiff of his pleadings after an offer, in nowise affects such offer (*Kilts* v. *Seeber*, 10 How. 270).

f. **Joint debtors.**—In an action against two to recover a joint demand, an offer by one of the defendants, the other defendant not making any defence will subject the plaintiff to costs if he proceed and fail to recover more than the amount mentioned in the offer (*La Forge* v. *Chilson*, 1 Code Rep. N. S. 159).

g. Where A, B, and C were sued jointly as joint debtors, and A was the only defendant served, and he made an offer under § 385, for plaintiff to take judgment for $410 and costs, the plaintiff accepted the offer, and entered judgment against "all" the defendants as joint debtors. It was held that the plaintiff was regular (*Lipman* v. *Joelson*, 1 Code Rep. N. S. 160, *n.*; *Emery* v. *Emery*, 9 How. 130); and that he might enforce his judgment against the joint property of all the defendants and the separate property of the defendant who made the offer (*Emery* v. *Emery*, 9 How. 130). Where two defendants were regularly served with summons, and one defendant without the authority of the other authorized an attorney to appear for both, and he appeared and served an offer which the plaintiff accepted, and took judgment,—the court, on motion of the defendant who had not authorized the emplov-

ment of the attorney, let such defendant in to defend, the judgment standing as security (*Blodgett* v. *Conklin*, 9 How. 442).

a. **Partners.**—One partner has no general authority to make an offer of judgment against the firm, in an action against the firm; and if one partner makes such an offer, and it is accepted and judgment entered, the judgment will be irregular as to all the defendants but the one making the offer (*Everson* v. *Gehrman*, 1 Abb. 167; 10 How. 301; *Binney* v. *Le Gal*, 1 Abb. 283). But where an attorney appears for both partners, and there is no contrivance in employing him to appear, his appearance on the record may make the judgment regular (S. C. on appeal to the general term, 19 Barb. 594; *Bridenbecker* v. *Mason*, 16 How. 203). One partner of a firm in failing circumstances, for the purpose of securing a *bona-fide* partnership creditor, admitted service of a summons and complaint, and served an offer on which judgment was entered and execution issued against, and levy made on, the partnership property; and on motion to set aside the judgment and execution, by the other member of the firm, who was not cognizant of or consenting to the proceedings, it was held that the judgment and proceedings were regular (*Olwell* v. *McLaughlin*, 10 N. Y. Leg. Obs. 316).

b. **What is a more favorable judgment.**—In an action to recover $274, the defendant, *before answering*, served an offer to allow judgment for $230 and costs. The offer was refused, and the defendant put in an answer denying the allegations of the complaint, and setting up afterwards a counter-claim for $175. On the trial, the plaintiff recovered $241 67, being less than the $230 with interest from the date of the offer to the day of trial; but as the recovery was over and above the counter-claim, and was an extinguishment of it, which an acceptance of the offer would not have been, it was held that the plaintiff was entitled to recover full costs (*Ruggles* v. *Fogg* 7 How. 324); and when a defendant, before answering, serves an offer that the plaintiffs may take judgment for a certain specified sum, with costs, which offer is not accepted, and the defendant subsequently answers, controverting the claim of the plaintiff, and setting up a counter-claim, if on the trial the plaintiff recovers the precise sum specified in the offer, and extinguishes the counter-claim, they recover a more favorable judgment than that offered (*Fielding* v. *Mills*, 2 Bosw. 489).

c. In an action to recover a money demand bearing interest, the defendant *after an answer* which set up a counter-claim of $30, and on the 14th of September, 1852, served an offer that the plaintiff might take judgment for $68 04. The offer was not accepted, and the plaintiff on the 9th of March, 1853, obtained a verdict for $69 40. The question arose which party was entitled to costs; and it was held that the plaintiff was liable to pay the defendant's costs from the time of the offer (*Schneider* v. *Jacobi*, 1 Duer, 694); and per Bosworth, J.: "If the plaintiff had accepted the offer, he might have entered judgment on the 14th of September, 1852, for $68 04, exclusive of costs. The $68 04, with interest to March 9th, 1853, amounts to $70 32. On that day he obtained a verdict for $69 40. A judgment for that sum would be less favorable to the plaintiff by the sum of $0 92 than the one entered on the offer. He therefore failed to obtain a judgment more favorable than the one offered. The plaintiff insists that if he had accepted the offer the counter-claim would not have been extinguished,—that the verdict has extinguished the counter-claim, and therefore the judgment on the verdict will be more favorable than the judgment on the offer. He relies on *Ruggles* v. *Fogg* (7 How. 324); but in that case the offer was served before answer, and if it had been accepted would not have extinguished a claim not then interposed. This case is clearly distinguishable from that. The counter-claim had been interposed before the offer was made, and the offer must be understood to have been made with reference to the claims which each party had previously set up in the pleadings; and an acceptance of the offer would have extinguished the counter-claim." And to the like effect is *Kilts* v. *Seeber* (10 How. 270); *Budd* v. *Jackson* (26 How. 398).

d **Costs.**—In an action on contract, at issue and on the calendar for trial, the

defendants made an offer of judgment for $49 50, which the plaintiff accepted; held, the defendant was entitled to recover his costs of the defence (*Johnson* v. *Sagar*, 10 How. 552).

a. Where, in an action to recover land, the defendant served with his answer, which was a general denial, an offer under section 385 allowing the plaintiff to take judgment for a part of the premises claimed. The offer was not accepted. The plaintiff did not obtain a more favorable judgment than that offered, and the question arose as to the amount of costs to each party. Hand, J., allowed the plaintiff $12 and disbursements for his costs up to the time of the offer, but disallowed all subsequent costs and disbursements, including the disbursements on entering judgment. He also allowed the defendant full costs, excepting $5 costs before notice of trial, but no costs of entering up a separate judgment for his costs. He disallowed extra costs to the defendant (*Kess* v. *Wyman*, 8 How. 88; and to the like effect is *Burnett* v. *Westfall*, 15 *id.* 481).

b. Judgment.—The judgment may be entered without the direction of a judge (*Hill* v. *Northrop*, 9 How. 525).

§ 386. [339.] *Defendant may offer to liquidate damages conditionally.*

In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fail in his defence, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

§ 387. [340.] *Effect of acceptance or refusal of offer.*

If the plaintiff do not accept the offer, he shall prove his damages, as if it had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses, incurred in consequence of any necessary preparation or defence in respect to the question of damages. Such expense shall be ascertained at the trial.

c. Effect of non-acceptance.—By not accepting an offer, the plaintiff does not waive his right to be paid the sum admitted by the answer, to be due (*Duesenbury* v. *Woodward*, 1 Abb. 442; and see *Smith* v. *Olsen*, 4 Sand. 711).

d. The mere acceptance of an offer is not obtaining judgment (*Lippmann* v. *Petersburger*, 9 Abb. 209).

CHAPTER V.

Admission or Inspection of Writings.

§ 388. [341, 342.] (Am'd 1849.) *Existing suits. Inspection and copy of books, papers, and documents, how obtained.*

Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission, within four days after the request, and if the party exhibiting the paper be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission, unless it appear to the satisfaction of the court that there were good reasons for the refusal. The court before which an action is pending, or a judge or justice thereof, may in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents, in his possession or under his control, containing evidence relating to the merits of the action or the defence therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

a. This section is not a substitute for the provisions of the revised statutes, but is auxiliary thereto (*Gould* v. *McCarthy*, 1 Kernan, 575; *Morrison* v. *Sturgis*, 26 How. 177). The two systems may well stand together (*Follett* v. *Weed*, 1 Code Rep. 65; *Dole* v. *Fellows*, 1 Code Rep. N. S. 146; *Davis* v. *Dunham*, 13 How. 427; *Pindar* v. *Seaman*, 33 Barb. 140).

b. This section extends only to an inspection (which implies production) and a copy, and not to discovery (*Brevoort* v. *Warner*, 8 How. 321) and the right to an inspection to discover evidence, is not to be confounded with the production of books &c. as evidence on the trial (*Lefferts* v. *Brampton*, 24 How. 257).

a. The power of the court in a proceeding under this section is limited by the terms of the section. In the first instance, the court may order a party to give within a specified time, an inspection and copy or permission to take a copy of books, &c.; if compliance with the order is refused, the court may exclude the paper from evidence, or punish the party refusing compliance or both, but it is erroneous to order a deposit of books, &c. and in default that the party be precluded from all defense and adjudged guilty of contempt (*Prindar* v. *Seaman*, 30 Barb. 140).

b. The provision in the revised statutes (2 R. S. 199, not inserted in the 4th edition of the revised statutes) *as to the discovery of books, papers, &c., is as follows:*

§ 21. The supreme court shall have power, in such cases as shall be deemed proper, to compel any party to a suit pending therein, to produce and discover books, papers, and documents, in his possession or power, relating to the merits of any such suit, or of any defence therein (9 Wend. 458; 20 *id.* 682; 5 Cow. 27; 2 Hall, 520).

§ 22. The court shall, by general rules, prescribe the cases in which such discovery may be compelled, and the proceedings for that purpose, where the same are not herein provided; and therein the court shall be governed by the principles and practice of the court of chancery, in compelling discovery, except that the costs of such proceedings shall always be awarded in the discretion of the court.

§ 23. To entitle a party to any such discovery, he shall present a petition, verified by oath, to the court, or to any justice thereof, or to any circuit judge in vacation, upon which an order may be granted by the court, or such officer, for the discovery sought, or that the party against whom the same is sought should show cause why the prayer of such petition should not be granted.

§ 24. Every such order may be vacated by the officer granting the same, or by the court,—

1. Upon satisfactory evidence that it ought not to have been granted.
2. Upon the discovery sought being made.
3. Upon the party required to make the discovery denying on oath the possession or control of the books, papers, or documents ordered to be produced.

§ 25. The court shall provide by general rules, for the staying of the proceedings of any party against whom such discovery shall have been ordered, either by the court or by any officer, until the same shall have been complied with or vacated.

§ 26. In case of the party refusing or neglecting to obey such order for a discovery within such time as the court shall deem reasonable, the court may nonsuit him, or may strike out any plea or notice he may have given, or may debar him of any particular defence in relation to which such discovery was sought; and the power of the court to compel such discovery shall be confined to the remedies herein provided, and shall not extend to authorize any other proceedings against the person or property of the party so refusing or neglecting.

§ 27. The books, papers, and documents, produced under any order made in pursuance of the preceding sections, shall have the same effect, when used by the party requiring them, as if produced upon notice according to the practice of the court.

c. By laws 1841, ch. 38, the like powers are given to the superior court of New York, the common pleas, recorders', and mayors' courts, and the rules of the supreme court are to apply.

d. The superior court of New York, is authorized by the foregoing provisions of the revised statutes to compel a defendant in a suit pending therein to make discovery of books, papers, and documents in his possession or power relating to the merits thereof, and which are necessary to the plaintiff to enable him to prepare for the trial (*Gould* v. *McCarthy*, 1 Kernan, 575).

a. **Power of superior court.**—The superior court of the city of New York has the same powers to compel discovery by the parties to a suit pending in that court which are conferred by the revised statutes on the supreme court (*Id.* confirming *Moore* v. *Pentz*, 2 Sand. 664)

b. **Rules which govern the superior court.**—In *Hoyt* v. *The American Exchange Bank* (8 How. 89; 1 Duer, 652), Bosworth, J., said, It is important that the views which govern the action of the court in these proceedings should be distinctly stated, in order that the cases in which a discovery may be made, and the manner in which it will be ordered to be made, may be understood. And he stated the views of the court as follows:

c. "If a party applies under the revised statues, and makes a case provided for by them and the rules made under them, he has a right to a discovery. The court will exercise its discretion in specifying the manner in which it is to be made. In ordinary cases, and unless indispensable to protect the rights of the party applying, it will not order an inspection to be given, or a deposit to be made.

d. "Sworn copies of books, entries, or papers and documents, to the discovery of which the applicant shows a right, will be ordered to be furnished.

e. "Enough must be stated to justify a presumption that entries, papers, or documents relating to a specified subject-matter exist, are in the possession or control of the other party, and that they will tend to establish some claim or defence of the party asking for the discovery, and that they are not in his possession or under his control. (Rule 15.)

f. "If in answer to the order, the opposite party denies fully and explicitly that there are any such entries, books, or papers under his control, that is an end of the application.

g. "He cannot be subjected to a fishing examination or investigation, with a view to ascertain the fact whether he has or has not books, papers or documents which may contain evidence relating to the merits of the action, or of the defence, unless he is examined as a witness, so that his deposition may be made evidence as well for as against him. (Code, § 389.)

h. "According to the practice of the court of chancery, it was necessary to set forth in the bill the particulars of which the discovery was sought. The opposite party was not required to answer vague and loose surmises. An averment that the matters as to which a discovery was sought were material to the defence, was not sufficient. It was requisite to so state the case, that the court could see how they might be material on the trial of the suit at law.

i. "As soon as the answer was perfected, the defendant might move for costs, and to dissolve any injunction that had been granted staying proceedings at law until the discovery was made.

j. "It was almost a matter of course to grant both motions unless before the bill was filed he had been applied to for the discovery and had refused to make it, in which case costs were not allowed him (2 Barb. Ch. Pr. 106, 111, 115).

k. "The practice in case of applications under the revised statutes, is deemed to be well settled (18 Wend. 529; 2 Sand. 662).

l. "The applicant must state the particulars of which a discovery is sought, and enough to satisfy the court that it is in the power of the opposite party to furnish it, and that it is material for the support of the claim or defence of the applicant that it should be made.

m. "If the party answer distinctly and unevasively, that as to all or any of the papers or documents or entries of which a discovery is sought, there are no such papers or documents in his possession or under his control, and that there are no entries relating to the specified subject-matter, or except such as he has furnished copies of, the applicant must abide by the answer so far as the proceedings for a discovery are concerned. If dissatisfied with the result of the proceedings, he must examine him

as a witness, or rely on such other evidence as he may be able to command.

a. "He has no right to have a general, inquisitorial examination of all the books, papers, and documents of his adversary, with a view to ascertain if perchance something cannot be found which will possibly aid him.

b. "If rules 14, 15, 16 and 17, are to be regarded as regulating the practice in applications under the revised statutes only, and as having no reference to proceedings under § 388 of the code, then a discovery can be directed to be made in only one of the modes specified in rule 16.

c. "Giving permission to take a copy, is necessarily giving power to inspect; as a copy cannot be made without inspecting the book, paper, or document to be copied.

d. "The only discretion which the court can exercise, under this section of the code, is in determining whether it will order an *inspection* to be given at all. If it grants a discovery under this section it has no discretion in directing the manner in which it is to be made. An inspection is to be given at all events, and the only alternative that can be presented to the party against whom the motion is made, is to either give a copy or submit to the inconvenience of allowing the petitioner to make a copy.

e. "If either party applies under the code, he should be required to make a case as strong and urgent as is deemed necessary to entitle him to a production and deposit of books, papers, and documents, instead of sworn copies. Neither reason, principle, nor policy, demands that a party's books and papers, or any part of them, should be submitted to the inspection of his adversary, when the court would not order them to be deposited in order that they might be inspected. Such an order should be made only in those cases in which one for production and deposit would be granted, unless an inspection was ordered as a substitute for deposit, on the sole ground that a deposit and production would be a substantial inconvenience to the owner of the books, papers, and documents, and would be of no benefit to the applicant beyond that which an inspection would confer.

f. "Where the sworn copies furnished in obedience to an order for a discovery indicate that the discovery may not be complete, it is proper for the petitioner to apply for a further order based on the return and previous proceedings, or on them and further affidavits, for an order requiring the opposite party to show cause at a time to be named why sworn copies should not be furnished of such other entries, papers, or documents, relating to the points as to which a discovery had been ordered, as the return and other papers may induce the court to believe to be in his possession or control; and unless the possession and control of such papers and documents, or the existence of such entries, be explicitly and unequivocally denied, a peremptory order would be granted."

g. **At what stage of the action the order may be made.**—The order may be made in any stage of the action (*Miller* v. *Mather*. 5 How. 160; *Morrison* v. *Sturgis*, 26 How. 177). It was there made and enforced before issue. To enable a defendant to make his defence (*Stanton* v. *Del. Mut. Ins. Co.* 2 Sand. 662; 2 Code Rep. 83; *Powers* v. *Elmendorf*, 2 Code Rep. 44; 4 How. 60; *Gelston* v. *Marshall*, 6 How. 398), or a plaintiff to reply or prepare for trial (*ib.*); but it is doubtful if the order would be granted before service of a complaint in an action for libel, and to enable the plaintiff to frame his complaint (*Keeler* v. *Dusenbury*, 1 Duer, 660); and where the justice of the case requires it, the court will order the discovery of papers, &c, pending a trial before referees (*Mechanics' Bank* v. *James*, 2 Code Rep. 46).

h. **Who may make the order.**—The power to order the production of books, &c, under this section, is limited to the court or a justice thereof, whether exercised under the code or the revised statutes. A referee cannot make the order (*Frazer* v. *Phelps*, 8 Sand. 741; 1 Code Rep. N. S. 214), unless, indeed, provision to that effect is contained in the order of reference.

i. **When the order will be granted.**—The granting the order in all cases

is in the discretion of the court (*Keeler* v. *Dusenbury*, 1 Duer, 660; *Follett* v. *Weed*, 1 Code Rep. 65; *Van Zandt* v. *Cobb*, 12 How. 544; *White* v. *Monroe*, 33 Barb. 650; see however, *Woods* v. *De Figaniere*, 25 How. 522), and is never a matter of course (*Hooker* v. *Matthews*, 8 How. 329; 1 Code Rep. 108); and the order will never be granted where it appears that the party making the application is chargeable with gross negligence or bad faith (*ib.*), or where he can obtain the production of the paper, &c., by a *subpœna duces tecum*, and an examination as a witness of the party having the custody of such paper either before or on the trial (*Van Zandt* v. *Cobb*, 12 How. 544; *Com. Bank of Albany* v. *Dunham*, 13 id. 541; *Brevoort* v. *Warner*, 8 id. 321; *Stalker* v. *Gaunt*, 12 N. Y. Leg. Obs. 124). And as a party cannot procure the production of the books of a corporation by means of a *subpœna duces tecum*, the proper remedy of a party entitled to use such books as evidence is an application under this section or under the revised statutes (*La Farge* v. *La Farge Ins. Co.*, 14 How. 26).

a. In ordinary cases the plaintiff cannot be compelled to submit his books or documents in his possession to the inspection of the defendant to enable the latter to answer. But if the plaintiff upon request refuses to allow an inspection he cannot object that the answer is insufficient for not stating the contents of such books or documents (*Kelly* v. *Eckford*, 5 Paige, 548).

b. An administrator plaintiff may have an order for discovery of the books, &c., of the defendant in an action to recover money due to the estate of his intestate, notwithstanding that he complains on a promise of payment made to himself as administrator (*Mathis* v. *Vanderbilt*, 2 Abb. 387).

c. When the motion is made pending a trial before a referee, the certificate of the referee that the production of the papers, &c., is necessary, will be considered by the court as presumptively sufficient to warrant the making the order (*Frazer* v. *Phelps*, 1 Code Rep. N. S. 214; 3 Sand. 741).

d. Where an instrument, *i. e.* an undertaking, in the possession of the plaintiff, is set out or referred to in the complaint, and the defendant is "in doubt as to the correctness of what purports to be a copy in the complaint, he may demand from the plaintiff or his attorney an inspection of the original instrument before making answer; and if an inspection is refused, the court would order its production" (*Wesson* v. *Judd*, 1 Abb. 254).

e. In an action on a book account for goods sold and delivered to defendant by C. & H., the assignors of the plaintiff, the defendant set up a counter-claim, and an order had been obtained calling on him to deliver particulars thereof; he then moved at chambers on petition, "that plaintiff be ordered to produce and discover to defendant the day books, journals, ledgers, lumber-books, memorandum-books, and receipts, of C. & H.," and that defendant may be at liberty to inspect the same at all reasonable times; and that he, defendant, could not give dates and items of his counter-claim without such inspection. The plaintiff admitted possession of the books referred to. The court ordered plaintiff to deliver sworn copies of the entries of the credits of the defendants, on the books in the possession of the plaintiff (*Brevoort* v. *Warner*, 8 How. 321).

f. In courts of law it is a matter of course to compel a party who has the possession of a document belonging equally to both, to produce the same for the inspection of his adversary, for the purposes of the action (*Kelly* v. *Eckford*, 5 Paige, 548; see 10 Abb. 341, note).

g. Partnership books and papers in the hands of one partner or his representatives, will in any stage of the action be ordered to be deposited in court (*Kelly* v. *Eckford*, 5 Paige, 548).

h. It was not intended by the supreme court rules to confine the discovery of documentary evidence to the cases mentioned in the rule, but all proceedings instituted under section 388 must be governed by its provisions, uncontrolled and unaffected by the rule (*Exchange Bank* v. *Monteith*, 2 Code Rep. 148; 4 How. 280). For although the legislature has imposed upon the supreme court the duty of prescribing, by general rules, the cases in which a

discovery may be compelled, and although this has been done, yet the court itself is not bound by these rules, but may compel a discovery in other cases than those prescribed (*Davis* v. *Dunham*, 13 How. 427; 11 N. Y. 575).

a. A petition for the discovery of books, &c., which in effect stated: Defendants believe plaintiff has books, &c., in his possession or control which will, as defendants believe, show title to the property in question in one other than plaintiff, and which defendants are advised by counsel are material and necessary for their defense—held insufficient. It contained no allegation of knowledge or of information from any one as to the contents of any one entry. It failed to show that defendant did not posess the means of proving, by other competent evidence, the title to the property (*Pegram* v. *Carson*, 18 How. 519; 10 Abb. 340; and see *Husson* v. *Fox*, 15 Abb. 464; *Morrison* v. *Sturgis*, 26 How. 177). It is not sufficient for the petitioner to say he thinks a discovery necessary; he must show how and why it is necessary (*Wilkie* v. *Moore*, 17 How. 480); and *semble*, he should show that witnesses cannot establish the facts sought to be proved without the production of such books &c. (*Wood* v. *De Figaniere*, 25 How. 522; *Pegram* v. *Carson*, 10 Abb. 340; 18 How. 519; see *Low* v. *Graydon*, 14 Abb. 443).

b. Ordinarily a discovery will not be ordered where the facts sought to be proved thereby can be established without such discovery (*Low* v. *Graydon*. 14 Abb. 443; *Woods* v. *De Figaniere*, 25 How. 522; *Pegram* v. *Carson*, 10 Abb 340).

c. The power to order the production of books, &c., will never be stretched to cover those books, &c., which only furnish information to enable the party to procure evidence (*Woods* v. *De Figaniere*, 25 How. 522; *Morrison* v. *Sturgis*, 26 How. 177). And it is not sufficient that the books, &c., may or probably will furnish information to obtain evidence which may be material. The book, &c., itself must contain the evidence (*Morrison* v. *Sturgis*, 26 How. 177; *Woods* v. *De Figaniere*, 25 How. 522; *Pegram* v. *Carson*, 10 Abb. 340). But in the New York Common Pleas it is held that an inspection of books and papers should be granted, if the books, &c., contain evidence which will prove or *tend to prove* a material fact (*Lefferts* v. *Brampton*, 24 How. 257).

d. The documents required to be produced should be specifically set forth (*Jackling* v. *Edmonds*, 3 E. D. Smith, 539; and see *Watson* v. *Renwick*, 4 Johns. 381), with sufficient precision to enable the opposite party to know with certainty, what are the documents required (*Low* v. *Graydon*, 14 Abb. 443).

e. An order requiring the plaintiff to produce or give copies of papers to enable the defendant to answer, will not be made when it is manifest that the defendant has no defense which he cannot set up in due legal form, to raise the proper issues, without the aid of such papers (*Mora* v. *McCredy*, 2 Bosw. 669). Discovery may be ordered to assist the defendant to facts without which, he cannot frame an answer which will protect his rights in the action itself; but the object for which discovery will be ordered is not to prevent a defendant from answering untruthfully. (*Id.*) It may be very much desired by a defendant to know before he answers, what facts the plaintiff may be able to prove, and what admissions or evidence statements and accounts rendered by him to the plaintiff may contain; and such knowledge might perhaps serve as a useful precaution, admonishing the defendant what he may not, with safety to his reputation, aver or deny; but such considerations are no reasons for compelling a discovery to enable the defendant to answer. (*Id.*)

f. An application for discovery of books, &c., to enable plaintiff to prepare his complaint, will be granted in an action against defendants as plaintiff's factors in selling his goods, the defendants not having rendered an account; but will not be granted to enable plaintiffs to ascertain if an account rendered is correct (*Ruberry* v. *Binns*, 5 Bosw. 685). And an order may be made to enable a party to furnish a bill of particulars (*Prince* v. *Currie*, 2 How. 119).

g. Where a discovery of a paper is sought, and it is stated on oath to have been delivered to the adverse party, to excuse himself from discovering it, he

must swear positively that it is uot in his possession or under his control, or must state facts which, with his denial on his knowledge, information, and belief, are equivalent to a positive negation on oath (*Southart* v. *Dwight*, 2 Sand. 672; 2 Code Rep. 83).

a. The application must be denied, where the party against whom the application is made denies under oath that the books or papers sought for are in his possession or under his control (*Bradstreet* v. *Bailey*, 4 Abb. 233; *Ahoyke* v. *Wolcot*, id. 41; *Hoyt* v. *Amer. Ex. Bank*, 8 How. 89; 1 Duer, 652; see *Woods* v. *De Figaniere*, 25 How. 522). But where on a motion founded on a petition under the provisions of the revised statutes for the deposit of books for inspection, the affidavit to resist such motion did not deny possession or control of the books, &c., but alleged that deponent "has made diligent search therefor, and has been unable to find any such books, &c., and that the same are not now in his possession or under his control, and he is unable from any knowledge he has, to produce such books," &c., was held to be evasive, and not sufficient to defeat the motion (*Hicks* v. *Charlick*, 10 Abb. 129).

b. An application under the provisions of the revised statutes for a discovery of books, &c., should be denied where it appears that the petitioner might, without any order, have access to the books, &c., mentioned in the petition for discovery (*Charlick* v. *Flushing R. R. Co.*, 10 Abb. 130). As where it appeared that the petitioner was one of the directors of a corporation to which the books and papers belonged and the custodian of them held them subject to the control of the board thereof. (*Id.*) And where it appeared that the books of the defendants, of which discovery was sought, had been freely offered to the plaintiff's attorney for examination and inspection, and he had omitted to avail himself of the opportunity, the order was denied (*McAllister* v. *Pond*, 15 How. 299).

c. The court has no power to order a draft upon which the action is brought to be delivered to defendants, for the purpose of being annexed to a commission to be inspected by the witnesses (*Butler* v. *Lee*, 19 How. 383).

d. The courts will be cautious how they make an order where the action is by executors, and a discovery of the papers of the decedent is required, and where two years after the complaint was served, and after the death of the original plaintiff, and the substitution of his administrator as plaintiff, the defendant moved for the production of papers of the decedent, without specifically describing them, the court denied the motion (*Jackling* v. *Edmonds*, 3 E. D. Smith, 539).

e. **Order for further discovery.**—Where an order was made under this section for the defendants to furnish sworn copies of all entries, &c., as to certain Indiana bonds, &c., the defendants furnished certain papers, and afterwards the plaintiff moved for a more full and perfect discovery; and on the hearing of that motion, an order was made referring it to a referee to ascertain and report whether the defendants had made as full a discovery as circumstances permitted, and that the referee might examine defendant's books, &c. From this order the defendants appealed, and the order was set aside, the general term holding that if the return was deemed insufficient, a further return, and not a reference, should have been ordered (*Hoyt* v. *Amer. Exchange Bank*, 8 How. 89; 1 Duer, 652).

f. **Motion, how made.**—"A party seeking a discovery has two concurrent remedies to which he may resort. He may make his application in the manner prescribed by the revised statutes, or he may proceed under the code" (*Davis* v. *Dunham*, 13 How. 427; Albany Gen'l Term, citing *Gould* v. *McCarty*, 1 Kernan, 575).

g. "The motion to compel the production and discovery of books, &c., is to be made "in the manner provided by law" (Rule 14); and the manner provided is by petition (*Dole* v. *Fellows*, 1 Code Rep. N. S. 146; 5 How. 451; *Follett* v. *Weed*, 1 Code Rep. 65).

h. When the application is made to enable the plaintiff to prepare his com-

plaint, "strong affidavits," showing the necessity of the discovery, will be required (*Keeler* v. *Dusenbury*, 1 Duer, 661).

a. Where the application was to enable the defendant to answer, and no fact was stated showing how the discoviny was necessary, but the petition merely stated that with the aid of the discovery the defendant *expected* to be able to prove that the note, the cause of action, had been paid,—held, the petition was defective in not stating the facts the defendant expected to prove (*Gelston* v. *Marshall*, 6 How. 398; *Stanton* v. *Del. Mut. Ins. Co.*, 2 Sand. 662; 2 Code Rep. 83). And so where on an application for the discovery of minutes kept by the defendants from 1696 to 1716, the petition stated that the petitioner "is informed and believes that such minutes contain evidence" in favor of the plaintiffs,—held not sufficient to warrant any order for production. To warrant an order, the minutes should have been described with sufficient certainty to enable the defendant to ascertain whether they existed in his possession and to enable the court to judge of their materiality (*The People* v. *Trinity Church*, 6 Abb. 177; and see *Jackling* v. *Edmonds*, 3 E. D. Smith, 539). An allegation that the books, papers, and documents "relate to the merits of the action" is wholly insufficient. The petition must show in what respect they relate to the merits, that the court may judge for itself (*Cassard* v. *Hinman*, 6 Duer, 695; *Morrison* v. *Sturgis*, 26 How. 177; *Pegram* v. *Carson*, 10 Abb. 340; 18 How. 519).

b. The rules contemplate the setting forth in the moving papers the *facts and circumstances* which show that the discovery is necessary, and that the party applying therefor is entitled to demand it of the adverse party. A mere statement, that in the opinion of counsel the discovery sought is necessary, will not suffice. Such a statement is requisite, but it is *cumulative* (*McAllister* v. *Pond*, 15 How. 299; *Jackling* v. *Edmonds*, 3 E. D. Smith, 529). One of the first facts which should appear on an application for a discovery of books and papers, for the purpose of preparing for trial, is, that the applicant has not in his possession the same information, or if he has, that he has not the means of establishing by other available proof the contents of such books or papers. (*Id.*)

c. The application may be so framed as to embrace a discovery under the code and the production of papers under the rules (*Lovell* v. *Clark*, 7 How. 158).

d. In every case the party seeking the discovery must show, to the satisfaction of the court or officer, that the books or papers which he seeks to have produced contain evidence relating to the merits of the action (*Davis* v. *Dunham*, 13 How. 428; *Cassard* v. *Hinman*, 6 Duer, 695); because the order is never granted to produce papers, &c., other than those which relate to the merits (*Keeler* v. *Dusenbury*, 1 Duer, 661; *Woods* v. *De Figaniere*, 25 How. 522). Where the petition stated that the action was brought upon a note made by the defendants through their authorized agents, on, &c., and that the defence was a general denial, no other facts or circumstances were stated to support the general allegation that all the bill-books, day-books, cash-books, and ledgers, in which the transactions and business of the defendants are entered, are material to enable the plaintiff to prepare for trial, and to sustain his complaint,—held that sufficient was not stated to warrant an order for discovery (*Davis* v. *Dunham*, 13 How. 428; 11 N. Y. 575).

e. It is not necessary that the facts should be made to appear by the oath of the party. They may be shown by the oath of any other person (*Exchange B'k* v. *Monteith*, 2 Code Rep. 148; 4 How. 280).

f. **Costs on motion for inspection.**—When the right to the production and inspection is clear, and the request unreasonably refused, costs may be given to the moving party (*Brevoort* v. *Warner*, 8 How. 321). [That case held that costs could only be granted when the application was to *the court*, not to *a judge*, but that was the result of the then provisions of law. Now, a judge may order costs.]

g. **Costs of inspection.**—In England the costs of inspection must be paid by the party seeking it (*Hill* v. *Phillip*, 7 Exch. 232). This is reasonable,

unless the labor or expense is trifling; and in *Brevoort* v. *Warner* (8 How. 321). the order was that the party asking for copies should pay for them, unless the other party preferred allowing him to take copies without charge.

Order for inspection how enforced. See Rule 16.

a. **Inspection.**—On an order that one of several defendants should allow the plaintiff, his solicitor or agent, to inspect certain documents in that defendant's custody, that defendant is justified in refusing to allow the inspection in the presence of a co-defendant although he be *agent* of the plaintiff. If it is desired that the co-defendant also have an inspection the order should so state (*Bartley* v. *Bartley*, 22 Law J. R. N. S. Ch. 47; 16 Jur. 1062; 1 Drewry, 233; 17 Eng. Law & Eq. R. 329).

b. On producing books, the party producing them may seal up those parts which do not relate to the matters in issue, and his affidavit that the parts sealed up do not relate to the matters in issue is *prima facie* sufficient to protect such parts from examination. His affidavit may be rebutted (*Titus* v. *Cortelyou*, 1 Barb. 444).

c. **Appeal from order.**—An order for discovery of books and papers affects a substantial right and is appealable to the general term in the Superior Court of New York (*Woods* v. *De Figaniere*, 25 How. 522; contra, in the supreme court (*White* v. *Munroe*, 33 Barb. 650; 12 Abb. 357).

CHAPTER VI.

*Examination of parties.**

SECTION 389. Action for discovery abolished.
390. A party may examine his adversary as a witness.
391. Such examination also allowed before trial. Proceeding therefor.
392. Party, how compelled to attend.
393. Testimony of party may be rebutted.
394. Effect of refusal to testify.
395. Testimony of a party not responsive to the inquiries may be rebutted by the oath of the party calling him.
396. Persons for whom action is brought or defended may be examined.
397. Examination of co-plaintiff or co-defendant.

§ 389. [343.] *Action for discovery abolished.*

No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor

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* *a.* If a person is allowed by a statute to be a witness, who was inadmissible at common law, he becomes at once affected by all the rules and principles which appertain to that character. If the statute removes one disability, all others remain in full force and application (*Ketchum* v. *Tyson*, 3 Murphy's Law and Eq. 314).

b. **Attesting witness must be called.**—The law which renders the parties to a suit competent and compellable to give evidence, has not altered the rule of law which requires the execution of attested instruments to be proved by the subscribing witness (*Whyman* v. *Gath*, 17 Jur. 559; 22 Law J. Rep. (N. S.), Ex. 316; 19 E. L. and E. R. 359; and see *Story* v. *Lovett*, 1 E. D. Smith, 153; *Jones* v. *Underwood*, 28 Barb. 484; *King* v. *Smith*, 21 Barb. 158).

c. **Credit to testimony.**—It is the intention of the code, in authorizing parties to be examined as witnesses, to confer upon the courts a wide discretion as to the credit to be given to their testimony (*Roberts* v. *Gee*, 15 Barb. 449; *Forward* v. *Harris*, 30 Barb. 338; see note to § 393).

d. **Fees for attendance.**—When a party to the action is made a witness by his adversary, he is entitled to be paid witnesses' fees, as a condition to creating it his duty to attend, and be sworn as one who is not a party to the action (*Hewlet* v. *Brown*, 1 Bosw. 655; 7 Abb. 74).

e. **Surrogates' courts—courts of sessions—courts of oyer and terminer.**—This chapter had no application to proceedings in surrogates' courts (*Woodruff* v. *Cox*, 2 Brad. Sur. R. 224; *Wilcox* v. *Smith*, 26 Barb. 316); or courts of sessions, or oyer and terminer (*The People* v. *Duel*, 6 Abb. 285; 16 How. 43; but now see § 399).

f. **Husband and wife as witnesses.**—The code does not render a wife a competent witness for or against her husband (*Pillows and wife* v. *Bushnell*, 2 Code R. 19; 5 Barb. 156; 4 How. 9; and see also *Erwin* v. *Smaller*, 2 Sand. 340; *Barnes* v. *Camack*, 1 Barb. 392). A husband cannot be a witness for his wife's trustee in a suit affecting her separate estate, although she is not a party to the suit, and he has no interest whatever in the event of the suit (*Hasbrouck*

shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter.

a. **Accounting as agent.**—The rules and practice of the courts on the subject of accounting, existing at the time of the adoption of the code, are still

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v. *Vandervoort* 4 Sand. 596; 1 Code Rep. N. S., 81; approved 5 Seld. 153; and see *Trenton Banking Co.* v. *Woodworth*, 1 Green's Ch. R. 118). In one case it was held that where the wife sues alone for her separate property, her husband is a competent witness for the defendant to prove the marriage of the plaintiff (*Willis* v. *Underhill*, 6 How. 396). [The soundness of this decision may justly be doubted.] Where two persons are sued as husband and wife, for work, labor, and materials furnished to the wife, she cannot be examined as a witness. The husband alone is liable (*Main* v. *Stevens*, 4 E. D. Smith, 86).

d. In an action against husband and wife to compel the application of certain real property, standing in the name of the wife, to the payment of a judgment recovered against the husband, upon the ground that it in reality belongs to the husband, and was bought in the name of the wife in order to defraud the creditors of the husband, the wife cannot be examined as a witness

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CHAPTER 887.

AN ACT to enable Husband and Wife, or either of them, to be a witness for or against the other, or on behalf of any party in certain cases.

Passed May 10, 1867.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as hereinafter stated, be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action or proceeding.

§ 2. Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for or on account of criminal conversation.

§ 3. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

§ 4. This act shall take effect immediately.

in force; accordingly, where an order of reference directed the account of the defendant, an agent, to be taken in the "usual manner," it was held, that he was bound to bring before the referee a sworn account, including both debts and credits, in the manner prescribed in the 107th rule of the late court of chancery, and to submit to such examination as was allowed by that rule (*Wiggins* v. *Gans*, 4 Sand. 646).

§ 390. [344.] *Existing suits. A party may examine his adversary as a witness on the trial, &c.*

A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission.

a. **Party to an action.**—A party to an action within this section, is one who is named plaintiff or defendant, and appears on the record as such (*Woods* v. *De Figaniere*, 16 Abb. 1).

b. The president of an unincorporated joint stock company sued as such for a demand against the company, is a party to the action. (*Id.*)

See *ante*, pp. 105, *e. f.* 106, *a.*

c. **Interlocutory proceedings.**—This provision only authorizes the examination of an adverse party in respect to the issues. It does not authorize his examination in interlocutory proceedings. And in a motion to vacate an arrest, the court refused to issue a commission applied for by the plaintiff, to examine two of the defendants, who were out of the State, as witnesses, for the purposes of the motion (*Huelin* v. *Rudner*, 6 Abb. 19; *Stake* v. *Andre*, 9 Abb. 420; 18 How. 159). See now, § 401, *post.*

d. **Mechanic's lien.**—In an action brought by a material man, to foreclose a mechanic's lien, the contractor, although a party defendant, is a competent witness for the plaintiff (*Cannon* v. *Van Wagner*, 2 Abb. 106).

e. **Restriction on party as a witness.**—A party to the suit who is made a witness by statute, is to become such under the same requisitions and restrictions as any other witness. He must be of sane mind, of sound memory, of suitable age, willing to be sworn, and capable of taking an oath (*Arnold* v. *Arnold*, 13 Verm. 370).

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8 *id.* 297; and see Supreme Court, Rule 88). But *semble*, in an action between husband and wife, either party is a competent witness against the other (*Chamberlain* v. *The People*, 23 N. Y. 85; March 1861).

f. In supplementary proceedings on an execution against the husband returned unsatisfied, the wife cannot be examined as a witness (*Andrews* v. *Nelson*, 7 Abb. 3 *note; Copous* v. *Kauffman*, 8 Paige, 588). But subsequently it was held that in a proceeding under § 294, the wife of the judgment debtor may be examined (*Lockwood* v. *Worstell*, 15 Abb. 430, *note*).

g. **Wife of assignor of chose in action.**—The wife of the assignor of chose in action is a competent witness for the assignee in an action to recover such assigned chose in action (*Prince* v. *Down*, 2 E. D. Smith, 525; *Farley* v. *Flanagan*, 1 *id.* 314).

h. **Mandamus.**—A relator in a writ of mandamus suing in the name of the People, is a competent witness for the plaintiffs (*The People* v. *Albright*, 14 Abb. 305; 20 How. 306).

a. **Production of papers on subpœna duces.**—A *party* to an action may, at the instance of the *adverse party*, be compelled by the process of *subpœna duces tecum*, not only to appear at the trial and submit to a personal examination, but to produce papers and books in his possession, precisely as any other witness may be so compelled. And a witness, when properly subpœnaed, is as much bound to produce books and papers in his possession as evidence, as to testify orally; and his neglect of either is a contempt of court (*Bonesteel* v. *Lynde*, 8 How. 226; affirmed on appeal at the general term, and see *Garighe* v. *Losche*, 6 Abb. 284, *note*; 14 How. 453; *Woods* v. *De Figaniere*, 16 Abb. 159; *The People* v. *Dyckman*, 24 How. 222; *Brett* v. *Bucknam*, 32 Barb. 655; *contra*, see *Trotter* v. *Latson*, 7 How. 261).

b. If a witness on whom a subpœna *duces tecum* is served, neglects without good excuse, to obey the subpœna by producing the papers mentioned in the subpœna, he is liable to the aggrieved party for all damages sustained in consequence of such neglect, although the witness in other respects obeys the writ by personally appearing and giving evidence in the cause. It is not necessary in order to sustain such action for the aggrieved party to prove that he had a good cause of action in the suit wherein the witness was subpœnaed. It is sufficient to prove that he was non-suited in consequence of the non-production of the paper mentioned in the subpœna (*Lane* v. *Cole*, 12 Barb. 680).

c. The president or other officer of a corporation which is a party to an action, is not bound to produce on the trial, the books and papers of the corporation under a *subpœna duces tecum*, issued by the adverse party. He has no such property in or control over them as gives the right, or makes it his duty to produce them. Their proper place is the office in which the business is transacted to which they relate. The proper remedy of a party who is entitled to use their contents as evidence is to obtain sworn copies, or an inspection and copy under the Revised Statutes or the Code (*La Farge* v. *The La Farge Ins. Co.*, 14 How. 26).

d. An unincorporated joint stock company is not such a corporation as will enable its officers to refuse to produce its papers in their custody, when required by subpœna (*Woods* v. *De Figaniere*, 16 Abb. 159). And an attorney must produce his client's papers (*The People* v. *Sheriff of N. Y.* 7 Abb. 96).

e. **Evidence on new trial.**—Laws of 1847, ch. 462, p. 630, provided for the examination of parties in civil suits; and section 5 enacted, "If a party in any suit shall be called and sworn by the opposing party as a witness, such party shall be entitled to be sworn as a witness in the cause in any new or second trial of the cause, or upon any appeal in such cause; but in case such party shall testify on such second or other trial without being called by the opposing party first calling him, such opposing party shall also be entitled to be sworn and testify on such second or other trial."

§ 391. [345.] (Am'd 1849.) *Existing suits. Such examination also allowed before trial. Proceedings therefor.*

The examination, instead of being had at the trial, as provided in the last section, may be had at any time before the trial, at the option of the party claiming it, before a judge of the court, or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown, the judge order otherwise. But the party to be examined shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

a. [Sections 390 and 391 provide for four cases in which an adverse party may be examined; (1), on the trial; (2), conditionally; (3), upon commission; and (4), upon a notice to be examined.

b. **Witness on the trial.**—To examine an adverse party on the trial, no order is necessary; his attendance can be compelled by service of a subpœna, in the same manner as any other witness.

c. **Conditional examination.**—To examine an adverse party conditionally, no further or other notice, order, or summons is necessary than is required on the conditional examination of any other witness. As in the case of a witness not a party, the examination may be had before a referee, if the facts calling for it exists. *See, Conditional examination*, post.

d. **Commission.**—To procure the examination of an adverse party on a commission, the like proceedings, and no others, are necessary as in the case of another witness. See *Commission.*

e. **On notice.**—The examination of an adverse party on notice, may be either (1), on a notice of five days; (2), on such a notice as a judge may order. . (1) A notice of five days is to be given the adverse party not to *attend and be examined*, but that he will be examined before a certain judge of the court, or county judge, at the certain time and place mentioned in the notice. This notice has no potency to compel the adverse party to attend. To compel his attendance he must be served with a summons, in the form and served in the same manner as a summons to a witness not a party, to attend and be examined conditionally. Where the notice is of five days, no order whatever is necessary or proper. On the appearance of the parties, the examination is subject to the control of the judge. The attendance of the party cannot in any event under a proceeding on a notice, be required before a referee. (2), If the party desiring the examination can show "good cause" for requiring it to be had on a shorter notice than five days, then a judge may order that the notice be of such a length of time as he may see fit. The order merely determines the length of the notice. It does not require the attendance of the adverse party; and his attendance can only be compelled by a summons, as in the case where a five days' notice is served.] See *Form of summons* 14 How. 453.

f. **No order for examination necessary.**—All that is necessary for one party to obtain the examination of an adverse party, is to give such adverse party a previous notice to be examined, of at least five days, and the only case in which an order is necessary is, where the party seeking the examination wishes it to be had on a shorter notice than five days. On one party to a suit being served by his adversary with a previous notice of five days to attend and be examined, and a summons, and on being paid the usual fee payable to a witness subpœnaed to attend a trial, it is his duty to attend and submit to be examined; and on his making default in either of these particulars, he will be liable to be punished as for a contempt, and to have his pleading struck out (*Taggard* v. *Gardner*, 2 Code R. 82; *Draper* v. *Henningsen*, 1 Bosw. 614; *Gaughe* v. *Laroche*, 14 How. 453; 6 Abb. 284, *note*; *Leeds* v. *Brown*, 5 Abb. 418).

g. **Examination, at what stage of the action.**—The examination cannot be had until after issue joined (*Chichester* v. *Livingston*, 1 Code Rep. N. S. 109; 8 Sand. 718 · *Suydam* v. *Suydam*, 11 How. 518; *Watson* v. *Gale*, 12 Abb. 215).

h. **The examination is a matter of right.**—The examination of an adverse party before trial, provided for by section 391, is a matter of right (*Green* v. *Wood*, 6 Abb. 277; 15 How. 338; *Cook* v. *Bidwell*, 17 Abb. 300). If the judge has discretion to refuse the examination before trial, for good cause shown, it is not good cause for such refusal that the party, sought to be examined, prefers to testify at the trial, and offers to stipulate that he will then attend for that purpose. (*Id.*) *Query*, can it be had in an action between husband and wife (6 Abb. 277, *note*).

i. **Appealable order.**—An order refusing an examination, under section 391, is appealable (*Green* v. *Wood*, 6 Abb. 277; 15 How. 338). In which case the order refusing the examination was reversed on appeal.

a. **The examination.**—The limit of the examination is within the discretion of the judge (*Plato* v. *Kelly*, 16 Abb. 188). The examination of the adverse party is in effect a cross examination and governed by the same rules (*Id.*)

b. Where on an examination before the trial the witness refuses to answer a legal and pertinent question, the judge should issue his warrant for the commitment of the witness, not make an order adjudging him in contempt (*The People* v. *Dyckman*, 24 How. 222).

c. If the party giving the notice is not in attendance at the time mentioned in the notice, the party to be examined cannot be adjudged in contempt for not attending (*Gardiner* v. *Peterson*, 14 How. 513).

d. **Examination of an infant.**—Where an infant defendant was examined as a witness against his own interest, by an adult co-defendant, under a common order and against the objection of the guardian *ad litem*, his deposition was suppressed. Such an examination should not be had, without the special order of the court, made upon a full understanding of all the circumstances (*Moore* v. *Moore*, 4 Sand. Ch. R. 37).

See note to section 390.

§ 392. [346.] (Am'd 1849.) *Existing suits. Party, how compelled to attend.*

The party to be examined, as in the last section provided, may be compelled to attend, in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed by the judge in like manner, and may be read by either party on the trial.

e. **Compelling attendance.**—The attendance of the witness cannot be compelled, except upon a summons (*Bleecker* v. *Carroll*, 2 Abb. 82; *Draper* v. *Henningsen*, 1 Bosw. 614; *Garighe* v. *Laroche*, 14 How. 452; S. C. 6 Abb. 284, *note*; *Jarvis* v. *Clarke*, 12 N. Y. Leg. Obs. 129); and on payment of his fees as a witness for attending (*Taggard* v. *Gardner*, 2 Code Rep. 82; 2 Sand. 669; *Draper* v. *Henningsen*, 1 Bosw. 614).

§ 393. [348.] (Am'd 1849.) *Existing suits. Testimony of party may be rebutted.*

The examination of the party, thus taken, may be rebutted by adverse testimony.

f. **Contradicting party as a witness.**—A party who calls his adversary as a witness, thereby represents him as worthy of credit, and cannot afterwards impeach him by showing either that his general character for truth is bad, or that he has made previous contradictory statements (*Pickard* v. *Collins*, 23 Barb. 444). But he may prove a fact to be otherwise than his adversary has testified to (*id*; *Parsons* v. *Suydam*, 3 E. D. Smith, 275; *Muir* v. *Culy*, 10 Up. Can. Q. B. R. 321; *Armstrong* v. *Clark*, 2 Code R. 143); and he may do this by proving admissions of such adversary. (*Id.*) And the testimony of a party may be controverted or impeached in the same manner as any other witness (*Varono* v. *Socarras*, 8 Abb. 302; *Forward* v. *Harris*, 30 Barb. 338).

g. Where the plaintiff and defendant's testimony is contradictory, a written statement by either opposed to his testimony will warrant the jury in disregarding his testimony (*Boyd* v. *Colt*, 20 How. 384).

a. **Account books.**—The code has not abrogated the rule of law admitting account books as evidence in certain cases (*Tomlinson* v. *Borst*, 30 Barb. 42); contra in New York Common Pleas (*Conklin* v. *Stamler*, 8 Abb. 396; 2 Hilton, 422). To render account books competent evidence the party must prove that during the period the charges were made, he kept no clerk, that *some* of the articles charged for were delivered, that the books are his account books and that he keeps correct accounts (*Tomlinson* v. *Borst*, supra, and see *Conklin* v. *Stamler*, supra). The books cannot be discredited by proving the parties' general bad character. (*Id.*)

c. **Perpetuating testimony.**—Proceedings under the Revised Statutes to perpetuate testimony (2 R. S. 398) may still be resorted to. The dictum to the contrary in *Keeler* v. *Dusenberry*, 1 Duer, 660, is not followed. On an application to perpetuate testimony it should appear that the application is made in good faith (*Paton* v. *Westervelt*, 5 How. 399).

§ 394. [347.] (Am'd 1849.) *Existing suits. Effect of refusal to testify.*

If a party refuse to attend and testify as in the last four sections provided, he may be punished as for a contempt, and his complaint, answer, or reply, may be stricken out.

d. To authorize the punishment of a party for contempt in refusing to be examined under sections 390–393, it need not appear that the misconduct was calculated to, or did, defeat, impair, impede, or prejudice the rights or remedies of any party as required (2 R. S. 538, § 20) in ordinary cases of contempt (*Woods* v. *De Figaniere*, 16 Abb. 1).

e. The proceedings to punish for a contempt, or strike out a pleading, must be based on affidavits, to be served with a notice of *eight* days (*Hewlett* v. *Brown*, 1 Bosw. 655). A party cannot be punished for a contempt for refusing to attend and testify on the mere service of a notice to attend, without any summons, and without payment of his fees as a witness. (*Id.*)

f. Where one of several defendants was subpœnaed to appear before a county judge, for an examination on behalf of the plaintiffs, and, on the day appointed, made default without any sufficient excuse, but it not appearing that the plaintiff or any of the parties were in attendance on said day, nor any reason given why they were not,—held that the defendant was not in contempt, and that the inference was that the plaintiff had abandoned the proceeding (*Gardiner* v. *Peterson*, 14 How. 513).

g. In *Anderson* v. *Johnson* (1 Code Rep. 95; 1 Sand. 713), after an issue on a *joint defence*, the plaintiff obtained an order for *one* of the defendants to show cause *why he should not be examined as a witness* in the cause before the trial. The order was silent as to what would be the consequence if he failed to show cause. The defendant failed to show cause, and the plaintiff took an order reciting the former order and defendant's default, and directing him to attend on the service of the subpœna, at a time designated, and submit to be examined, or in default, that his defence should be stricken out. The defendant appealed from this order; and it was set aside as not authorized by the first order; and the court said that on a default under the first order the plaintiff could ask nothing more than it contemplated in terms; besides, to give effect to the order would be to strike out a joint defence, and thus to punish parties who had committed no offence.

See note to section 391.

h. In *Bennett* v. *Hall* (10 N. Y. Leg. Obs. 191), it appeared the defendant was subpœnaed on Saturday to attend to be examined on the following Tuesday, and in pursuance of previous arrangement he sailed for California on the Mon-

day preceding. A motion for an order to strike out the answer for his non-attendance was denied.

§ 395. [349.] (Am'd 1849, 1863.) *Existing suits, Testimony by a party not responsive to the inquiries, may be rebutted by the oath of the party calling him.*

A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf subject to the same rules of examination as other witnesses. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answers thereto, or discharge when his answers would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, subject to the same rules of examination as other witnesses, and shall be so received.

a. Where the defendant on the trial of a cause called the plaintiff as a witness and in reply to a question put to him *by the court*, the plaintiff testified to new matter, going beyond the point to which he was examined by his adversary, it was held, that the defendant was entitled to offer himself as a witness for the purpose of answering such new matter (*Myers* v. *McCarthy*, 2 Sand. 399).

b. In an action on a contract by which the defendant agreed to make a quantity of scythe snaths for the plaintiff within a specified time, the plaintiff called the defendant as a witness, who testified that he did not within the time specified make any scythe snaths for the plaintiff. On cross-examination by his own counsel he testified that the reason he did not make the snaths was that he was under no obligation to make any, as he had made no agreement with the plaintiff, but was working merely as an experiment,—held, that the defendant had not been examined on his own behalf to any new matter so as to entitle the plaintiff to be examined as a witness in his own behalf (*Chamberlain* v. *Hamilton*, 18 Barb. 324).

c. Where the defendant has by his answer set up a counter-claim, and on the trial the plaintiff calls him as a witness, and he in addition to proving the plaintiff's demand, proved the counter-claim set up in the answer, held, that the plaintiff might offer himself as a witness to contradict the defendant (*Harpell* v. *Irwin*, 3 E. D. Smith, 565; 1 Abb. 144; *Anon.* 3 *id.* 102).

§ 396. [350.] *Existing suits. Persons for whom action is brought or defended, may be examined.*

A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination as if he were named as a party.

Who are regarded as "persons for whose immediate benefit a suit is prosecuted or defended"? See note to section 399.

§ 397. (Am'd 1851, 1852.) *Existing suits. Examination of co-plaintiff, or co-defendant.*

A party may be examined on behalf of his co-plaintiff or of a co-defendant, as to any matter in which he is not jointly interested or liable, with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. And he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in the behalf of the party examined. And whenever in the case mentioned in sections three hundred and ninety and three hundred and ninety-one, one of several plaintiffs or defendants, who are joint contractors, or are united in interest, is examined by the adverse party, the other of such plaintiffs or defendants may offer himself as a witness to the same cause of action, or defence, and shall be so received.

a. In an action on a promissory note, made by the defendants, who were partners, the defence was usury, and after the plaintiffs had proved their case, counsel for the defence offered Wilber, one of the defendants, as a witness for his co-defendant. The plaintiffs objected to Wilber's being admitted to testify, and the court sustained the objection (*Farmers' and Mechanics' B'k* v. *Wilber & Radley*, 2 Code Rep. 33). But the general term held otherwise, and granted a new trial (1 Code Rep. N. S., 61).

b. In an action for a breach of contract, alleged by the plaintiffs to be the joint contract of the defendants Doe and Roe, one of the defendants (Doe) made no answer, and judgment for want of an answer was taken against him; the other defendant answered separately, denying that the contract declared on was the joint contract of him and the other defendant. On the trial Doe was examined as a witness for the plaintiff, and testified that the contract was made jointly by him and the other defendant, Roe. When the plaintiff had closed his case, the defendant Roe was offered as a witness on his own behalf, for the purpose of contradicting the evidence of Doe, and testifying that the alleged contract was not the joint contract of the defendants. The admission of this evidence was objected to by the plaintiff; but the objection was overruled, the evidence received, and the defendant Roe had a verdict in his favor (*Comstock* v. *Roe*, 2 Code Rep. 140; S. C. 2 Sand. 705).

c. In *Parsons* v. *Pierce* (3 Code Rep. 177), and *Finch* v. *Cleveland* (10 Barb. 230), it was held that in actions for tort commenced under the code, one defendant may be called as a witness on behalf of his co-defendant. And in *Parsons* v. *Pierce*, it was further held, that in actions commenced before the code went into effect, one defendant may call his co-defendant as a witness, but he can testify only to such facts as would entirely acquit the party calling him. He cannot give testimony to affect the amount of damages merely. See *post*, 753, *f*.

d. In *Selkirk* v. *Waters* (1 Code Rep. N. S. 35), it was held that one co-defendant was a competent witness for another in all joint and several actions whether on contract or tort, and in all actions where a separate judgment could be rendered in favor of the co-defendant, provided the defendant called as a witness is not disqualified by reason of interest.

e. In *Johnson* v. *Wilson* (in note 1 Code Rep. N. S. 40), the New York common pleas held that one co-defendant could not be examined for another in an action

on a joint liability, whether on contract or in tort; and the same was held in *Frost* v. *Hanford* (1 E. D. Smith, 540).

a. In the superior court, Sandford, Mason, and Campbell, J. & J., at general term held, that in an action on a joint and several bond against three defendants, one of them being principal and the others sureties, the parties defendant might be examined as witnesses for each other (*Mayor &c. of N. Y.* v. *Price* 1 Code Rep. N. S. 85; 4 Sand. 616).

b. In an action for damages arising from a false warranty, one of several defendants may be called as a witness by and on behalf of his co-defendants (*Holman* v. *Dord*, 1 Code Rep. N. S. 331; 12 Barb. 336).

c. In an action against two defendants as makers of a *joint and several* promissory note, one defendant cannot examine the other as a witness to establish the defence of usury (*Ely* v. *Miller*, 1 Abb. 241). *Semble*, that if the action had been on a several and not joint note, one defendant might have examined the other as a witness to establish the defence of usury, or any other defence. (*Ib.*)

d. In an action for assault and battery, and in all other actions of tort, a verdict and judgment may be rendered in favor of one and against another defendant; that is a verdict or judgment separate and not joint may be rendered in such actions; one defendant may be examined for his co-defendant as to *any matter* as to which a separate and not joint verdict or judgment may be rendered, and as to *any matter* in which he is not jointly interested or liable with such co-defendant. In all actions a defendant is a competent witness for his co-defendant. His admissibility as a witness cannot be questioned, but he is restricted as to the subject-matter of his examination. If any question is asked tending to establish a defence of which the co-defendant cannot separately avail himself, the plaintiff is at liberty to object, and the court must exclude it. Where a witness is called to the stand who is competent to be sworn and to testify to some matters, but who may not speak to other matters, it is not proper to object to his competency generally and exclude him (*Beale* v. *Finch*, 9 How. 390; 1 Kern. 128; and to the like effect is *Munson* v. *Hegeman*, in court of appeals, see 9 How. 388, overruling *Munson* v. *Hegeman*, 5 *id.* 223; 10 Barb. 112; and see *Eno* v. *Del Vechio*, 4 Duer, 58; *Montfort* v. *Hughes*, 3 E. D. Smith, 591).

e. The question has arisen whether a defendant when called to testify for his co-defendant can be examined to mitigate the amount of damages as against the defendant for whom he testifies. * * * He is jointly interested, because the damages are indivisible. There can be but one verdict, and for one amount, against all those found guilty. * * * * If, however, the case made out against the defendant who is called as a witness be a doubtful one, I see no objection to receiving his testimony to mitigate damages for his co-defendants, under proper instructions to the jury to consider it if they acquit the witness, and to reject it if they find him guilty (Parker, J., *Beale* v. *Finch*, supra.) See *ante*, 752, *c.*

f. Now, there can be no possible case [in tort] in which a party may not offer his co-plaintiff or co-defendant as a witness, and have him received. For there is no case in which a separate judgment may not be rendered for one plaintiff or defendant and against another. The party therefore, is in all cases, when offered, to be admitted as a witness. Having been admitted and sworn his examination is to be restricted to "matters in which he is not jointly interested or liable with the co-plaintiff or co-defendant" who has called him. The practice suggested in the leading opinion of *Beale* v. *Finch* (supra), of receiving the testimony of parties *de bene esse* in "doubtful cases," and then instructing the jury that if they acquit the witness, and thus find him competent, they should consider the testimony, and if they convict him then reject the testimony, can never be tolerated (Harris, J., *Lefever* v. *Brigham*, 10 How. 385). In an action on contract, a defendant offered as a witness for his co-defendant may be rejected without being sworn, if he is only to be examined as to a matter in which he is jointly interested with the party calling him (*City B'k of Columbus* v. *Bruce*, 17 N. Y. 507). So held where the

defendant was offered to prove that the signature of his co-defendant to their joint and several promissory note given for a joint subscription to the stock of a corporation was obtained by fraud. (*Id.*) And in an action for the recovery of personal property, the court said, "It would be an idle ceremony to swear defendants as witnesses when it appears from the pleadings that neither of them can be allowed to testify to any matter in issue (*Ward* v. *Woodburn*, 27 Barb. 346). Thus, where in an action against three defendants for the recovery of personal property, it appeared there was no issue involving anything personal to either, but the only defence was a joint defence, held that neither defendant could be allowed to testify for the defence, and it was useless to have either defendant sworn. (*Id.*)

a. Where in an action of foreclosure the mortgagor and his grantee are made defendants—the latter only answering; the morgagor is not a competent witness for the grantee to prove usury (*Warden* v. *Buell*, 18 How. 256).

b. Where in an action of trespass against two for cutting timber, the defendant alleged that one of them purchased the timber of the plaintiff, and employed the other to aid in cutting and carrying it away, held that neither defendant was a competent witness for the other to prove the purchase of the timber (*Dean* v. *Thornton*, 3 Kernan, 266).

c. Where a defendant has no separate defence in an action on a joint contract, a co-defendant is incompetent as a witness (*King* v. *Lowry*, 20 Barb. 533).

d. In an action against two or more to recover damages for wrongfully detaining personal property, each defendant is a competent witness for his co-defendant (*Gardner* v. *Finley*, 19 Barb. 317).

e. Where two joint makers of a note and two joint indorsers of a note, are sued in one action, the makers are competent witnesses for the indorsers and the indorsers for the makers: but one maker is not competent to testify for the other, nor one indorser for the other (*Finn* v. *Gustin*, 2 Abb. 191; 3 E. D. Smith, 382).

f. In a partition suit each defendant has a distinct interest, and has a right to examine any other defendant as a witness in respect of such interest; and that, too, whether the party called to testify be or be not a married woman, or the husband of a married woman (*Rogers* v. *M'Lean*, Supreme Court, First District, General Term, February, 1857). See *ante*, p. 744, *f*.

g. Where on the trial of an action against two persons for a joint assault, no evidence appears against one of them, he is entitled to be discharged, and may be a witness for his co-defendant (*Labar* v. *Koplin*, 4 Coms. 547).

h. Defendants may be "united in interest" in respect to a matter involved in the issues, though not sued as partners or joint contractors (*Buchanan* v. *Morrell*, 1 Bosw. 602).

i. In an action against two defendants on a joint and several promissory note, neither defendant can be examined as a witness in behalf of the other to prove payment (*Newell* v. *Salmon*, 22 Barb. 647).

j. In an action by A and some of his creditors, against B, to whom A had previously assigned his property for the benefit of his creditors, charging B with fraud and gross negligence in the sale of the assigned property, and asking that he might be decreed to account for the true value, A cannot be examined as a witness on behalf of his co-plaintiffs (*Brahms* v. *Joyce*, 5 Duer, 16).

k. When a party is examined as a witness on his own behalf, and the opposite party objects generally that the plaintiff cannot be a witness, the objection will not avail if any part of the testimony is competent (*Richardson* v. *Wilkins*, 19 Barb. 510; *Anon.* 3 Abb. 102. See notes to sections 390, 399).

Examination of an infant co-defendant, see in note to § 391.

CHAPTER VII.

*Examination of Witnesses.**

SECTION 398. Interest not to exclude a witness.
399. Parties to actions and special proceedings may be witnesses on their own behalf, except in certain cases.

§ 398. [351.] *Existing suits. Interested Witness.*

No person offered as a witness shall be excluded by reason of his interest in the event of the action.

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* *a.* **Confessions to clergy.**—No minister of the gospel, or priest, of any denomination whatsoever, shall be allowed to disclose any confessions made to him, in his professional character, in the course of discipline enjoined by the rules or practice of such denomination (2 R. S. 508, § 91).

b. **Knowledge acquired by physicians.**—No person duly authorized to practice physic or surgery, shall be allowed to disclose any information which he may have acquired in attending any patient, in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon (*Id.* § 92; *Hanford* v. *Hanford*, 8 Edw. Ch. R. 468; *Kendall* v. *Gray*, 2 Hilton, 300). But a physician consulted as to the means of doing an unlawful act such as procuring an abortion, is not excused from answering (21 Wend. 79). The statute does not prevent the physician of a deceased person giving evidence in a testamentary cause, concerning the probate of the will of such decedent. The statute does not establish a general and absolute prohibition of such testimony in all cases, but secures a personal privilege to the party, or his representatives, which may be waived; and if such privilege be waived, the witness cannot object to testify (*In the matter of Harrison, deceased*, 1 Bradford's Surrogate Rep. 231).

c. **Attorney.**—An attorney cannot be a witness as to confidential communications between himself and his client (see *Rochester City Bank* v. *Suydam*, 5 How. 254; *Williams* v. *Fitch*, 18 N. Y. 546; *Brandt* v. *Klein*, 17 Johns. 335; *March* v. *Ludlam*, 3 Sandf. Ch. 35), and the disability applies to the attorney's clerk (*Sibley* v. *Waffle*, 16 N. Y. 180). An attorney may testify on behalf of his client (*Little* v. *McKeon*, 1 Sandf. 607; *Robinson* v. *Dauchy*, 3 Barb. 21). An attorney having papers of his clients in his possession in court is not privileged from producing them, at least for identification (*The People* v. *Sheriff of New York*, 7 Abb. 96).

d. **Corporation.**—The provisions of law allowing parties to be witnesses in their own behalf, apply to actions wherein a *municipal* corporation is a party (*Mott* v. *Mayor of N. Y.* 2 Hilton, 358; *Wallace* v. *Mayor of N. Y.* id. 440; 18 How. 169; *Johnson* v. *McIntosh*, 31 Barb. 267; *Woods* v. *De Figaniere*, 16 Abb. 1;) and in an action against such a corporation the plaintiff may be examined in his own behalf. (*Id.*) The defendant being a corporation does not prevent the plaintiff being examined as a witness in his behalf (*Fields* v. *N. Y. Cent. R. R. Co.* 29 Barb. 176; *Wright* v. *N. Y. Cent. R. R. Co.* 28 Barb. 80; *Lafarge* v. *Exchange Ins. Co*, 3 Bosw. 157; 22 N. Y. 352; *Wallace* v. *Mayor of N. Y.* 18 How. 169; 2 Hilton, 440).

e. **Who is an assignor of a thing in action.**—The *payee or indorser* of a nego-

* § 399. [352.] (Am'd 1851, 1857, 1858, 1859, 1860, 1862, 1863.) *Existing suits. Examination of parties to the action, or special proceeding.*

A party to an action or special proceeding, including pro-

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tiable promissory note who transfers it in *any way* to another is not an assignor of a chose in action (*Calkins* v. *Packer*, 21 Barb. 275; *Watson* v. *Bailey*, 2 Duer, 509; *Hicks* v. *Worth*, 10 How. 555; 4 E. D. Smith, 78; *Tulloss* v. *Rapelyee*, 3 Abb. 93; *Anderson* v. *Busteed*, 5 Duer, 585; *Gardner* v. *Gordon*, 3 Bosw. 369; *Porter* v. *Potter*, 18 N. Y. 52; *contra*, see *Seeley* v. *Seeley*, 2 Hill, 496; *Chamberlain* v. *Gorham*, 20 Johns. 144; *Clark* v. *Atkinson*, 2 E. D. Smith, 112; *Hedges* v. *Sealy*, 9 Barb. 214; *Clement* v. *Adams*, 12 How. 163; *Bump* v. *Van Oredale*, 11 Barb. 634; *Potter* v. *Bushnell*, 10 How. 94; *Collins* v. *Knapp*, 18 Barb. 532; *Jagoe* v. *Allen*, 18 Barb. 580).

a. The vender of personal property in the possession of another is not an assignor of a chose in action (*McGinn* v. *Worden*, 3 E. D. Smith, 355; *Crosby* v. *Nichols*, 3 Bosw. 451).

b. The grantor of premises upon which rent is accruing, but is not due at the time of the grant, is not in respect of such rent an assignor of a chose in action (*Van Weeklen* v. *Paulson*, 14 Barb. 654).

c. An assignor of a thing in action to come within this section must be one who makes such an assignment as without which the action would necessarily have been brought in his name (*Hale* v. *Boardman*, 27 Barb. 82; *Hudson R. R. Co.* v. *Lounsberry*, 25 id. 597).

d. The section applies not only to the case of a voluntary assignor, but also to the case of an assignment made in pursuance of law or by direction of a court or officer (*Gardner* v. *Clark*, 17 Barb. 538).

e. **Representative of a deceased person.**—Where promissory notes payable to a foreign executor as such, are indorsed by him as executor, to himself in his individual capacity, and he sues thereon in his own name, he is not to be deemed the representative of a deceased person so as to exclude the defendant from testifying on his own behalf (*Buckingham* v. *Andrews*, 34 Barb. 434; 12 Abb. 322).

f. A party sued by an administrator may testify to a conversation heard by him between the decedent and a third person (*Simmons* v. *Sissons*, 26 N. Y 264).

g. In an action by a legatee of a bond against the obligor, the defendant may be examined on his own behalf to prove payments in the life-time of the plaintiff's testator (*Wildey* v. *Whitney*, 25 How. 75; and see *Schenck* v. *Warner*, 37 Barb. 258).

h. A guardian in socage, an heir or a doweress, is not a representative of the decedent within the meaning of this section (*McCray* v. *McCray*, 12 Abb. 1 Gen. T. 6 Dist; see contra *Lee* v. *Dill*, 16 Abb. 9, Gen. T. 1 Dist).

i. The bailee for hire of a chattel, when sued for its detention by a third party, may be a witness in his own behalf, although the bailor be dead (*Penny* v. *Black*, 6 Bosw. 50).

j. **Metropolitan police.**—A subpœna from a civil court cannot be served on any person holding office under the Metropolitan Police act, while such person is actually on duty (Laws 1860, p. 446, § 34).

k. **Examination of witnesses and parties on commission.**—The examination of witnesses and parties out of the State, on commission, is provided for, 2 R. S. 393 to 397, and Code, § 390. The material parts of the statute, and the decisions thereon, are given below. The articles of the revised statutes relative to taking testimony out of the State, only applied to actions at common law; the court of chancery had the power, independently of any statute (*Brown* v. *Southworth*, 9 Paige, 351).

* *Amended—See Appendix.*

ceedings in surrogates' courts and proceedings for the summary recovery of the possession of land, may be examined as

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a. **Commission, in what cases—On an issue.**—When an issue of fact has been joined in any action in a court of record, and it appears, on the application of either party, that any witness (or party, *Brockway* v. *Stanton*, 2 Sand. 640; 1 Code Rep. 128; *Fairbanks* v. *Tregent*, 16 How. 187; 17 How. 258; *Biglow* v. *Mallory*, 17 How. 427; *Block* v. *Haas*, 8 Abb. 335; *Stuke* v. *Andre*, 9 Abb. 420; *McCarty* v. *Edwards*, 24 How. 236); not residing within the State, is material in the prosecution or defence of such action, the court may, upon such terms as it shall think proper, award a commission to one or more competent persons, authorizing them, or any one of them, to examine such witness [or party] on oath, upon the interrogatories annexed to such commission, to take and certify the depositions of such witness, and to return the same according to the directions given with such commission.

b. **On assessment of damages, on judgment for want of an answer.**—A commission may issue after a default for want of an answer, and ex parte, if the defendant has not served notice of appearance in the action (Laws 1862 ch. 375, p. 628).

c. **Supplementary proceedings, &c.**—A commission would not, prior to the amendment of 1860, be allowed in proceedings before referees under a special statute (18 Wend 464); nor in supplementary proceedings (14 How. 52; *Morrell* v. *Hay*, 15 Abb. 430; S. C. 24 How. 48).

d. **Resident witness.**—A commission may issue to a non-resident witness, though his domicile be within the State (1 Wend. 65).

e. **In the discretion of the court.**—It is in the discretion of the court to grant or refuse the commission (4 Sand. 676; 8 Johns. Cas. 137; 2 Sand. 683; 3 Code Rep. 202); and if the opposite party shows any reasonable ground for denying the motion, the court will order the party applying for the commission to disclose by affidavit what he expects to prove (3 Code Rep. 234), and may then, in its discretion, grant the rule either absolutely or conditionally, unless the adverse party will admit the facts sought to be proved (7 Cow. 369); and he must admit the *facts*, not that the witness will testify to such facts (*Bank of Commerce* v. *Michel*, 1 Sand. 687).

f. In *Clayton* v. *Yarrington* (16 Abb. 273, *note*) the court ordered a commission on condition that the applicant would consent that the witnesses be examined and cross-examined orally. In *Deshon* v. *Packwood* (16 Abb. 272, *note*), Hoffman J., refused to grant a commission with a direction to take the testimony orally (see 3 Bradf. Surr. Rep. 249).

g. **On a motion.**—When there shall be a motion or other proceeding in the supreme court, in which it shall be necessary for either party to have the deposition of any witness who shall have refused voluntarily to make his deposition, the court may direct a commision to be issued to one or more persons, inhabitants of the county in which such witness resides, to take his testimony. Such witness may be subpœnaed to attend and testify before such commissioners, in the same manner as before referees, and with the like effect; and obedience to such subpœna shall be enforced in the same manner (2 R. S. 554, §§ 24, 25; and see § 401, *post*; and *ante*, 746, *c*). Prior to the amendment to § 401 of the code giving power so to do, a party to the action could not be required by the adverse party to make an affidavit or deposition to be used on a motion (*Palmer* v. *Adams*, 22 How. 375).

h. After a person has made a voluntary affidavit, *semble*, no order should be made for his oral examination (*Ryers* v. *Hedges*, 1 Hill, 646).

i. The amendment allowing the examination of a witness on a motion, does not repeal the law of 1840. A witness ordered to attend and be examined may be punished as for a contempt if he refuse to answer proper questions (*Clark* v. *Brooks*, 26 How. 254).

a witness on his own behalf, or in behalf of any other party in the same manner, and subject to the same rules of examination, as any other witnesses.

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a. **Co-defendant.**—One of three defendants sued jointly in an action on contract, *may* (at least for some purposes) be a competent witness for his co-defendants; and, therefore, where of three defendants in action on contract, only two defendants appeared and answered, held, that those two were entitled to a commission to examine the third defendant as witness (*Shufelt* v. *Powers*, 10 How. 286).

b. One of the several defendants moved for a commission to examine his co-defendant out of the State as a witness. The affidavit in support of the motion was in the usual form to obtain a commission to examine a foreign witness. It did not disclose the nature of the action, nor any facts to show whether or not the case was one in which the moving defendant could examine his co-defendant as a witness on the trial. The court denied the motion (*Merrifield* v. *Cooley*, 4 How. 272; and see 7 Abb. 411; 8 *id.* 66; 14 How. 77).

c. **Adverse parties.**—On motion by the defendant to examine the plaintiff as a witness, the latter residing in the State of Pennsylvania, and more than one hundred miles from the city of New York, the superior court said, "There is no doubt that the commission ought to issue in this case," and granted the motion (*Brockway* v. *Stanton*, 1 Code Rep. 128; 3 *id.* 206).

b. **Who may issue commission.**—Commissions to take testimony out of the State may be granted either by the court or, if the action be in the supreme court, by a judge at chambers or county judge of the county in which the action is triable (2 R. S. 394; § 12).

e. A commission may also issue out of the marine court (Laws of 1852, p. 648, § 8), and the district courts of the city of New York (Laws of 1857, ch. 344, § 30).

f. **Motion for commission, when and how made.**—The motion for a commission must be made in the district in which the action is triable, or in the county adjoining that in which it is triable (*Sturgess* v. *Weed*, 13 How. 130; *Newcombe* v. *Reed*, 14 *id.* 100; *Erwin* v. *Voorhies*, 26 Barb. 127).

g. An order for a commission taken by default, is not a nullity because the motion papers do not disclose the name of the county in which the action is to be tried. If necessary to show the place of trial it can only be to show that the motion is made in the proper county (*Blackman* v. *Van Inwagen*, 1 Code Rep. N. S. 80; S. C. 5 How. 367).

h. The application is founded on an affidavit, stating that the cause is at issue, and the names of the witnesses, except where their names are unknown (2 Hall, 502); that he has fully and fairly stated the case to counsel (19 Wend. 98); and that the witnesses are material, as the party is advised by said counsel after such statement and verily believes, and are without the State (2 Johns. Cas. 68, 285; 1 Wend. 65; 7 Barb. 631). And if the defendant makes the application, and asks for a stay of proceedings until a return of the commission, but not otherwise (9 Wend. 444), he must swear to merits (1 Wend. 27; 4 Hill, 534; 2 Johns. Cas. 285).

j. The affidavit may be made by the attorney (7 Wend. 513); or any third person cognizant of the facts (1 Cow. 210); and when made by the attorney it need not state the advice of counsel as to the materiality of the witnesses 7 Wend. 513). The agent in fact of the plaintiff, acting under a letter of attorney, may make the affidavit without showing any excuse why it is not made by the party (1 Cow. 210; 2 Johns. Cas. 69; *Johnson* v. *Lynch*, 15 How. 200). The fact that the party applying for a commission is not a resident of the city of New York, and is absent therefrom, is a sufficient excuse for the

Provided, however, that the assignor of a thing in action shall not be examined in behalf of said party, nor shall a party

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making the affidavit in support of the application by the attorney instead of the party (*Eaton* v. *North*, 7 Barb. 631; *Deshays* v. *Persee*, 9 Abb. 289, *note*). Where no laches are imputable to a party applying for a commision, and there is nothing to cast suspicion upon the application, he is not bound to state what he expects to prove by the witness whose testimony he seeks to procure. (*Id.*)

The notice of motion should contain the names of the proposed commissioners.

a. The court will not entertain the motion after application therefor has been made to a judge and has been denied (*Allen* v. *Gibbs*, 12 Wend. 202).

b. If the motion is made by the plaintiff, it should be made as soon after issue joined as practicable (7 Wend. 518); and when by the defendant, it should be made before notice of trial; otherwise he must pay costs to that time (1 Johns. Cas. 391), unless it appear that he has used due diligence (1 Wend. 283; 3 Code Rep. 150; *Brokaw* v. *Bridgman*, 6 How. 114).

c. If the *bona fides* of the application is doubtful, the commission will not be ordered on the common affidavit (3 Johns. Cas. 137; 7 Wend. 514).

d. **Stay of proceedings.**—The defendant may obtain a stay of proceedings, to enable him to move for a commission, and he has twenty days after the cause is at issue to move for a commission with a stay (1 Sand. 717; 1 Code Rep. 96). By rule 96 of the Common Pleas rules of 1840, an application for a commission is required to be made within ten days after issue is joined or a stay will not be granted.

e. A commission with a stay will not be refused upon affidavit that the witnesses named are incompetent, but the court will leave the question as to their competency to be determined at the trial (11 Johns. 200).

f. The court will usually stay the proceedings until the return of the commission. The granting a stay is in the discretion of the court or judge to whom the application is made, and the court will not review the exercise of such discretion; but perhaps the court would review an order refusing to stay proceedings until the return of a commission (*Thatcher* v. *Bennett*, MS.)

g. The order for a commisision is not, *per se*, a stay of proceedings (7 Wend. 520).

h. If a stay of proceedings has been granted with the commission, the party obtaining it must use all diligence to have it returned within a reasonable time.

i. If issued by the plaintiff, the defendant, after the expiration of a reasonable time, may move the court for judgment, as in case of non-suit, and compel the plaintiff to stipulate (1 Caines R. 517; 23 Wend. 38; 2 Caines R. 47).

j. Where the commission has been issued by the defendant, or where both parties have joined in it (2 Johns. Cas. 70; 1 Caines R. 115, 503), the plaintiff, after the lapse of a reasonable time, may move for leave to proceed to trial notwithstanding the commission (23 Wend. 38; 2 Sand. 690; 3 Code Rep. 202). It may be resisted by the defendant on the ground, that the delay of returning the commission has been occasioned by the plaintiff (2 Johns. 196; 2 Caines R. 47).

k. If the plaintiff have leave to proceed, and proceeds to trial, the defendant may apply at the circuit to put off the trial (1 Caines R. 503, note; 2 *ib.* 46; 2 Sand. 690; 3 Code Rep. 202; 18 Wend. 657). If, without leave of the court, the plaintiff go to trial, and the defendant appear and examine witnesses, it is a waiver of the commission (1 Caines R. 73).

l. Where sufficient time has elapsed *prima facie* to have the return of a

to an action be examined in his own behalf in respect to any transaction or communication had personally by said assignor,

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commission issued with a stay of proceedings, the stay will be vacated on motion of the adverse party; and on the cause being called for trial, the party taking the commission must establish the grounds for a further stay if there be any, for the return of the commission (*Voss* v. *Fielden*, 2 Sand. 690).

a. **Commissioners.**—The adverse party may object to the commissioners named in the moving papers (3 Johns. 251; 2 Wend. 62).

b. The commission to examine a witness in a foreign state or county may be directed to a resident of this State (3 Caines' R. 105).

c. **Interrogatories and directions for return of commission.**—Interrogatories are to be annexed to the commission; they must be signed by counsel, and settled before a justice of the court (2 R. S. 394, § 14). A county judge has no power to settle interrogatories in an action in the supreme court (*Ervin* v. *Voorhies*, 26 Barb. 127).

d. To procure the settlement, serve a copy of the interrogatories, and a notice (of four days) of the time and place at which they will be presented for settlement, on the opposite attorney. The opposite party may propose cross-interrogatories, a copy of which must be served two days before the time of settlement of the interrogatories (See 1 Edw. Ch. R. 649).

e. Where parties join in a commission they should deliver their interrogatories simultaneously (*Brush* v. *Vanderburgh*, 1 Edw. Ch. R. 649).

f. At the time of settlement either party may except to the interrogatories of the other, and the judge will decide on the exception. If an interrogatory is allowed to pass without exception, the answer to such interrogatory cannot be objected to at the trial, as incompetent evidence, provided it be fairly within the scope of the interrogatory (6 Cow. 404; 2 Wend. 65, 71, *contra*). Further questions may also be proposed, and if allowed, inserted among the interrogatories.

g. The settlement of interrogatories is equivalent to passing upon questions propounded to a witness when called to testify at the trial (*Macdonald* v. *Garrison*, 2 Hilton, 510).

h. In settling the interrogatories the judge will, if required, disallow such as there is reasonable ground to suppose do not relate to the issues to be tried (*Macdonald* v. *Garrison*, 2 Hilton, 510; 9 Abb. 178; *Blaisdell* v. *Raymond*, 9 Abb. 178, *note*).

i. The interrogatories being settled and engrossed, the judge endorses his allowance, and directs the manner in which the commission, with the interrogatories annexed, shall be returned (2 R. S. 394, §§ 14, 15).

j. In the supreme court, the direction usually is, that it be returned by mail, addressed to the clerk of the county in which the trial is to be had, designating the name and residence of such clerk (2 Hill, 502).

k. Where the place of trial of an action was changed, and a commission was afterwards issued and was directed to be returned to the clerk of the county originally named in the complaint as the place of trial, instead of the clerk of the county to which the trial was changed, it was held, that as it did not appear but that the place of trial was changed merely for the convenience of witnesses, the direction was proper (*Whitney* v. *Wynkoop*, 4 Abb. 370).

l. **Form of commission.**—To the commission should be annexed a copy of the sixteenth section of article 2, title iii., chap. vii., part iii., of the revised statutes (which contain instructions to the commissioners for executing the commision), together with any other particular directions that special circumstances may render necessary (*Smith* v. *Randall*, 3 Hill, 395). This provision is directory only, if the body of the commission contain the direction, although no directions are endorsed, it is sufficient (*Hall* v. *Barton*, 25 Barb. 274). These

or said party, respectively, with a deceased person, against parties who are the executors, administrators, heirs-at-law,

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provisions do not apply to commissions issued by justices of the peace. (*Id.*) If the commission be correctly executed, the court will presume that a copy of the said sixteenth section was annexed, until the contrary is shown (1 Hill, 249). The direction as to the manner of returning a commission must be signed by the officer settling the interrogatories, or the deposition cannot be read in evidence (*Crawford* v. *Loper*, 25 Barb. 449).

a. If any deeds or writings are to be proved, they, or copies thereof, should be annexed to the interrogatories, for the purpose of reference, description, and identification, producing the original on the examination of the witness. It is not indispensable that the original be annexed to the interrogatories (*Commercial B'k of Pa.* v. *Union B'k of N. Y.*, 1 Kernan, 203). Nor has the court the power to order the original instrument to be annexed to the commission (*Butler* v. *Lee*, 32 Barb. 75; 19 How. 384).

b. Where by mistake the name of C. instead of K. was inserted in the caption of the commission, the name of K. being on the commission and the commission being executed by K., held the error might be disregarded (*Hall* v. *Barton*, 25 Barb. 274).

c. Further instructions are contained in the printed forms of commissions sold by the law stationers.

d. The witnesses to be examined should be named in the commission; and this is a rule which is only departed from under very special circumstances, and never when, by reasonable diligence, the names of the witnesses can be ascertained (*Wright* v. *Jessup*, 3 Duer, 642). Where, by mistake, a witness intended to be examined was not rightly named in the commission, but the commissioners, notwithstanding such mistake, examined the witness,—held that the deposition was extra-judicial, and could not be read in evidence (*Brown* v. *Southworth*, 9 Paige, 352).

e. The commission should be sealed with the seal of the court out of which it issued; and if not so sealed it is defective (*Whitney* v. *Wynkoop*, 4 Abb. 370; *Tracy* v. *Suydam*, 30 Barb. 110); and a nullity (*Ford* v. *Williams*, 24 N. Y. 359).

f. The court will not depart from the usual method of issuing commissions to take testimony in foreign countries, unless important advantages to be gained by some other mode are shown (3 Bradf. Surr. R. 249). See *ante*, p. 757, *f.*

g. **The execution and return of the commission.**—Want of diligence on the part of a plaintiff in obtaining a return to a commission entitles the defendant to move for a non-suit (*Coles* v. *Thompson*, Col. & C. Cas. 330); see *ante*, p. 759, *l.*

h. The court will intend that the oath was publicly administered when the commissioners certify that they administered the oath; and such oath will be deemed to apply to the interrogatories on both sides (23 Wend. 38); and it need not appear by the return that the oath was publicly administered (1 Hill, 249). And a deposition has been received in evidence, although the oath to the witness was not administered by the commissioners, it appearing that they were prohibited from administering it, and that it was, in fact, administered by the local authorities (6 Wend. 476). But where it appeared by the return that the witnesses had been sworn "to make true answers to the interrogatories read to them," instead of being sworn "to tell the truth, the whole truth, and nothing but the truth," as the statute requires, it was held that the oath administered was insufficient, and the testimony taken under the commission not properly receivable in evidence (*Whitney* v. *Wynkoop*, 4 Abb. 370).

i. The absence of the return which the statute requires the commissioner to indorse upon the commission, though it may be a good reason for not al-

next of kin, or assignees of such deceased person, where they have acquired title to the cause of action immediately from

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lowing the deposition to be read on the trial, is not ground for suppressing the deposition upon motion. Whether the defect may be cured by sending back the commission to the commissioner to amend his return, query? (*Creamer* v. *Jackson*, 4 Abb. 413).

a. It is immaterial in whose handwriting the depositions are; the commissioners may employ a clerk (3 Peters, 8), although they are not bound to do so (2 Har. & Johns. 442).

b. On the execution of a commission, the parties have a right to appear by counsel (*Union B'k of Sandusky* v. *Torrey*, 2 Abb. 269; and see 8 Blackf. 443).

c. Cross-interrogatories cannot be withdrawn on the execution of the commission, unless by consent of the adverse party. (*Id.*)

d. Each interrogatory must be answered specifically; and it is not sufficient to say, "I have given an answer to this interrogatory in my answer to the —— interrogatory" (*Wilkes* v. *Welch*, 2 Code Rep. 64; *Union B'k of Sandusky* v. *Torrey*, 2 Abb. 269; 5 Duer, 626). Subsequently it was held that it is not a valid objection that cross-interrogatories in a commission, offered in evidence, are not all answered, where it appears that some of them, in whole or in part, are answered by reference to previous answers, the latter being full and explicit (*McCarty* v. *Edwards*, 24 How. 237).

e. Under a commission for the examination of a foreign witness who cannot speak English, the deposition must nevertheless be taken in English, by means of an interpreter (*Belmore* v. *Anderson*, 2 Cox Chan. Cas. 288).

f. A deed or other exhibit, proved under a commission, must be annexed to and returned with the commission (20 Johns. 361). Except it be in the custody of the law; then a copy is sufficient, and the exhibit may be produced on the trial, separate from the commission (6 Cow. 144). And where notes offered in evidence as proved by a witness examined on commission, were attached to and returned with his deposition, were marked A. and B., and had the names of the witness and the commissioners written upon them, and the witness in the deposition described the notes, to which he testified by dates, amounts, &c., corresponding with those of the notes offered, and stated they were produced to him on his examination, marked A. and B., and that he wrote his name upon them, and the commissioners in their return certified that the notes attached to the deposition were produced to the witness on his examination, and he signed his name thereon in their presence,—held that the notes offered in evidence were sufficiently identified as those testified to by the witness (*Brunskill* v. *James*, 1 Kernan, 294). Witnesses may be examined under a commission in respect to an original paper, by annexing a copy thereof to the interrogatories, and producing the original upon the examination and having it identified by the witness. The original need not be annexed to the interrogatories (*Comm. B'k of Penn.* v. *Union B'k of N. Y.*, 19 Barb. 392; aff'd 11 N. Y. 203).

g. Where an exhibit proved before a commissioner was a bill of sale executed by J. M. and wife, and the commissioner certified that the same was produced and shown to the said J. M., a witness sworn and examined, and by him deposed unto,—held the certificate was sufficient (*Hall* v. *Barton*, 25 Barb. 274).

h. Where the return was written on the deposition, and the deposition, commission, &c., were all annexed together in such a manner that the return could not be separated from the commission and the evidence,—held a substantial compliance with the statute (*Hall* v. *Barton*, 25 Barb. 274; *McCleary* v. *Edwards*, 27 *id.* 239). And in *Pendell* v. *Coon* (20 N. Y. 134), the court of appeals held that the return need not be indorsed on the commission itself,

said deceased person, or have been sued as such executors, administrators, heirs-at-law, next of kin, or assignees.

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nor upon a paper containing the depositions annexed or any part thereof; but that where it is necessary by reason of the paper containing the depositions being filled thereby, to annex an additional sheet of paper, the return may be upon such additional sheet (*Pendell* v. *Coon*, 20 N. Y. 134).

a. The deposition of a witness examined on interrogatories is admissible, although it appears on his examination he referred to papers which he refused to allow the commissioner to see (*Steinkeller* v. *Newton*, 2 M. & Rob. 372).

b. The signature of a commissioner will be judicially noticed, though his name be not written at length (1 Hill, 249). The annexing the papers together by wafers is sufficient. A tape and seal are not necessary. (*Ib.*) When a commission is directed to two, either or both of whom being authorized thereby to execute it, and the return is by only one of them, it will be presumed that he alone was present at its execution. (*Ib.*)

c. It will be presumed that the commissioner who took the testimony closed and sealed the package himself, and that he discharged his duty by doing all those things in the execution of the commission which he is not bound to certify specifically as done. And when the manner of the return is provided for by stipulation, it will be no objection to the reading of the depositions, that the direction on the return does not specify the clerk's residence. (*Id.*)

d. It cannot, however, be urged on the trial as an objection, that the depositions were not deposited in the post-office immediately after they were taken (28 Wend. 38).

e. Although there be nothing on the envelope, or elsewhere, showing that the commission was deposited as required by the statute, or that it was returned by mail, it will be presumed that the commission was so deposited and returned (*Hall* v. *Barton*, 25 Barb. 274).

f. If the packet containing the commission and return be transmitted by mail, the clerk to whom it is addressed must receive it from the post-office, and open and file it in his office. If delivered to an agent, he must deliver the packet to the clerk to whom it is dirtected, or to one of the judges of the court, who will receive and open it on the agent making affidavit that he received it from the hands of one of the commissioners, and that it has not been opened or altered since he received it.

g. If the agent be dead, or from sickness or other casualty be unable to deliver such packet personally, it may be received by the clerk or judge from the hands of any other person, upon such person making affidavit that he received the same from the agent, that the agent is dead, or otherwise unable to deliver it, that it has not hot been opened or altered since such person received it, and that he believes it has not been opened or altered since it came from the hands of the commissioners.

h. Where a commission is returned by an agent, his affidavit as prescribed by statute, that he received it from the hands of the commissioner, and that it has not been opened or altered since he received it, is indispensable, unless waived by consent. A commission returned by express and unaccompanied by such affidavit is inadmissable, although that method of returning it was expressly authorized by the commission (*Dwinelle* v. *Howland*, 1 Abb. 87).

i. The clerk or judge receiving and opening the commission, must immediately file the same in the office of the clerk of the court from which it issued, or, if the action be pending in the supreme court, in the office of the clerk of the county in which the action is triable (20 Johns. 357).

j. The parties, or their attorneys, may agree in writing on the manner in

But where such executors, administrators, heirs-at-law, next of kin, or assignees shall be examined on their own behalf in

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which the commission shall be returned; and on filing such agreement in the clerk's office, the attorney for the party suing out the commission may endorse on it a direction according to such agreement, and the commission shall be returned accordingly.

a. Where the direction as to the return of a commission required it to be inclosed in a wrapper and deposited in the post-office at Toronto by the commissioners, directed to W. B., Buffalo, and a certificate thereof indorsed upon the wrapper by the commissioners, and the commission was received from the post-office at Buffalo, post-marked "Toronto,"—held, that it was not requisite that the certificate on the wrapper should state that the commission was deposited in the post-office by the commissioners (*Brumskill* v *James*, 1 Kernan, 294). In the foregoing case the certificate was, "We certify that within is contained the commission, interrogatories, exhibits, depositions, and the examinations, taken before us in a certain suit where Thomas Brumskill is plaintiff and William I. James, joined in this action with Eliza Eaglesum, is defendant."

b. The commission, return, depositions, and exhibits annexed, are required to be kept on file in the office of the clerk to whom they were addressed (unless otherwise directed by a special order of the court), when they are to be at all times open to the inspection of the parties, who are entitled to copies on payment of the fees allowed by law.

c. On the trial of the cause, the examination and depositions taken under the commission (or an exemplification thereof, where the originals are filed in any other county than that in which the cause is tried), may be offered and used in evidence by either party.

d. Every objection to the competency or credibility of a witness so examined, or to the competency or relevancy of any question put to him, or of any answer given by him, may be made in the same manner and with the like effect as if the witness were personally examined at the trial. The objection to an interrogatory annexed to a commission, on the ground of its being leading, may be made when the answer of the witness is proposed to be read in evidence; especially when the interrogatories are annexed under a stipulation expressly saving all legal exceptions (*Fleming* v. *Hollenback*, 7 Barb. 271). And generally it is in time to take exceptions to interrogatories when the answers are offered in evidence on the trial (2 Wend. 65, 71; 6 Cow. 404, 416, *contra*). But the statute provision reserving to the parties every objection to the competency or relevancy of any question put to or answer given by a witness examined upon commission, is not applicable to a case in which the parties have stipulated upon the objections which are reserved and thus by implication waiving all others (*Moss* v. *Cloyes*, 11 Barb. 101; and see *Cope* v. *Sibley*, 12 Barb. 521).

e. "Where depositions taken on a commission are offered to be read on the trial, and the opposite party objects to them on the ground that the interrogatories are leading, the question whether the interrogatories and the answers thereto are admissible is one addressed to the discretion of the court (*Cope* v. *Sibley*, 12 Barb. 521; disapproving *Williams* v. *Eldridge*, 1 Hill, 249; and see *Hall* v. *Barton*, 25 Barb. 274).

f. Where the attorneys indorsed on the interrogatories: "It is stipulated that the within interrogatories and cross-interrogatories are agreed upon, and that these stipulation, have the same affect as the allowance of a judge, reserving all legal rights," held, that on the trial neither party could object to the reading of depositions on the ground that the interrogatories were leading (*Cope* v. *Sibley*, 12 Barb. 521; and see *Morse* v. *Cloyes*, 11 Barb. 101).

g. When a commission has been returned and opened, so that its contents

regard to any conversation or transaction had between the deceased person and said assignor, or said party, respectively,

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might, with reasonable diligence, have been known to the parties before the trial of the cause, a motion for the suppression or re-execution of the commission on the ground of its irregular or defective execution, must be made at chambers, and will not be entertained by the judge on the trial. The objections on the trial are limited to the competency of the witnesses or the admissibility of their testimony." This was pronounced as the rule of practice in the superior court (See 2 Abb. 271; and see *Sheldon* v. *Wood*, 2 Bosw. 269).

a. A motion at the trial to suppress the whole of a deposition on the ground that some of the interrogatories and parts of the deposition are improper, should be denied (*Commercial Bank of Penn.* v. *Union Bank of New York*, 19 Barb. 391; 1 Kernan, 203). If any part of a deposition is competent, the objection should be confined to that part which is not so. (*Ib.*)

b. If a direct interrogatory and the answer of the witness to it, are properly excluded by the court, cross-interrogatories and the answers thereto, which are dependent upon the direct interrogatory, should also be excluded (*Fleming* v. *Hollenback*, 7 Barb. 271).

c. An answer not responsive to an interrogatory, may be objected to by either party on the trial and will thereupon be excluded (*Lansing* v. *Coley*, 13 Abb. 272). But under the general interrogatory, requiring a witness to state any thing known to him material to the issue *or* to the benefit of the party putting the interrogatory the witness may state a fact material to the issue, though it be to the detriment of such party (*Van Ness* v. *Bush*, 14 Abb. 33).

d. Where pertinent evidence is given in answer to the general interrogatory to which the attention of the opposing counsel was not called by the others, if he desires to cross-examine the witness as to such evidence, he should apply to the court for relief before the trial. It is not a ground for suppressing the whole deposition on the trial. If any part of the evidence so given is incompetent or impertinent, such part may be excluded. The refusal to suppress the deposition of a witness at the trial, where it was proved that the attorney of the party examining him, at the request of the witness, and before he was sworn, wrote down for him at his dictation the substance of what he afterwards testified to in answer to the interrogatories, is not error; it goes to the credibility of the evidence. If the witness was imposed upon, or any fact was misstated, colored, or concealed, the court, on motion for that purpose might set aside the deposition and order the commission to be executed anew, or grant other approriate relief (*Ibid*).

e. Where, on the return of a commission, it does not appear that the last general cross-interrogatory was put to and answered by the witness, the depositions cannot, in general, be read in evidence (4 Wash. C. C. Rep. 324; 25 Wend. 259).

f. Upon the deposition of a witness taken on commission being offered in evidence at the trial, the defendants objected on the ground that two cross-interrogatories, one embracing nineteen questions and the other five, were unanswered in part, but in what respect they were unanswered was not specifically stated. After the deposition had been received and read, the same objection was renewed and exception taken. *Held*, that it would be an unjustifiable exercise of discretion to suppress the entire deposition upon such a vague and indefinite objection, and that the refusal to do so was no ground for a new trial. It is only when the officer neglects to put the interrogatories as settled, or when the witness refuses to answer, that the deposition will be suppressed on the ground of the commission having been imperfectly executed. Where a witness has not been impeached, nor any foundation laid for his impeachment, by showing contradictory statements made by him as to a material fact, and he has not been interrogated as to what he said in a particular conversation, proof of declarations made by him on that occasion, in the ab-

then the said assignor or the said party may be examined in regard to such conversation or transaction, but not in regard to any new matter.

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sence of the party by whom he is called, cannot be received (*Valton* v. *Nat. Loan Fund Life Assur. Soc.*, 22 Barb. 9; approved 20 N. Y. 34). Where the taking of a deposition having been commenced, it was adjourned after four or five interrogatories were answered, upon the witness refusing to answer further because of vertigo and consequent confusion of mind; and subsequently the witness appeared again with his counsel, and the examination being commenced from the beginning, the witness read his answers from a paper he brought, which had been prepared by himself and counsel, and was in his counsel's hand-writing,—*held*, upon motion, that the deposition must be suppressed. *It seems* that in such a case the answers taken upon the first examination should not have been disregarded by the commissioner, but that the proceedings should have been stated by him as they took place, and both examinations should have been included in the deposition returned (*Creamer* v. *Jackson*, 4 Abb. 413).

a. If a witness, after being examined on a commission, should come into the State, he may be examined on the trial (17 Johns. 345).

b. **Second commission.**—The court will sometimes allow a second commission to issue (17 Johns. 343; 2 Caines R. 47, 253; 1 ib. 345; 3 ib. 321; 2 Sand. 689, 690).

c. After the testimony of a witness has been taken upon a commission, and the commission returned, the party cannot have a new commission to re-examine the witness merely on the expectation that he may now swear more definitely than before, in the absence of any suggestion that the witness has made a mistake, or that new evidence has been discovered. More especially will such an application be refused when the only other witness, who was cognizant of the fact to which the witness is sought to be examined, is dead (*Raney* v. *Weed*, 1 Barb. 220).

d. An amendment of the pleadings does not render inadmissible a deposition previously taken (*Vincent* v. *Conklin*, 1 E. D. Smith, 204). The plaintiff's case rested principally on a deposition taken under a commission. After the taking the deposition the pleadings were amended in form, but the issues between the parties were not in substance changed,—held, that the deposition was admissible in evidence. "If either party wished further to examine the witness, a motion should have beeen made for a further commission, and if not, and the testimony was inapplicable to the new issue, a motion to suppress the deposition would have been proper; but we are not prepared to hold that a mere technical amendment of proceedings renders void all previous depositions which may have been taken in a cause." (*Ib.*, Ingraham, First J).

e. **Amending return of commissioners.**—If a commission be defectively executed, the court has power to order it to be returned to have the defect amended, and it is not necessary to issue a new commission (1 Code Rep. N. S. 289; *Sheldon* v. *Wood*, 2 Bosw. 269).

f. **Costs of a commission.**—Costs of a commission do not include the charges of a solicitor employed abroad (*Dunham* v. *Sherman*, 19 How. 572; 11 Abb. 152).

g. **Letters rogatory.**—The superior court held that it was inexpedient to grant the process of that court to compel the attendance of witnesses to be examined under a commission from a foreign country, *the case not being provided for by statute* (*In Re the petition of Jay*, 5 Sand. 647); but the supreme court granted the process required. (*Ib.* 680.)

h. **Examination de bene esse.**—The examination of witnesses (and parties) *de bene esse*, is provided for by 2 R. S. 391 to 393, amended by Laws of 1851, p. 871; Laws of 1852, p. 471; and Code, § 390.

But if the testimony of a party to the action or proceeding has been taken, and he shall afterwards die, and after his death

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a. Where a party or witness, whose testimony may be considered material on either side, is about leaving the State, and there is no probability of his returning in time to appear at the trial, or is so sick or infirm as to be unable to attend, either party may apply to a judge for leave to take his testimony *de bene esse*—that is conditionally—to be used only in case the personal attendance of such witness at the trial cannot be procured.

b. This application may be made at any stage of the cause (7 Cow. 489), on an affidavit stating,—

1. The nature of the action, the plaintiff's demand;
2. If the application be made by the defendant, the nature of his defence;
3. The name and residence of the witness;
4. That the testimony of such witness is material and necessary for the party making such application, in the prosecution or defence of such suit, as the case may be; and
5. That such witness is about to depart from this State, or that he is so sick or infirm as to afford reasonable grounds for apprehension that he will not be able to attend the trial.

c. The time fixed for the examination, must not exceed twenty days from the date of the order, and may be as much shorter as the exigencies of the case may require, and the residence of the adverse party or his attorney will allow, in order to afford opportunity to attend such examination.

d. A summons may issue to compel the attendance of the witness, and which must be served in the same manner as a subpœna (See 1 Bosw. 611).

e. Or the judge may, in his discretion, make an order, requiring the adverse party to show cause, on a day in such order to be named, why such testimony should not be taken by a referee, to be appointed by him; and in such order shall direct the time and mode of the service thereof. Such an order is an order out of court, and without notice, and in actions in the supreme court, may be made by any judge of the court in any part of the State (*Bank of Silver Creek* v. *Browning*, 16 Abb. 272).

f. An order requiring the adverse party to attend the examination of a witness *de bene esse* in an action in the supreme court may be made by any judge of the court in any part of the State (*Bank of Silver Creek* v. *Browning*, 16 Abb. 272).

g. At the time specified in the order, the opposite party may show cause against proceeding in the examination, by proof that the witness is not about to depart from this State, or that he is not sick or infirm, or that the application for his examination is made collusively, to avoid his being examined on the trial of the cause; and upon any such cause being shown, the application may be dismissed.

h. If no sufficient cause be shown, then, on proof of service of the order and a copy of the affidavit upon which it was granted, the party may either proceed to examine the witness and take his deposition,—in which shall be inserted any answer or declaration of the witness, which either of the parties shall require to be included therein,—or if the order was to show cause why the testimony should not be taken by a referee, the judge may appoint a referee to take such testimony, who shall take, certify and file the same, in the same manner and with the like effect as is provided for the examination of a witness by a judge of the court.

i. In taking a deposition, it is not necessary for the judge himself to write down the examination of the witness; it is sufficient that he administers the proper oath, and then, after the witness has been examined in his presence, and the examination has been written down by counsel, that he reads it over

the testimony so taken shall be used upon any trial or hearing, in behalf of his executors, administrators, heirs-at-law, next of

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to the witness before the signing and certifying thereof (*McDonald* v. *Garrison*, 9 Abb. 34; 18 How. 249).

a. The witness must be interrogated to every fact to be deposed to, as on a trial (7 Cow. 60).

b. The statute regulating the taking of depositions *de bene esse*, and requiring the officer to insert therein every answer of the witness examined, which either party shall require to be included, is complied with by confining the direction to *answers*, leaving the officer to exclude questions in his opinion illegal or irrelevant: and a party is not empowered by the statute to go into a course of irrelevant inquiry, and have answers thereto included in the deposition (*Gibson* v. *Pearsall*, 1 E. D. Smith, 90). "The defendant insists that the deposition of Vanderslice was improperly admitted, on the ground that an officer taking the examination of a witness *de bene esse*, is bound by statute to receive and take down every answer to questions proposed; and that in this case, the judge before whom the deposition was taken, refused to allow a question presented by the defendant's counsel on cross-examination, to be put to the witness at all. The statute is very explicit in its terms, requiring the officer to insert in the deposition every answer or declaration of the witness examined, which either party shall require to be included therein. It is, in my judgment, unreasonable and very unfortunate, if the proper construction of this statute permits a party who has a witness under examination, to make that the occasion for going into every species of irrelevant inquiry into matters having no possible connection with the controversy; and the abuses to which such a construction may lead, seem to me too obvious to require enumeration." (*Ib.*, Woodruff, J.)

c. The deposition being finished, must be carefully read over to, and subscribed by the witness, certified by the judge or referee taking it, and filed in the clerk's office within ten days thereafter; but where a deposition, taken *de bene esse*, is not filed within ten days as directed by the statute, the court *may* order it to be filed *nunc pro tunc* (*Burdell* v. *Burdell*, 11 N. Y. Leg. Obs. 189; 1 Duer, 625; *Bank of Silver Creek* v. *Browning* 16 Abb. 279).

d. If a witness, on being summoned to attend for the purpose of being examined *de bene esse*, fail to comply with the summons, the judge issuing the summons, on due proof of the service, and of the failure of the witness, is required to issue his warrant to the sheriff of the county, to apprehend the witness, and bring him before such judge to be examined. And if any witness, attending pursuant to the summons or brought before the officer, shall, without reasonble cause, refuse to be examined or to answer any legal or pertinent question, or to subscribe his deposition when taken, the officer issuing the summons shall, by warrant, commit such witness to the common jail of the county in which he resides, there to remain until he submits to be examined, or to answer, or to subscribe his deposition, as the case may be, or until he be discharged according to law.

e. The deposition thus taken *de bene esse* (or a certified copy thereof), may be given in evidence by either party on the trial of the cause, or upon the assessment of damages by the clerk, or by a writ of inquiry. But it must first be satisfactorily proved that the witness is unable to attend the trial or assessment, personally, by reason of death, insanity, sickness, or settled infirmity, or that he has continued absent from the State, so that his attendance could not be compelled by the ordinary process of law. Where the residence of a party in another State, at a given time, has been proved, the presumption, unless rebutted, is that it continues, and the burthen of proof is upon the party alleging a different place of residence (*Nixon* v. *Palmer*, 10 Barb. 175). Is a party against whom a deposition taken *de bene esse* is offered, a competent

kin, or assignees, the other party or the assignor of a thing in action, shall be a competent witness, as to any and all matters

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witness for the purpose of excluding the deposition? (*Ib.*) The uncorroborated testimony of an interested witness, that shortly before the trial he saw in this State a person proved by other testimony to be a resident of another State, is not sufficient to authorize the exclusion of a deposition of such person taken *de bene esse*. (*Ib.*)

a. To entitle the deposition of a witness examined *de bene esse*, under the statute, to be read at the trial, on the ground of his absence from the State, it must be proved by competent evidence, to the satisfaction of the court, that he has continued absent, out of the State, so that his attendance at such trial could not be compelledby the ordinary process of law. The mere declaration of his wife, out of court, that he is absent, without other evidence, does not constitute such proof. She is competent to prove the fact if it exists; and there is no reason why hearsay evidence should be admitted to establish it, when the fact itself may as easily be proved by the wife as her declaration concerning it by a third person (*Fry* v. *Bennett*, 4 Duer, 247). *Semble*, That in order to let in the deposition of a witness examined *de bene*, the absence of the witness must be shown by some one who can speak to the fact of his own knowledge; proof of inquiries made at the residence of the witness and of the answers given, is not enough (*Robinson* v. *Markis*, 2 M. & Rob. 375).

b. The party offering the deposition in evidence cannot rely merely upon the presumption of the inability of the witness to attend the trial, arising from his advanced age (3 Wend. 180). And in case of the absence of a witness, the party offering his deposition in evidence must prove that he has used due diligence to procure the attendance of the witness, and that he has made inquiries at his last place of abode, in order to have him subpœnaed (4 Wash. C. C. Rep. 219). Where it appears that every reasonable effort has been made to find the witness and there is reason to suppose he is out of the State, that is sufficient to authorize the reading of the deposition (*Roberts* v. *Carter*, 28 Barb. 462). And proof that the party examined resided in another State, that he had been seen there since he was examined; and that the witness had been informed that he was then, at the time of the trial, at his place of residence was held sufficient to entitle the deposition to be read (*Donnell* v. *Carver*, 6 Bosw. 621).

c. The preliminary proof may be made by affidavit, unless the proof is objected to specifically on the ground that it is by affidavit, and *vica voce* testimony insisted on (7 Cow. 59). The preliminary proof may be made by a party to the suit (*Harris* v. *Ely*, court of appeals, Dec. 1852; 1 Selden's Notes, 35; 10 Barb. 175; and see *Sheldon* v. *Wood*, 2 Bosw. 269).

d. The deposition of a foreign witness, taken *de bene esse*, may be read, though it appear that he came into this State on request of the party, for the purpose of being examined, and that he is at home in a foreign country, and might have been examined on a commission, and even though a commission may have been obtained for the purpose of examining him at his foreign residence 7 Cow. 69).

e. The opposite party may prevent the reading of the deposition, by satisfactory proof that sufficient notice was not given him to enable him to attend the examination of the witnesses, or that the examination was not, in all respects fair and conducted according to the statute. But he cannot object that the notice was too short, where he appears before the officer and omits there to object for that reason (7 Cow. 59). A party by appearing and cross-examining the witness, waives all irregularities in the proceedings to have the witness examined (*Rushmore* v. *Hall*, 12 Abb. 420).

f. The court will presume that the certificate that the deposition was read

to which the testimony so taken relates, notwithstanding anything in this section contained to the contrary thereof.

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over to the witness, &c., was not given until the statute in that respect had been complied with (*Sheldon* v. *Wood*, 2 Bosw. 268).

a. Formal defects in the affidavit on which the order for examination was obtained will not prevent the deposition taken pursuant to said order being read in evidence. (*Id.*)

b. The reading of the deposition may be prevented by proof that the witnesses' attendance might, with due diligence, be obtained (8 Barb. 530).

c. Where, after testimony has been taken conditionally, one of the plaintiffs dies and the action is continued by the survivor, under section 121, this testimony so taken, is admissible on the trial, just as though no change in the parties had taken place (*Markoe* v. *Aldrich*, 1 Abb. 55).

d. Testimony taken conditionally may be read on the trial if the witness is actually absent, notwithstanding the witness' in the interval between the taking of the testimony and the time of the trial has returned to the State. (*Id.*)

e. Where the execution of a document is proved without objection on an examination *de bene esse*, the opposite party cannot, on the trial, object to the reading of the document (*Ward* v. *Whitney*, 4 Selden, 445).

f. A party is not required, on the call of his opponent, to produce documents the execution of which he has proved upon the examination of a witness *de bene esse*. They remain under his control until read in evidence and he may read a portion of them and refrain from using the others at his election (*Edmonstone* v. *Hartshorn*, 19 N. Y., 9). The opposite party must procure a discovery of them before the trial, or be prepared with parol evidence of their contents on a refusal to produce them. (*Id.*)

g. A party who has caused a deposition to be taken on his own behalf, does not necessarily by offering and reading parts of it in evidence bind himself to read it all, nor make the whole of it evidence offered and put in by himself, nor make answers which are irrelevant and incompetent admissible (*Gellatly* v. *Lowery*, 6 Bosw. 113). In this respect the deposition of a party taken on his own behalf stands, on the same footing as any other deposition. If the answers which the party declines to read are relevant and competent the other party may read them or cause them to be read and use them as evidence in his own favor. (*Id.*)

h. **Examination of witnesses on interrogatories by consent.**—The testimony of any competent witness may be taken in this State, to be used in any civil suit or proceeding, on an agreement in writing to that effect being made between the parties, their attorneys or solicitors, and on interrogatories to be agreed upon in the same manner. Said testimony may be taken before a judge of any court of record of this State, or local officer elected to discharge the duties of county judge, or a justice of the peace of this State, who shall, before the interrogatories are put to him, publicly administer an oath to the witness that the answers given to said interrogatories shall be the truth, the whole truth, and nothing but the truth: and the testimony shall be duly and carefully reduced to writing by the officer, and read to the witness, and subscribed by him and certified by the officer. The testimony so taken, together with the interrogatories, shall be filed with the clerk of the court in which the suit or proceeding shall be pending; and if in the supreme court and taken in a suit or proceeding at law, the same shall be filed with the clerk of the county in which the venue is laid; if in equity, with the clerk of the county in which the suit or proceeding shall be pending; and if before any court or officer having no clerk, then with said court or officer. And said testimony may be used in evidence on any trial or hearing of such suit or proceeding; and every objection to the competency or

a. Where the action is against the survivor of a firm (as such) which at the time the transaction occurred consisted of three persons, and two of such persons are dead, *semble* the plaintiff may be examined on his own behalf (*Bissell* v. *Hamlin*, 3 Bosw. 383; *Biglow* v. *Mallory*, 17 How. 427).

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credibility of said witness, or to the competency and relevancy of any answer given by him, may be made in the same manner and with the like effect as if such witness was personally examined at such trial or hearing (Laws 1847, ch. 280, section 78; 2 R. S. 4th ed., 374, section 50).

b. The deposition thus taken *de bene esse*, is to have the same effect, and no other, as the oral testimony of the witness would have if given on the trial or assessment; and every objection to the competency or credibility of the witness, and to the competency or relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if the witness were personally examined on the trial or assessment. (*Id.*)

CHAPTER VIII.

*Motions and Orders.**

SECTION 400. Definition of an order.
401. Definition of a motion. Motions, how and when made. Motions in the first district. Stay of proceedings. Compelling parties to testify on motions.
402. Notice of motion.
403. In actions in the supreme court, county judge may exercise powers of a judge at chambers. His orders, how reviewed.
404. In absence, &c., of judge at chambers, motion may be transferred to another judge.
405. Enlarging time for the proceedings in an action.

§ 400. [357.] *Definition of an Order.*

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

a. **Order and judgment, distinction between.**—The distinction between

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* *b.* **Motions to be on notice.**—All motions are to be on notice, or order to show cause (Rule 39). But an application to the court to remove a mere technical difficulty, by which other parties cannot be affected, may be made *ex parte* (*Re Patterson*, 4 How. 34).

c. **Motions must be made to the court.**—Except in the city of New York, and with the exception of certain cases specified by law, in which a motion may be made at chambers, motions must be made either at a general or special term (*Bedell* v. *Powell*, 3 Code Rep. 61. See *ante*, § 27 and note thereto).

d. **Road law.**—A motion for a new trial and assessment of damages, under the general road law (Laws of 1847, c. 210), can *only* be made at a special term (*In Re Fort Plain and Cooperstown Plank Road Co.; Ex Parte Ransom*, 3 Code Rep. 148).

e. **Petitions.**—Petitions should be addressed "to the Supreme Court of the People of the state of New York" (see *Re Buckhout*, 21 Barb. 348).

f. **Motion to set aside for irregularity.**—*See Rule* 39.—A motion to set any proceeding on the ground of irregularity must be made promptly and before the moving party takes any other step in the cause (*Perse and Brooks Paper Works* v. *Willet*, 14 Abb. 119; *Lawrence* v. *Jones*, 15 Abb. 110; *Low* v. *Graydon*, 14 Abb. 444). Or the irregularity is waived (1 Johns. Cas. 248; 10 Wend. 560; 4 Paige, 488; 10 Paige, 559; 11 Paige, 470; 11 How. 91; 16 How. 129; 371; 9 How. 7; 34; 78; 6 Abb. 307). Ignorance of the practice no excuse for not moving (1 Denio, 660). The court refused to set aside an irregular judgment after a delay of three months (*Jones* v. *U. S. Slate Co.*, 16 How. 129). And there can be no relief against an irregular judgment unless applied for within a year after the judgment is entered (*Van Benthuysen* v. *Lyle*, 8 How. 312; *Whitehead* v. *Pecare*, 9 How. 35, *ante*, p. 520 *c*). But where the defect is a want of jurisdiction the motion may be made at any time (*Hal-*

"an order" and "a judgment," is this: An order is the decision of a motion, a judgment is the decision of a trial (*Bentley* v. *Jones*, 3 Code Rep. 37; 4 How. 435; *King* v. *Stafford*, 5 How. 30).

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lett v. *Righters*, 13 How. 43; *Boredorf* v. *Dayton*, 17 Abb. 36, *note*; *Blake* v. *Simonson*, 12 Abb. 331).

a. Serving notice of appeal from a judgment is not a waiver of a motion to set aside the judgment for irregularity (*Chumpha* v. *Whiting*, 10 Abb. 448).

b. In all cases of irregularity merely, or to open a default, and in every case where the court at general term do not pass upon the merits, the motion is properly made at special term (*Corning* v. *Powers*, 9 How. 54).

c. **One motion in several actions.**—Where there are several actions, in the same court and between the same parties, a motion at the same time and for the same object in all the actions, should be made on one set of papers and one order only is necessary (*Hornfager* v. *Hornfager*, 6 How. 13).

d. **Motion papers to be legibly written (Rule 20).**—The motion papers being badly defaced with interlineations and erasures is a sufficient reason for denying a motion (*Henry* v. *Bow*, 20 How. 215). Costs of motion refused because motion papers badly written (*Bane* v. *Jones*, 8 D. & R. 114).

e. **All objections in one motion.**—A party complaining of any proceeding in a cause, must embody all objections, then existing, in one motion; he cannot make a separate motion for each objection. Thus, when a plaintiff moved to set aside a demurrer as irregular, and failing in that, moved to set aside the demurrer as frivolous, held, that the second motion could not be entertained (*Desmond* v. *Wolf*, 1 Code Rep. 49; *Pattison* v. *Bacon*, 12 Abb. 142; 21 How. 478; and see *Schlemmer* v. *Myerstein*, 19 How. 412; *Mills* v. *Thursby*, 11 How. 115).

f. **Motion for first day of term.**—Motions, except in the first district, are to be noticed for the first day of the term, and to be accompanied with copies of the affidavits, &c., on which the motion is to be made (Rule 49; 2 Code R. 67; 129).

g. **Grounds of motion.**—The particular *grounds* of a motion should appear plainly, either by the notice of motion or the affidavits (*Ellis* v. *Jones*, 6 How. 296; and see Rule 39).

h. **Countermand.**—A notice of motion cannot be so countermanded by the party who has given it, as to deprive the opposite party of the right of attending on the day specified, and having the motion dismissed with costs (*Bates* v. *James*, 1 Duer, 668. Approved by all the judges of the superior court).

i. **Death of party pending a motion.**—If a party dies pending a motion, the decision of which will not finally determine the action, an order of revival must be had before the decision of such motion can be entered (*Reed* v. *Butler*, 11 Abb. 128).

j. **Order concludes only parties or privies.**—An order on a summary application, in an action, is not conclusive upon a person not a party to the action, although he appears and opposes the granting the order (*Acker* v. *Ledyard*, 8 Barb. 515; see Clark's case, 15 Abb. 227).

k. **Order binding until set aside.**—If a motion is heard on insufficient notice, or, on defective papers, or in the wrong county, it may be irregular, but is not void and will be binding until set aside (*Blackmar* v. *Van Inwager*, 5 How. 367; 1 Code Rep. N. S. 80).

l. **Stay of proceeding until motion decided.**—Where there is a stay of proceedings until the decision of a motion and on deciding the motion the stay is ordered to be continued, the opposite party cannot take any step intermediate the decision and the service of the order (*Warren* v. *Wendell*, 13 Abb. 187).

m. **Order by default.**—Where a motion is noticed for a day out of an appointed term, it must be brought on on the day specified. And where the moving party does not appear on that day, he is not entitled to his motion by

a. **Motion papers to be filed.**—It is the duty of the respective attorneys to file the papers used by them, on a motion (*Savage* v. *Relyea*, 8 How. 276; 1 Code Rep. 42; Rule 8).

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default on a subsequent day (*Verneey* v. *Tawney*, 3 How. 360; see § 404). If no one appears to oppose, on proof of due service of notice of the motion, the moving party is entitled to the order asked for (Rules 39, 55), but no more than is asked for (*Anderson* v. *Johnson*, 1 Sand. 713; 1 Code Rep. 95). Thus, if the the notice of motion does not state that costs will be asked for, but that the party will apply "for such other and further order as the court may deem proper," it would be deemed irregular to take by default an order for the relief asked for *with* costs (*Northrup* v. *Van Deusen*, 3 Code Rep. 140; 5 How. 134). And in the court of appeals, an order will not be permitted to be taken by default, which interferes with the power of the court in controlling the calendar (*Crain* v. *Rowley*, 4 How. 79). And even if no one appears to oppose, yet if the service or proof of service, is insufficient, the court will deny the motion (3 Caines R. 88).

b. **Preliminary objection.**—If it is intended to take any objections, to a motion of a merely technical character, they should be raised before the merits of the motion are gone into; otherwise they will be considered as waived (3 Caines' R. 105; 16 How. 271).

c. **Affidavits on motion.**—Where papers have been served for a motion, and that motion is abandoned, the moving party may serve a fresh notice, stating therein that the motion will be made on the papers already served, intelligibly referring to them, and in that case such papers may be read on the second motion (*Van Bethuysen* v. *Stevens*, 14 How. 70), and although a party making a motion is not ordinarily allowed to read affidavits in support of his motion, copies of which have not been served, yet in cases where affidavits read in opposing a motion introduce new matter which may operate as a surprise upon the moving party, he is sometimes allowed to have the motion stand over for the purpose of obtaining affidavits to contradict or explain the new matter alleged, especially when the new matter charges the moving party with bad faith (*Schermerhorn* v. *Van Vorst*, 1 Code Rep. N. S. 400).

d. **Extent of relief on motion.**—Where a party, in his notice of motion served on the adverse party, asks for a specific relief, or for such other or further order as may be just, the court may afford any relief compatible with the facts of the case presented (*The People* v. *Turner*, 1 Cal. Rep. 152). Where the notice of motion was to dissolve the injunction, "and for other and further relief," &c., and the motion was denied at special term, the general term on appeal ordered a new defendant to be joined in the action, and it was held that such order was authorized by the prayer for other relief (*Martin* v. *Kanouse*, 2 Abb. 390; and see *Mann* v. *Brooks*, 7 How. 457). It is irregular to grant affirmative relief to a party opposing a motion, upon matters appearing in the opposing papers, which the moving party has no opportunity to answer (*Garvis* v. *Sheldon*, 3 Barb. 283). On a motion the court may grant the application in part and deny it in part (*De Santes* v. *Searle*, 11 How. 477).

e. On motion to vacate an *ex parte* order granting a stay for more than twenty days, the court may order a stay (*Clumpha* v. *Whiting*, 10 Abb. 448).

f. Facts occurring pending a motion held not to control the decision of the motion (*Rigney* v. *Tallmadge*, 17 How. 556).

g. **Amending moving papers.**—An opposing party is sometimes allowed to amend a defect in his proceedings, without being put to a motion on his part. But this may be allowed only in cases where the court can see, from the nature of the case, that no valid objection can be made to the amendment in case a motion is specifically made for that purpose. (*Ib.*) And where, after a motion had been heard and decided, it appeared that the affidavit used to oppose did not contain any jurat or signature of any officer before whom sworn, leave was granted to the party to re-swear the affidavit (8 How. 187, *note*).

a. **Renewing motion.**—A special motion cannot be renewed without leave of the court for that purpose obtained (*Mitchell* v. *Allen*, 12 Wend. 290; *Dollfus* v. *Frosch*, 5 Hill, 493; *Allen* v. *Gibbs*, 12 Wend. 202; *Willet* v. *Fayerweather*, 1 Barb. 73; *Bellinger* v. *Martindale*, 8 How. 113; *Bowman* v. *Shelden*, 5 Sand. 657; *Caneau* v. *Bryant*, 4 Abb. 402; *Snyder* v. *White*, 6 How. 321; *Mills* v. *Thurby*, 11 How. 114; Rule 23, and see *ante*, p. 406, *d*). A party cannot, by omitting to enter the order, obtain a right to renew a motion (*Peet* v. *Cowenhoven*, 14 Abb. 56). It is discretionary with the court to allow a renewal of a motion, on the same or additional papers, and its decision will not be reviewed on appeal (*White* v. *Munroe*, 12 Abb. 357). A motion denied on a preliminary objection may be allowed to be renewed on the merits (*Marvin* v. *Lewis*, 12 Abb. 482). But leave will not be given to renew a motion to enable a party to insist on facts known to him, but not insisted upon at the hearing of the original motion (*Pattison* v. *Bacon*, 12 Abb. 142; 21 How. 478, and see *Schlemmer* v. *Myerstein*, 19 How. 412; *Lovell* v. *Martin*, 12 Abb. 178).

b. **Conditional order.**—*See Rule* 57. Where an order is granted on a condition, the condition must be performed within twenty-four hours, unless otherwise expressed in the order (*Sabin* v. *Johnson*, 7 Cow. 421). An order granted on payment of costs is a conditional order, and it is of no force unless the costs be paid instanter, *i. e.* within twenty-four hours; and the party who is to pay costs must seek out the other party to make a tender of the costs (8 Johns. 272; 5 Paige, 82; 1 How. 7). And he must, at his peril, take notice of the order of the court, without waiting to be served with a copy of the order (*Wellink* v. *Renwick*, 22 Wend. 608). And if the party neglect to pay the costs on demand, the other party may proceed as if no such order had been made (*Pugsley* v. *Van Allen*, 8 Johns. 272). But where an order requires an act to be done, and costs to be paid, the payment of costs is not a condition precedent to the doing the act (*Sturtevant* v. *Fairman*, 4 Sand. 647; Rule 23; and see *Ford* v. *David*, 1 Bosw. 569). And where a party is relieved against a regular order on certain specified terms, it is the duty of the party applying for such relief to draw up and enter the order granting the same, without unreasonable delay, and if he neglects to do so, the adverse party upon filing an affidavit showing such neglect, and that the terms on which relief was to be granted have not been complied with, may proceed to carry into effect the original order without entering an order upon the application for relief against it (*Hoffman* v. *Tredwell*, 5 Paige, 82). When a party obtains an order to be relieved on terms against a regular order, he must seek out the attorneys of the adverse party, and perform, or offer to perform such terms, or he will lose the benefit of the order. (*Id.*)

c. **Chamber order after order of the court.**—After an order of a court in a cause, a further order of a judge as chambers on the same subject is irregular (*Stansbury* v. *Durell*, 1 Johns. C. 396).

d. **Entitling order.**—The entitling an order as granted at a special term, which by law may be made by a judge out of court only, or the making such order by a judge when sitting at a special term, instead of when sitting at chambers, will not vitiate the order (*In the matter of the Knickerbocker Bank*, 19 Barb. 602; and see *Dresser* v. *Van Pelt*, 15 How. 19, and 5 Abb. 53; 10 How. 425).

e. **Entry of order.**—Neither party can have any benefit from a decision of the court until the order upon such decision is drawn up and entered (*ante*, p. 684, *a*). And it is the duty of the prevailing party to see that the order conforms to the decision (*Savage* v. *Relyea*, 1 Code R. 42; 3 How. 276; *La Farge* v. *Van Wagenen*, 14 How. 57). The order should be dated as of the day it is actually entered. But where it is dated as of the day the decision was made, the party entering cannot afterwards object to it on that ground. If the party entitled to draw up the order neglects to enter it for twenty-four hours after the decision is made, any other party interested in the entry of the order, may enter it. Where an order is special in its provisions the party entitled to draw up the same should submit a copy of the proposed order to the adverse party, so that he may propose amendments (*Whitney* v. *Belden*, 4 Paige, 140). [In the Superior Court of New York city, where an order is entered *ex parte*, and the

opposite party is dissatisfied with it, he may on a notice of two days have a re-settlement.] See, *ante*, p. 687, *c*). If the successful party does not enter the order, the unsuccessful party may do so, in order to appeal (*Post* v. *Couenhoven*, 14 Abb. 56; and see *ante*, p. 465, *b*).

a. **Order, to what time it relates.**—The court never allows a party to be prejudiced by its own delay. And where the court delays announcing its decision on a motion, the decision when made relates back to the time when the motion was made, and any proceedings taken intermediate the making the motion and the announcement of the decision will be at the risk of having them set aside if conflicting with the decision. Thus, where a defendant moved on the 29th of January to change the place of trial, and the decision granting his motion was not announced till the 24th of February, the plaintiff in the interim having taken an inquest, held that the inquest was *irregular*, and on motion it was set aside (*Wilson* v. *Henderson*, 15 How. 90).

b. **Void order.**—An order returnable on a Sunday is void (*Arctic Fire Ins. Co.* v. *Hicks*, 7 Abb. 204). And, *semble*, so is an order made on a motion in the wrong county (*Newcomb* v. *Reed*, 14 How. 100; and see 13 id. 374; 5 id. 367; 2 Code R. 76; 10 How. 424).

c. **Denying motion, on party refusing to be examined orally.**—A judge before whom a motion is heard at special term cannot direct the responding party to appear before him and be examined orally touching the matters of fact involved in the controversy, and upon his refusing to submit to such examination, determine the motion against him for that cause (*Meyer* v. *Lent*, 7 Abb. 225; reversing 16 Barb. 538; see now, § 401).

d. **Reference on motion.**—It seems that if the affidavits on a motion are not sufficiently definite, the court should order a reference to ascertain and report the facts (*Id.*; and see, *ante*, p. 493, *c*).

e. **Commission to examine witnesses, on a motion.**—See *ante*, p. 757, *g*.

f. **Serving copy pleadings.**—When a motion is to be heard on the pleadings it is not necessary to serve a copy of such pleadings (*Newbury* v. *Newbury*, 6 How. 182).

g. Copies of pleadings served on the adverse party should be perfect copies, including signatures, jurat, &c., and the party served has a right to presume that the copy pleading served is a correct copy. But where the original is correct and the copy defective, the party serving the copy may be allowed to serve an amended copy on payment of costs occasioned by the irregularity (*Littlejohn* v. *Munn*, 3 Paige, 200).

h. **Right to begin on motion.**—When a motion is brought before the court upon an order to show cause, the order is regarded as a notice of motion, and the party obtaining it is entitled to open and close the argument (*N. Y. & Harlem R. R. Co.* v. *Commissioners of Metropolitan Police*, 1 Hilton, 562).

i. **Objection to complaint on motion.**—The court will not as a general rule, on an interlocutory motion made by the plaintiff after issue joined, consider the objection that the complaint does not state facts sufficient to constitute a cause of action (*Banks* v. *Maher*, 2 Bosw. 691).

j. **Impeaching a deponent on a motion.**—The character of the deponent in an affidavit used on a motion may be impeached, by affidavit, but the opposite party should be afforded an opportunity to rebut such impeachment (see, *Francis* v. *Church*, Clarke, 475; *Merritt* v. *Baker*, 11 How. 456; *Clarke* v. *Frost*, 3 Cai. 125; and contra, *Callen* v. *Kearny*, 2 Cow. 529).

k. **Costs on a motion.**—Costs of a motion are not given on a motion being granted by default, unless asked for in the notice of motion or order to show cause (*Banta* v. *Marcellus*, 2 Barb. 374). But if the opposite party appears and litigates the motion, costs are in the discretion of the court whether asked for by the notice or not (*Banta* v. *Marcellus*, 2 Barb. 374).

l. Where a motion was granted in part and denied in part no costs were allowed to either party (*Corbin* v. *George*, 2 Abb. 465).

m. Costs denied where the moving party asked for more than he was entitled to (*Whipple* v. *Williams*, 4 How. 29).

a. Costs were given against the moving party because he had improperly asked for costs (*Weeks* v. *Southwick*, 12 How. 170).

b. Each party succeeding, no costs allowed to either (*Chapman* v. *Lemon*, 11 How. 240).

c. Costs to abide event (*Johnson* v. *Jillott*, 7 How. 485).

d. Motions denied with costs, because the moving papers did not state the irregularities complained of (*Perkins* v. *Mead*, 22 How, 476; *Selover* v. *Forbes*, 22 How. 477).

e. Motion to set aside proceedings because the folios not marked denied with costs, the moving papers not having the folios marked (*Sawyer* v. *Schoonmaker*, 8 How. 198).

f. **Service of order**—An order entered with the clerk is properly served by delivering a copy and at the same time showing a certified copy (*Smith* v. *Smith*, 23 How. 134).

g. One appeal from two orders.—Where two orders are made and entered in a cause on the same day, one of which substantially embraces the other, and the opposite party appeals from both orders, he may do so in one appeal (*Gregory* v. *Dodge*, 3 Paige, 90; and see *Toll* v. *Thomas*, 15 How. 316).

h. **Motions in the superior court.**—The practice of the superior court as to granting motions by default, was stated by Bosworth, J. (*Cobb* v. *Lackey*, 12 How. 200; 4 Duer, 673; 2 Abb. 158), as follows: *Ex parte* orders may be granted by any judge of the court, wherever he may be found within the territorial limits in which he is authorized to do official acts. Motions upon notice, or orders to show cause can be moved in *vacation*, in the absence of the adverse party, only before the justice who sits at chambers, on the day for which the notice is given or the order to show cause is returnable. Defaults for not making such motions can be moved before such justice only. Chambers during *vacation* is regularly held in the *general-term room*. During *term time*, motions on notice and orders to show cause, in the absence of the opposing attorney or counsel, can be moved only before the justice who holds the *special term*. Motions to discharge such notices or orders to show cause, on account of the default of the party serving them to bring them on, can be made before such justice only. When the attorneys or counsel of both parties attend, they may be heard before any judge of the court, who is disengaged. But there is but one place where defaults can be taken on the failure of the attorney serving a notice or order to show cause to bring on his motion, or on the failure of the attorney on whom it is served, to appear and oppose.

See, *ante*, § 27, and note thereto.

i. **Decision on a demurrer.**—(See *ante*, p. 684, *b*.) [The decision of the court allowing or overruling a demurrer, is in the form of *an order for judgment*, in all cases, whether it gives leave to amend or not. That order for judgment is appealable, and is to be appealed from as any other order. Of course, it must be so appealed from while it remains an order, for after a judgment is entered, it becomes merged in the judgment; an appeal from the order would then be futile and irregular. The appeal must be from the judgment. This is the result of the decisions (see *Ford* v. *Turner*, 5 Duer, 684; 13 How. 193; 3 Abb. 385; *Phipps* v. *Van Cott*, 4 Abb. 90; 15 How. 110; *Ives* v. *Miller*, 19 Barb. 197; *Reynolds* v. *Freeman*, 4 Sand. 702; *Bentley* v. *Jones*, 3 Code R. 37; 4 How. 335; *King* v. *Stafford*, 5 How. 30; *Wood* v. *Lambert*, 1 Code R. N. S 214; 3 Sand. 724; *Drummond* v. *Husson*, 8 How. 247; 1 Duer, 633; *Dolph* v. *White*, 8 How. 275; *Lewis* v. *Acker*, 8 How. 414). If the demurrer is on to the whole pleading, and the decision reserves no leave to amend, nor grants a stay of proceedings, then, as an appeal from the decision as an order is not a stay of the proceedings (*ante*, p. 685, *i*), there is nothing to prevent the successful party entering a judgment on the decision in his favor, and forcing the opposite party to review the decision, if at all, by an appeal from the judgment. If an appeal be taken to the general term, from a decision on a demurrer, as an appeal from an order, and the general term affirms such decision, and judgment is thereupon entered, the cause must, in all cases, be again brought before the general term, on an

appeal from the judgment, before it can be appealed to the court of appeals see *Hollister Bank* v. *Vail*, 15 N. Y. 593).

a. **Decision on a motion under section 247.**—The decision of a judge at chambers, under section 247, holding an answer frivolous and ordering judgment for the plaintiff, is *an order* (*West R. R. Co.* v. *Kortright*, 10 How. 457; *Gould* v. *Carpenter*, 7 id. 98). In other cases it has been held that a decision on an application under section 247 is a judgment, and must be appealed from as a judgment (*Bentley* v. *Jones*, 3 Code Rep. 37; 4 How. 335; *Darrow* v. *Miller*, 3 Code Rep. 241; *King* v. *Stafford*, 5 How. 30; *Roberts* v. *Morrison*, 7 id. 396; *Lawrence* v. *Davis*, id. 354; *Hull* v. *Smith*, 8 id. 150; *Martin* v. *Kanouse*, 2 Abb. 390; *Bruce* v. *Pinkney*, 8 How. 397). Where a motion for judgment upon a demurrer as frivolous was granted, with leave to defendant to answer in two days, the defendant appealed from the decision to the general term, as from an order,—held by the N. Y. Com. Pleas, at general term, that he might do so (*Lee* v. *Ainslie*, 4 Abb. 90, *note*, and id. 463; see *supra*, and *ante*, p. 674, *b*).

b. **Dismissal of complaint.**—The dismissal of the complaint for not proceeding in the action, is a *judgment* (*Tillspaugh* v. *Dick*, 8 How. 33) [Doubtful].

c. **Order for new trial.**—An order of the supreme court at general term, reversing a judgment obtained at the circuit court, and ordering a new trial is not a judgment (*Duane* v. *Northern R. R. Co.* 4 How. 364).

See note to subdivision 5 of section 307.

* § 401. [358 to 362.] (Am'd 1849, 1852, 1858, 1859, 1862). *Definition of a motion. Motions, how and where made. Motions in the first district. Stay of proceedings. Compelling parties to testify.*

(1.) An application for an order is a motion.

(2.) Motions may be made, in the first judicial district, to a judge or justice out of court, except for a new trial on the merits.

(3.) Orders made out of court, without notice, may be made by any judge of the court, in any part of the State; and they may also be made by a county judge of the county where the action is triable, or by the county judge of the county in which the attorney for the moving party resides, except to stay proceedings after verdict.

(4.) Motions upon notice must be made within the district in which the action is triable, or in a county adjoining that in which it is triable; except that where the action is triable in the first judicial district, the motion must be made therein, and no motion upon notice can be made in the first judicial district, in an action triable elsewhere.

(5.) In all the districts, a motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, shall have preference over all other motions.

(6.) No order to stay proceedings for a longer time than

**Amended—See Appendix.*

twenty days shall be granted by a judge out of court, except upon previous notice to the adverse party.

(7.) When any party intends to make or oppose a motion in any court of record, and it shall be necessary for him to have the affidavit of any person who shall have refused to make the same, such court may, by order, appoint a referee to take the affidavit or deposition of such person. Such person may be subpœnaed and compelled to attend and make an affidavit before such referee, the same as before a referee to whom it is referred to try an issue. And the fees of such referee for such service shall be three dollars per day.

a. This section (401) does not apply to suits existing at the time of the passage of the code, nor to a special statutory proceding (*In Re Hick's Will*, 5 How. 316; 2 Code Rep. 128; *Brockway* v. *Jewett*, 16 Barb. 590; *Wells* v. *Jones*, 2 Abb. 20).

b. **Subdivision 1. What is a motion?**—The following applications to the court have been held to be motions: Application for a commission (*Erwin* v. *Voorhies*, 26 Barb. 127; 13 How. 130); an appeal pursuant to § 349 (*Savage* v. *Darrow*, 2 Code R. 57): an application pursuant to section 247 (*Roberts* v. *Clarke*, 10 How. 415; *Gould* v. *Carpenter*, 7 *id.* 99; see, however, (*Jones* v. *Bently*, 3 Code R. 37; 4 How. 335; *King* v. *Stafford*, 5 *id.* 30); an application for a rehearing at general term by way of appeal from a single judge (*Van Wyck* v. *Alliger*, 1 Code R. 68). But the application to have costs of appeal from a surrogate's decree taxed is not a motion (*Brockway* v. *Jewett*, 16 Barb. 590; and see, *ante*, p. 620, *j.*)

c. **Subdivision 2.**—This applies to all motions, except the one excepted, "therefore an order for the appointment of a guardian in partition may be made by a judge at chambers" (*Disbrow* v. *Folger*, 5 Abb. 54; and see, *ante*, section 27.

d. **Subdivision 3.**—The term "*the court*" means the court in which the action is pending (*Mann* v. *Tyler*, 1 Code Rep. N. S. 383; 6 How. 236). A county judge may make an order, staying proceedings on a judgment on the report of a referee. A report of a referee is not a *verdict* (*Otis* v. *Spencer*, 8 How. 171). A county judge before whom a proceeding supplementary to the execution is pending cannot make an order staying such proceeding (*B'k of Genesee* v. *Spencer*, 15 How. 412; and see *id.* 14; *Gould* v. *Chapin*, 4 How. 185; and *ante*, 147, *a.*)

e. **Subdivision 4.**—In order to authorize the court to hear a motion it is not necessary to show that it is made in the proper county. If not thus made, that fact can be shown in opposition to the motion, or it may furnish ground for vacating any order taken by default on such motion, and perhaps any order on such motion would be void (*Newcombe* v. *Reed*, 14 How. 100; see, however, as to the order being void, *Blackmar* v. *Van Inwager*, 5 *id.* 367; *Geller* v. *Hoyt*, 7 *id.* 265).

f. The county in which an action is triable, is the county in which the venue is laid, that is, the county named as place of trial in the complaint (*Gould* v. *Chapin*, 4 How. 185; *Canal B'k* v. *Harris*, 1 Abb. 192). The word *triable* applies only to the county named as the place of trial (*Bangs* v. *Selden*, 13 How. 168). Thus where the plaintiff and defendant reside in different counties not adjoining, and in different judicial districts not adjoining, and the plaintiff names the county of his residence as the place of trial, that is the county in which the action is triable, until the place of trial is changed by an order of the court (*Id.*; S. C. *id.* 374; *Askins* v. *Hearns*, 3 Abb. 184; *Chubbuck* v. *Morrisson*, 6 How. 367.

a. Where no copy of the complaint has been served, and no complaint has been filed, the defendant, for the purpose of moving, is at liberty to regard the county in which the summons states the complaint will be filed, as the county in which the action is triable (*Johnson* v. *Bryan*, 1 Code Rep N. S. 46; *Davison* v. *Powell*, 13 How. 287). And *semble*, where no place of trial is named in the complaint, the motion may be made in any district within which the action is properly triable (*Hotchkiss* v. *Crocker*, 15 How. 336.)

b. **Erie county.**—Actions triable in Erie county require all motions in relation to them to be made in the 8th district, as there are no counties out of that district adjoining Erie (*Inglehart* v. *Johnson*, 6 How. 80.)

c. **Orleans county.**—All motions in the supreme court, and all suits and proceedings in equity in said court, arising in the county of Orleans, may be brought to a hearing at any special or general term of said court in the county of Erie, in the same manner as though the said county of Erie was adjourning the said county of Orleans (Laws of 1848, ch. 35, p. 47.)

d. **First district.**—The special or general terms of the supreme court in the first judicial district have no jurisdiction to hear a motion [upon notice] in an action triable in another district (*Harris* v. *Clark*, 10 How. 415; *Canal Bank* v. *Harris*, id. 452; 19 Barb. 587; *Wheeler* v. *Maitland*, 12 How. 35). An application for an order of supersedeas (under 2 R. S. 556, §§ 36, 37) may be made to the judge of the first district, although the action is triable elsewhere (*Wells* v. *Jones*, 2 Abb. 20). It is not a case governed by section 401 (*id.;* and see *Weed* v. *Sturgis*, 13 How. 130; *Cunningham* v. *Widing*, 5 Abb. 413).

e. **Subdivision 6.**—No judge has the right arbitrarily to make an ex-parte order staying proceedings in an action for a given period, or twenty days (§ 401; *Mills* v. *Thursby*, 11 How. 114). The stay should always be until the party obtaining it can make some other application for relief (*Chubbuck* v. *Morrison*, 6 How. 367); and in *Sales* v. *Woodin* (8 id. 350), the same judge (Harris) held that an order to stay proceedings, to render it effectual, must be accompanied by a notice of motion. An order to stay proceedings for a given number of days is never proper. It should always be limited by a time when the party can make application for the relief he seeks. Whether an *ex-parte* order of a judge at chambers staying proceedings until the decision of an appeal is valid, although the effect of the order must be to create a stay for more than twenty days (*Lottimer* v. *Lord*, 4 E. D. Smith, 184). Held it is not valid (*Steam Nav. Co.* v. *Weed*, 8 How. 49; contra, of an order made by the court (*Harris* v. *Clark*, 10 How. 421). In one case (*Langdon* v. *Wilkes*, 1 Code Rep. N. S. 10), it was held by King, J., that, several orders each staying the proceedings for less than twenty days, but collectively more than twenty days, might be made. That case was cited in the superior court; and per Duer, J., "I cannot follow the decision that has been cited; the meaning of the code is that there shall be no stay of proceedings beyond twenty days, except upon notice to the adverse party; and whether a stay exceeding the time limited be granted by a single order or by successive orders, is immaterial. The intent of the provision is as much violated in the one case as in the other; nor do the words force us to adopt a different construction. A second order extending the stay twenty days beyond the twenty first allowed, is as truly an order to stay proceedings for a longer time than the code permits, as a single order for forty days" (*Anon.* 5 Sand. 656); *Marvin* v. *Lewis*, 12 Abb. 482; and in *Sales* v. *Woodin* (8 How. 349), where a defendant obtained two consecutive ex-parte orders, simply "that the plaintiff's proceedings be stayed twenty days," on applying ex-parte for a third order to the like effect, Harris, J., observed, "Such practice is a clear violation of the *spirit* if not the letter of section 401. The obvious intention of the legislature was that the power of a judge to arrest the proceedings of a party by an ex-parte order should be limited to twenty days. To effect a stay for a longer time by a series of orders each by itself within the statutory limit, but in the aggregate exceeding that limit, is but an *evasion* of the statute. It is but an attempt to accomplish indirectly what could not be done directly."

a. An order extending the time to make a case or exceptions is not *per se* a stay of proceedings, and this clause of the section does not apply to such an order (*Thompson* v. *Blanchard*, 1 Code Rep. 105; *Huff* v. *Bennett*, 2 ib. 189; *Adams* v. *Sage*, 13 How. 18; and see *Salls* v. *Butler*, 27 How. 133).

b. An order extending the time to answer was held not to be a stay of proceedings (*Wilcock* v. *Curtis*, 1 Code Rep. 96; *Sisson* v. *Lawrence*, 16 Abb. 259, *note*; 25 How. 435); and therefor a county judge may by an *ex-parte* order, extend the time to answer more than twenty days. (*Id.*)

c. An order of a judge staying proceedings cannot be treated as a nullity on the ground that it was improvidently granted, or improperly or fraudulently obtained (*Harris* v. *Clark*, 10 How. 416). The proper remedy is to move to have it vacated (*Hempstead* v. *Hempstead*, 7 id. 8). There are dicta to the effect that an order of a judge staying the proceedings more than twenty days may be treated as a nullity (*Anon.* 5 Sand. 656; *Sales* v. *Woodin*, 8 How. 349; (*Huff* v. *Bennett*, 2 Code Rep. 189); and in *Traver* v. *Silvernail* (2 Code Rep. 96), where the plaintiff disregarded the order of the county judge staying the proceedings, after verdict and entered judgment, Parker, J. held the judge had no power to stay the proceedings, and that the plaintiff was not irregular in disregarding the order. An order made out of court and without notice, staying proceedings for more than twenty days, is void (*Bangs* v. *Selden*, 13 How. 374; see 7 Abb. 80; 10 Abb. 448; 4 How. 248). *Semble*, the order is good for twenty days (*Bangs* v. *Selden*, 13 How. 374).

d. The provision that no order staying proceedings for a longer period than twenty days shall be granted by a judge out of court, *ex parte*, applies to the case of an order made by a judge sitting at chambers and holding special term at the same time; and an order so made *ex parte*, staying proceedings for a longer period than twenty days, but entitled "at chambers," will be deemed as granted out of court, and will be set aside (*Wood* v. *Kimball*, 9 Abb. 419; 18 How. 163). In such a case, the court on setting aside the order, will direct a stay of proceedings to allow the party to renew his motion. (*Id.*)

e. Where an order is obtained staying plaintiff's proceedings pending a motion, the defendant is entitled to the whole of the day on which the motion is disposed of for taking the next step in the cause, although pending the stay his time to take such step may have expired (see *Vernon* v. *Hodgkinson*, 3 Cr. M. & R. 151; 1 Tyrw. & Gr. 427; 4 Dowl. 665).

f. As to taking deposition of a party or witness upon a motion see *ante*, page 759, *g.*

§ 402. [363.] (Am'd 1849.) *Notice of motion.*

When a notice of a motion is necessary, it must be served eight days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

g. A notice of less than eight days is in the absence of an order to show cause irregular (*Rogers* v. *McElhone*, 12 Abb. 292; 20 How. 441); the objection to the length of the notice must be made on the hearing of the motion; it cannot be insisted upon for the first time on appeal (16 How. 271).

h. An order to show cause, returnable at special term, must be granted at special term, and not by a judge, and an order to show cause returnable before a judge must be returnable before the judge who made it (*Hasbrouck* v. *Ehrich*, 7 Abb. 76; *Merritt* v. *Slocum*, 6 How. 350).

i. The granting an order to show cause is not a matter of course (*Androvette* v. *Bowne*, 15 How. 75; 4 Abb. 440).

j. *Semble*, this section gives no authority to shorten the notice of a motion, pursuant to section 247 (*Lefferts* v. *Snediker*, 1 Abb. 41).

See sections 412, 413, Supreme Court Rule 49, and Rules of N. Y. Com. Pleas, in Appendix.

§ 403. [364.] *In actions in the supreme court, county judge may act at chambers. His orders, how reviewed.*

In an action in the supreme court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge of the supreme court at chambers, according to the existing practice, except as otherwise provided in this act. And in all cases where an order is made by a county judge, it may be reviewed in the same manner as if it had been made by a judge of the supreme court.

a. Every county judge within the county in which he shall have been elected, shall have power, and it shall be his duty, to perform all such duties, and to do all such acts, when not holding a county court, as might have been done or performed, by the laws in force on the 12th of May, 1847, by the judges of the common pleas, or by any one or more of them, at chambers or otherwise, when not holding court, or by any such judge being of the degree of counsellor of the supreme court, and acting as a supreme-court commissioner (2 R. S., Laws of 1847, ch. 470, § 27).

b. Where the place of trial mentioned in the complaint was the city and county of New York, and a county judge of the county of Kings had granted an injunction order, on motion to vacate such order the court said, "Section 218 says, the order may be made by '*a*' county judge, using the indefinite article; and section 408 defines what *county* judge is intended; and from that it appears it must be a county judge of the county in which the action is triable; that being so, the injunction order in this case is a nullity" (*Eddy* v. *Howlett*, 2 Code Rep. 76; and see *Chubbuck* v. *Morrison*, 6 How. 367).

c. A county judge has no power to hear a motion, as such, in an action pending in the supreme cour (*Merritt* v. *Slocum*, 3 How. 309; *Rogers* v. *McElhone*, 12 Abb. 292; 20 How. 441).

d. Where a county judge makes an order in an action pending in the supreme court, he acts as a justice of that court at chambers, and his orders are to be reviewed in the same manner as an order at chambers (*Conklin* v. *Dutcher*, 1 Code Rep. N. S. 49; 5 How. 386).

See Rules of New York Common Pleas, in Appendix; and *ante*, p. 760, *c*.

§ 404. [365.] (Am'd 1849.) *In absence, &c. of judge at chambers, motion may be transferred to another judge.*

When notice of a motion is given, or an order to show cause is returnable before a judge out of court, and at the time fixed for the motion he is absent or unable to hear it, the same may be transferred, by his order, to some other judge, before whom the motion might originally have been made.

e. "In the first district, all motions noticed for hearing at chambers, not heard on the day for which they are noticed, in consequence of the inability of the court to hear the same, stand over as a matter of course until the next day, unless a different disposition should be made by the direction of the judge, or the consent of parties (*Mathis* v. *Vail*, 10 How. 458).

f. In case of the death, sickness, resignation, or removal from office, absence from the county of his residence, or other disability of any officer before whom

any special proceeding authorized by any statute may have been commenced, and where no express provision is made by law for the continuance of such proceedings, the same may be continued by the successor in office of such officer, or by any other officer, residing in the same county, who might have originally instituted such proceedings; or if there be no such officer, then by the nearest public officer in any other county who might have originally had jurisdiction of the subject, matter of such proceedings, if such matter had occurred or existed in his own county (2 R. S. 284, § 51). Where a proceeding to attach for contempt in supplementary proceedings is pending before a county judge, and he goes out of office, such proceedings may by virtue of the above enactment be continued before his successor (*Holstein* v. *Rice*, 24 How. 135; and see *Cobb* v. *Harmon*, 23 N. Y. 155).

§ 405. [366.] (Am'd 1849.) *Enlarging time for proceedings in an action.*

The time within which any proceeding in an action must be had, after its commencement, except the time within which an appeal must be taken, may be enlarged, upon an affidavit showing grounds therefor by a judge of the court, or if the action be in the supreme court, by a county judge. The affidavit or a copy thereof must be served, with a copy of the order, or the order may be disregarded.

a. This section relates to the powers of a judge of the court at chambers, and has no application to the powers of the court (Marvin, J., *Haase* v. *N. Y. Cent. R. R. Co.* 14 How. 430; *Traver* v. *Silvernail*, 2 Code Rep. 97).

b. Where an act is to be done within a certain time, in which the concurrence of the court is necessary, and a party has done all that he is required to do to obtain the decision of the court, he is not to suffer through the court's delay; and if the court gives a decision after the time for doing the act is passed, the decision may be entered up as of the time when by law it ought to have been given (*Clapp* v. *Graves*, 9 Abb. 20).

c. **Time to make a case.**—Under the former practice, an order to enlarge the time to make a case was invariably granted *ex parte*, and without an affidavit, the judge who tried the cause acting from his own knowledge of the facts and questions of law arising in the case; section 405 allowing an order to be disregarded unless the affidavit on which it was granted, or a copy thereof, be served with a copy of the order, is inapplicable to an order to enlarge the time to make a case, *when the order is granted by the judge who tried the cause* (*Thompson* v. *Blanchard*, 1 Code Rep. 105). But if such an order be made by a judge other than the judge who tried the cause, the requirements of sections 405 and 401, subd. 3, must be complied with, and a copy of the affidavit must be served with the order (*ib.*; and *Savage* v. *Relyea*, 1 Code Rep. 42; 8 How. 276; and see *Adams* v. *Sage*, 13 How. 18).

d. A judge at chambers cannot extend the time to make a case *after* the ten days have expired. The party must apply to the court, on notice (*Doty* v *Brown*, 3 How. 375; *Sheldon* v. *Wood*, 14 How. 18).

e. **Serving copy affidavit.**—The provision in this section requiring the affidavit on which the order is made, or a copy thereof, to be served with a copy of the order, relates only to orders granted in actions enlarging the time within which any proceeding may be had, and does not, therefore, apply to an order under section 292 (*Green* v. *Bullard*, 8 How. 315). Where a party by mistake omits to serve his opponent with the copy order, a copy of the affidavit on which the order was granted, he is entitled to relief on terms (*Quinn* v. *Case*, 2 Hilton, 470).

a. **Copy affidavit.**—The copy affidavit should include the signature and jurats (3 Paige, 280); but it seems that omitting to include a copy of the *jurat* in the copy of affidavit served, does not render the proceedings irregular (*Graham* v. *McCoun*, 1 Code Rep. N. S. 43; 5 How. 353; *Barker* v. *Cook*, 16 Abb. 83; 40 Barb. 254).

See Rule 22.

CHAPTER IX.

Entitling Affidavits.

§ 406. [367.] *Existing suits. Affidavits defectively entitled, valid.*

It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title, or with a defective title, shall be as valid and effectual for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

a. Where an affidavit was entitled supreme court, instead of court of appeals, the court of appeals held it to be defective (*Clickman* v. *Clickman*, 1 Coms. 611).

b. An affidavit entitled in the "county court," for a motion for retaxation of costs, &c., in proceedings for "forcible entry and detainer," commenced before a county judge, and brought into the supreme court by *certiorari*, comes within this section and is sufficient (*People* v. *Townsend*, 6 How. 178).

c. On a motion to vacate an order, where the affidavits intelligibly refer to the action, an objection that the affidavits are entitled in the wrong court will be disregarded (*Blake* v. *Locy*, 1 Code Rep. N. S. 406; 6 How. 108).

d. The entitling an affidavit, made before the action is commenced, in a suit (which under the former practice was fatal), may now be disregarded, under sec. 176 of the code, as not affecting the substantial rights of the adverse party (*Pindar* v. *Black*, 2 Code Rep. 53; 4 How. 95).

e. This section does not apply to a notice of motion (1 Code Rep. 98), nor to proceedings on mandamus (*The People* v. *Dikeman*, 7 How. 124).

See *ante*, p. 554, *b*, 578, *f*.

f. The *title* of an affidavit embraces the name or style of the court, as well as the names of the parties. Hence an error in the name of the court, when it is certain that the opposite party has not been misled by it, is to be disregarded (*Bowman* v. *Sheldon*, 5 Sand. 657). And where it was objected to an affidavit that it was entitled in the *supreme* instead of the *superior* court, and it was admitted there was no other suit between the parties, the court said, "As this is the only suit between the parties, the plaintiff could not have been misled by the error in the name of the court;" and overruled the objection. (*Id.*)

g. Where a deponent is a marksman, the fact of the affidavit having been read over to him, and his understanding it, should be stated in the jurat (*Haynes* v. *Powell*, 3 Dowl. Pra. Cas. 599).

h. Affidavits should contain a venue—a venue being an essential part of an affidavit (see *Cook* v. *Staats*, 18 Barb. 408, and cases there cited).

Chapter X.

Computation of Time.

§ 407. [368.] *Existing suits. Time, how computed.*

The time within which an act is to be done, as herein provided, shall be computed by excluding the first day, and including the last. If the last day be Sunday, it shall be excluded.

a. In the computation of time, upon service of notice of trial, (except when the service is by mail, see § 412), the day of service is excluded, and the first day of term is included. This section establishes a general rule in such a case, notwithstanding the language in § 256 (*Easton* v. *Chamberlain*, 3 How. 412; *Dayton* v. *McIntyre*, 3 Code Rep. 104; 5 How. 117; *Bissell* v. *Bissell*, 11 Barb. 96).

b. A notice served on Saturday for Monday, is not a notice of two days (*Whipple* v. *Williams*, 4 How. 28). Sunday should be excluded in computing time, where the notice is less than a week. (*Ib.*) But see 2 Hill, 375; and in *King* v. *Dowdall* (2 Sand. 131) the court said, "We know of no rule or principle by which Sunday is to be excluded from the computation, where it is an intermediate day, and we supposed the law on the subject was settled. The law is established here, that Sunday must be computed, when it is an intermediate day." And see *McIntosh* v. *Great West. R. R.* (1 Hare, 330). And per Hand, J., "Nor is Sunday to be excluded in the computation, except in those cases where an act is to be performed within a certain length of time, and the last day for performance falls on a Sunday, and not when that day merely intervenes the notice and the time when an act is to be done on a specified day" (*Easton* v. *Chamberlain*, 3 How. 412; *Campbell* v. *Inter. Life Ass. Soc.* 4 Bosw. 298; see *ante*, p. 614, *d*). A notice served on the 14th for the 16th, is a notice of two days (*Ball* v. *Mander*, 19 How. 468; *Columbia Turnpike Road* v. *Haywood*, 10 Wend. 422).

c. Where an order was entered on 27th of May, and notice of appeal was served on 27th of June, held to be in time, that is, within 30 days (*Galli* v. *Finch*, 26 How. 193).

d. As to computing time, see *Phelan* v. *Douglass* (11 How. 193); *Pulling* v. *The People*, (8 Barb. 384); *The People* v. *N. Y. Cent. R. R. Co.* (28 Barb. 284); and as to not including Sunday in the computation when it is the last day see *Campbell* v. *Internat. Life Ass. Soc.* (4 Bosw. 298).

e. The 407th section prescribes the manner of computing time, in all cases where any act is to be done within a limited time. That is, the first day (of service) is excluded and the last day included. Therefore, a five days' notice served on Wednesday for the following Monday, is a good five days' notice. The intervening Sunday cannot be excluded. Where the last day falls on Sunday, the day following is the last day of limitation (*Taylor* v. *Corbiere*, 8 How. 385).

f. Where an act is to be done after the expiration of thirty days, it can not be performed until the 31st day (*Judd* v. *Fulton*, 4 How. 298).

a. An order granting *additional time*, does not commence to run until the time thereby extended would have expired, had no order been made (*Schenck* v. *McKie*, 3 Code Rep. 24; 4 How. 247). Thus, where the time to answer would have expired on the 8th of October, and on the 1st of October an order was made, for twenty days *additional time* to answer, it was held, that the time to answer was thereby extended until the 28th of October. (*Ib.*) See contra, *Simpson* v. *Cooper*, 2 Scott, 840).

b. As to computing time for publication of legal notices, see section 425.

Chapter XI.

*Notices, and filing and service of Papers.**

Section 408. Notices, &c., how served.
409. Service, how made.
410. Service, by mail.
411. The like.
412. Double time where service by mail.
413. Notice of motion, &c., where personally served.
414. When papers need not be served on defendant.
415. Service of papers where parties reside out of the State
416. Summons and pleadings to be filed.
417. Service on attorney.
418. When this chapter does not apply.

§ 408. [369.] *Existing suits. Notices, &c., how served.*

Notices shall be in writing; and notices and other papers may be served on the party or attorney, in the manner prescribed in the next three sections, where not otherwise provided by this act.

c. "Party or attorney" does not include the "clerk." *Ante*, p. 640, *d*, and in *note* to § 410.

d. Where two attorneys are in partnership, the business being done in the name of one, yet service of papers may be on either, whether he is in the office or abroad on other business (*Lansing* v. *McKillup*, 7 Cow. 416).

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* *e.* See *ante*, p. 169, *a;* and § 418, *post.*

f. Whenever it shall be necessary on the trial of an action, or in any judicial proceeding, to prove the service of any notice, an affidavit showing such service to have been made by the person making such affidavit, shall be received as presumptive evidence of such service, upon first proving that such person is dead or insane (Laws 1858, ch. 244).

g. Service of any notice or other paper required to be served on a sheriff, may be served by leaving the same at the office designated by him, by a notice filed in the office of the clerk of his county, during office-hours; or leaving the same, with any one belonging to such office, therein; and such service is equivalent to personal service on the sheriff, and if the sheriff has not designated any office, service may be made on the county clerk (2 R. S. 285, §§ 55, 56, 57).

a. Where a party changes his attorney and there is no regular substitution, notices may still be served on the attorney of record (*Grant* v. *White*, 6 Cal. 55).

b. Service on a Sunday, of a notice or other paper, is irregular and void (*Field* v. *Park*, 20 Johns. 140; and see *Fifield* v. *Wooster*, 21 Verm. R. 215).

See Rule 10, and, *ante*, pp. 463, *b;* 166, *c;* *Pulling* v. *The People*, 8 Barb. 386.

§ 409. [370.] *Existing suits. Service, how made.*

The service may be personal, or by delivery to the party or attorney on whom the service is required to be made; or it may be as follows:

1. If upon an attorney, it may be made during his absence from his office, by leaving the paper with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or, if it be not open so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

2. If upon a party, it may be made by leaving the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

c. The attorney mentioned in this section means an "attorney at law." And does not include an "agent," or "attorney in fact" (*Weare* v. *Slocum*, 1 Code Rep. 105; 3 How. 398).

d. An affidavit of service on a clerk must state that he was in the attorney's office at the time (*Jackson* v. *Giles*, 3 Cai. R. 88; *Paddock* v. *Beebe*, 2 Johns. Cas. 117). But it need not specify the name of the clerk (*Tremper* v. *Wright*, 2 Cai. R. 101).

e. Where a party makes the best service the circumstances of the case will admit, and follows it up promptly by regular service with notice of the facts, the service will be deemed sufficient (*Falconer* v. *Ucoppel*, 2 Code Rep. 71).

f. Where a party finds the office closed, he cannot effect a regular service by having the office unlocked and leaving the paper in a conspicuous place within (1 How. 253, 200).

See *ante*, p. 256, *b*.

§ 410. [371.] *Existing suits. Service by mail.*

Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

g. Where the service of a paper is made by mail, it must be deposited in the post-office at the residence of the attorney making the service—addressed to

the person on whom it is to be served, at his place of residence, and the postage paid (*Schenck* v. *McKie*, 2 Code Rep. 24; 4 How. 246); or the papers will not be deemed to be served where deposited (*Peebles* v. *Rogers*, 5 How. 210; *Van Benthuysen* v. *Lyle*, 8 How. 312); enclosed in a wrapper or envelope (25 Wend. 677; 9 Abb. 68, *n.*)

a. When the paper is thus deposited in the proper post-office, correctly addressed, and the postage paid, the service is deemed complete, and the party to whom it is addressed takes the risk of the failure of the mail (*Ib.*; *Lawler* v. *Saratoga Mut. Ins. Co.*, 2 Code Rep. 114; *Crittenden* v. *Adams*, 1 Code Rep. N. S. 21; 5 How. 300; *Gibson* v. *Murdock*, 1 Code Rep. 103; *Radcliffe* v. *Van Benthuysen*, 3 How. 67; *Van Horne* v. *Montgomery*, 5 *ib.* 238; *Jacobs* v. *Hooker*, 1 Barb. 71; *Rowell* v. *McCormick*, 1 Code Rep. N. S. 73; *Vassar* v. *Camp*, 14 Barb. 341; 10 How. 460).

b. A paper deposited by an agent of the attorney making the service, in a post-office in a different town from that in which the attorney resides, is not a good service, except from the time the paper is actually received (*Schenck* v. *McKie*, 3 Code Rep. 24; 4 How. 246; *Peebles* v. *Rogers*, 5 *id.* 210; 3 Code Rep. 213).

c. It seems that if an answer is served by mail, and the postage is not paid, the plaintiff's attorney may return the answer, and enter judgment as for default of an answer (*Van Benthuysen* v. *Lyle*, 8 How. 382).

d. The service of a paper by mail is good, although deposited in the post-office on the last day for service, after the mail has closed, if otherwise made in conformity to the statute and the rules of the court (*Noble* v. *Trotter*, 3 Code Rep. 35; 4 How. 322; *Elliott* v. *Kennedy*, 26 How. 422).

e. By "the person making the service" is meant the attorney on whose behalf it is done, and not an intermediate agent employed by him (*Schenck* v. *McKie*, supra). The code requires that there shall be a *regular communication* between the two places, to make service by mail available. (*Ib.*)

f. The provisions as to the service by mail apply only to service on the parties to the action or their attorneys, they do not apply to service on the clerk (*Lansing* v. *Gulick*, 26 How. 250; *Crittenden* v. *Adams*, 1 Code Rep. N. S. 21).

g. An irregularity in the service is waived by the paper served being retained and acted upon (*Georgia Lumber Co.* v. *Strong*, 3 How. 246; and see 1 *ib.* 240; 2 *ib.* 246). And it should be returned within a reasonable time (*McGown* v. *Leavenworth*, 3 Code Rep. 151; 2 E. D. Smith, 25). This is never limited to less than the same day (*ib.*); and when returned, the ground of objection should be explicitly stated. A statement that the service is irregular and not in compliance with certain sections of the code, is not enough (*Chemung Canal Bank* v. *Judson*, 10 How. 133).

See Rule 10 and note.

§ 411. [372.] *Existing suits. Service by mail.*

In case of service by mail the paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

h. The "place of residence" must be understood to mean the name of the post-office to which the papers are to be directed. And, for the purpose of this section, the attorney may decide where is his place of residence, by his indorsement on the papers (*Rowell* v. *McCormick*, 5 How. 337).

i. The term "at his place of residence" is to be deemed to relate to the post-office, and not to any particular locality in a town or city. Thus when a defendant's attorneys gave notice of appearance, and demanded that a copy of the complaint should be served on them at their "office, No. 52 Grove Street, in the city of New York," and the plaintiff's attorney mailed a copy of the

complaint at Fonda, New York, directed to the defendant's attorneys by name, "New York," without mentioning any street or number,—it was held good service, although it did not reach defendant's attorneys (*Oothout* v. *Rhinelander*, 10 How. 460); but see rule 20.

a. Giving notice by mail is, depositing a letter containing the requisite information, properly addressed, in the post office (*Vassar* v. *Camp*, 14 Barb. 341).

§ 412. [373.] (Am'd 1849, 1859.) *Existing suits. Double time when served by mail.*

Where the service is by mail, it shall be double the time required in cases of personal service, except service of notice of trial, which may be made sixteen days before the day of trial, including the day of service.

b. This section applies to a notice to limit the time to appeal (*Dorlon* v. *Lewis*, 7 How. 182).

c. Where an answer is served by mail the plaintiff has forty days within which to amend his complaint (see *Casson* v. *Whaley*, 5 How 305; *Washburn* v. *Herrick*, 4 How. 15).

§ 413. [374.] (Am'd 1849.) *Existing suits. Notice of motion, &c. when personally served.*

Notice of a motion, or other proceeding before a court or judge, when personally served, shall be given at least eight days before the time appointed therefor.

d. Where motion papers for the 28th were served by mail on the 17th and came to hand on 19th Oct., and on the 20th Oct. the moving party served a notice personally that said motion would be made on the 28th, on the papers so served by mail, held a sufficient service (*Van Benthuysen* v. *Stevens* 14 How. 70).

§ 414. [375.] (Am'd 1849.) *Existing suits. When papers need not be served on defendant.*

Where a defendant shall not have demurred or answered, service of notice or papers, in the ordinary proceedings in an action, need not be made upon him, unless he be imprisoned for want of a bail, but shall be made upon him or his attorney if notice of appearance in the action has been given.

e. "This provision does not embrace *provisional remedies*. These are not *ordinary proceedings* within the sense of that term as used in this section. Though a defendant has appeared, he is not entitled to notice of an application for an order to arrest him. Neither is he entitled to notice of an application for injunction, before he has answered" (*Becker* v. *Hager*, 8 How. 69). And the service of an injunction, obtained after a defendant has appeared by attorney in the action, on the attorney instead of on the defendant, is a defective service; but it furnishes no reason for setting aside the injunction order. (*Ib.*)

a. After a defendant has appeared in the action, an application by the plaintiff for leave to amend must be on notice to the defendant (*Hewett* v. *Howell*, 8 How. 346).

b. When a statute requires service of notice on an individual it means personal service, unless some other mode of service is specified (*Rathbone* v. *Acker*, 18 Barb. 393; *McDermott* v. *B'd of Metro. Police*, 25 Barb. 636; see however, *The People* v. *Walker*, 2 Abb. 422).

See *ante*, p. 459, *a*.

§ 415. [376.] (Am'd 1849.) *Existing suits. Service of papers where parties reside out of the State.*

Where a plaintiff or a defendant who has demurred or answered, or gives notice of appearance, resides out of the State, and has no attorney in the action, the service may be made by mail, if his residence be known; if not known, on the clerk for the party.

§ 416. [377.] *Summons and pleadings to be filed.*

The summons and the several pleadings in an action shall be filed with the clerk within ten days after the service thereof, respectively, or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

c. The court will permit a party to file a pleading after the time limited therefor in an order to file it, if the omission be explained—as, if a copy be inadvertently filed instead of the original (*Short* v. *May*, 2 Sand. 639).

d. When a party files a pleading in obedience to an order under this section requiring him to do so, he is not bound to notify the party obtaining the order that the pleading is filed (*Douoy* v. *Hoyt*, 1 Code Rep. N. S. 286).

§ 417. [378.] *Existing suits. Service on attorney.*

Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney, instead of the party.

e. Notice of appeal should be served on the attorney of record in the court below, not on the party (*Tripp* v. *De Bow*, 5 How. 114; 3 Code Rep. 163). Where such service was made upon the party only who had not appeared so as to give the court jurisdiction, the appeal was held a nullity. (*Ib.*)

f. Where the attorney for the plaintiff in error removed from the State, and notice had been given to the party to appoint another attorney, pursuant to the statute (2 R. S. 287, § 67),—held, nevertheless, that a motion to quash the writ of error could not be made without notice thereof to the plaintiff in error (*Jewell* v. *Shouten*, 1 Coms. 241).

g. "This section, like the 414th, applies to the *ordinary* proceedings in the

action. Service of an injunction upon the attorney might be sufficient as a notice to him of the plaintiff's rights, but it could never be made the foundation of a proceeding against the defendant for its violation (Harris J., *Becker* v. *Hager*, 8 How. 69)

a. It is irregular to serve papers in a cause upon the attorney after he becomes a non-resident (*Diefendorf* v. *House*, 9 How. 243); see, however, laws 1862, ch. 43, in note to *Rule* 2, *Supreme Court Rules*, *post*.

b. Service of motion papers to set aside an attachment and an order for publication, were held to be properly served on the plaintiff's attorney in the action although more than four years had elapsed since the judgment had been entered (*Drury* v. *Russell*, 27 How. 130).

See note to section 285 *ante*.

§ 418. [379.] *Existing suits. When this chapter does not apply.*

The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

Chapter XII.

Duties of Sheriffs and Coroners.

§ 419. [380.] (Am'd 1849.) *Duty of sheriff and coroner in serving or executing process, and how enforced.*

Whenever, pursuant to this act, the sheriff may be required to serve or execute any summons, order, or judgment, or to do any other act, he shall be bound to do so in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process where the sheriff is a party; and all the provisions of this act relating to sheriffs shall apply to coroners when the sheriff is a party.

See rule 8, and section 290.

c. A sheriff may, under the statute, demand his fees for service of a summons and complaint, previous to the service thereof; but if he *serves* them without pre-payment, he cannot retain them, and refuse to make a return because his fees are not paid (*Wait* v. *Schoonmaker*, 15 How. 460).

d. Where the coroner is the defendant in the action, a writ of attachment against the sheriff must issue to the elisors in the first instance (*Reg.* v. *Sheriff of Glamorganshire*, 1 Dowl. Prac. Cas. (N. S.) 806).

Chapter XIII.

Accountability of Guardians.

§ 420. [381.] *Guardian not to receive property until security given.*

No guardian appointed for an infant shall be permitted to receive property of the infant, until he shall have given sufficient security, approved by a judge of the court or a county judge, to account for and apply the same, under the direction of the court.

See Rule 62 *et seq.*

Chapter XIV.

Powers of Referees.

§ 421. [382.] *Powers of Referees.*

Every referee appointed pursuant to this act, shall have power to administer oaths in any proceeding before him, and shall have generally the powers now vested in a referee by law.

See, *ante*, note to § 273.

CHAPTER XV.

Miscellaneous Provisions.

SECTION 422. Papers lost or withheld, how supplied.
423. Where undertakings to be filed.
424. Judgment on bond and warrant of attorney, executed before July 1, 1848.
425. Time for publication of notices, how computed.
426. Laws of other States and governments, how proved.

§ 422. *Papers lost or withheld, how supplied.*

If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

See note to section 416; and *Renoud* v. *Harris*, 1 Code Rep. 125.

§ 423. *Where undertakings to be filed.*

The various undertakings required to be given by this act, must be filed with the clerk of the court, unless the court expressly provides for a different disposition thereof, except that the undertakings provided for by the chapter on the claim and delivery of personal property, shall, after the justification of the sureties, be delivered by the sheriff to the parties respectively for whose benefit they are taken.

See note to § 222, and Rule 4, and 2 R. S. 190, §§ 149, 150, omitted from 4th edit. R. S. said, however, to be still in force; *Cook* v. *Dickinson*, 2 Sand. 691; *Wilde* v. *Joel*, 15 How. 321; see also, *ante*, p. 409, *f*.

a. In an action on an undertaking, on its production at the trial, its delivery to the party for whose benefit it was taken pursuant to § 423 will be presumed (*Bowdoin* v. *Coleman*, 8 Abb. 431).

b. Although the provision of the Revised Statutes (2 R. S. 190), which is presumed to be in force, that the chancellor shall direct the delivery of any bond executed under the provisions of that article to the person entitled to the benefit thereof, for prosecution, whenever the condition thereof shall be broken, or the circumstances of the case shall require such delivery, yet the court might well decline the delivery of an undertaking on file in these cases (*See Code* § 423); as an inspection to draw the complaint is all that is necessary; and upon the trial, the clerk can be subpœnaed to produce it in case of dispute (*Wilde* v. *Joel*, 15 How. 320).

§ 424. *Judgment on bond and warrant of attorney, executed before July* 1, 1848.

Upon any bond and warrant of attorney executed and delivered before the first day of July, 1848, judgment may be entered in the manner provided by sections 382, 383, and 384, upon the plaintiff's filing such bond and warrant of attorney, and the statement, signed and verified by himself, in the form prescribed by section 382.

See *Allen* v. *Smillie* (12 How. 156; 1 Abb. 354).

§ 425. *Time for publication of notices, how computed.*

The time for publication of legal notices shall be computed so as to exclude the first day of publication, and include the day on which the act or event, of which notice is given, is to happen, or which completes the full period required for publication.

a. Notices or advertisements, which by law are required to be published in any public newspaper published in this State, may be proved by the affidavit of the printer, or foreman of the printer, of such newspaper (Laws of 1835, c. 159; and see §§ 138 and 407 *ante*, and Laws 1859, ch. 252).
See Rule 73 and *note*.

§ 426. *Laws of other States and Governments, how proved.*

Printed copies in volumes of statutes, code, or other written law, enacted by any other State or Territory, or foreign government purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts and judicial tribunals of such State, Territory, or government, shall be admitted by the courts and officers of this State, on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other State or Territory, or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts, may also be admitted as presumptive evidence of such law.

b. See Laws of 1845, p. 326; Laws of 1846, pp. 204, 303; Laws of 1858, pp. 498, 500; 6 Wend. 488; 2 ib. 411; Dall. 412; 9 Cranch, 122, *n.*; 1 Stark. Ev. (ed. 1842) 232, *n.* 2; 1 Phill. Ev. (Cow. & H. ed., 1843), 388; 3 ib. 1056, *n.* 708.

c. The charter of the city of New York may be read as evidence, from a volume printed by authority of the common council, whether it was printed prior or subsequent to the act of April 17th, 1832. The charter may be so read on a trial involving the title to lands, the statutes making no distinction in

regard to the purposes for which it may be read. Such proof of the charter is *prima facie* only (*Howell* v. *Ruggles*, 1 Selden, 444. See Laws 1832, p. 251).

a. Foreign laws are regarded as *facts*, and should be alleged and proved like other facts of which the courts do not take judicial notice (*Monroe* v. *Douglass*, 1 Selden, 447; and see 2 Laws U. S. 102 § 1).

b. As to the proper method of proving public records of other States, see *Markoe* v. *Aldrich* (1 Abb. 55); and see Laws 1858, pp. 498, 500; 24 N. Y. 394.

c. Books offered in evidence as the "printed statute book," of a sister State, must purport "to be printed under the authority of such" State (*Bright* v. *White*, 8 Mo. R. 421; and see *Bailey* v. *Lincoln Academy*, 12 *id.* 177).

d. A land patent may be proved by a *constat* or exemplification of the record (*McKinstron* v. *Bliss*, 31 Barb. 180).

e. As to proving incorporation of foreign corporation, see *Waterville Manuf. Co.* v. *Brown* (9 How. 27); records of courts in Canada, see *Lavier* v. *Westcott* (26 N. Y. 146); records of inferior courts, see *Simons* v. *De Bare* (4 Bosw. 547; 6 Abb. 188); corporation ordinances, see 7 How. 81; *Logue* v. *Gillick* (1 E. D. Smith, 398); records in supervisors' office, Laws 1855 (ch. 249 p. 388); records in office of collectors of customs, Laws 1862 (ch. 251, p. 450); judgment of foreign state, *Black's case* (4 Abb. 162).

TITLE XIII.

Actions in Particular Cases.

CHAPTER I. ACTIONS AGAINST FOREIGN CORPORATIONS.
II. ACTIONS IN PLACE OF *scire facias*, *quo warranto*, AND OF INFORMATIONS IN THE NATURE OF A *quo warranto*.
III. ACTIONS FOR THE PARTITION OF REAL PROPERTY.
IV. ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND FOR WASTE AND NUISANCE.
V. GENERAL PROVISIONS RELATING TO ACTIONS CONCERNING REAL PROPERTY.

CHAPTER I.

Actions against Foreign Corporations.

§ 427. *Where and by whom brought.*

An action against a corporation created by or under the laws of any other State, government, or country, may be brought in the supreme court, the superior court of the city of New York, or the court of common pleas for the city and county of New York, in the following cases:

1. By a resident of this State, for any cause of action.

2. By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within this State.

[This section is one of those added to the code in 1849, by a law passed 11th April, 1849, and which took effect twenty days after its passage (*Gamble* v. *Beattie*, 4 How. 41). At the same session, by a law which took effect 15th March, 1849, it is provided that suits may be brought in the supreme court, superior court of New York, and common pleas of New York, against any foreign corporation, "for the recovery of any debt or damages whether liquidated or not, arising upon contract *made, executed or delivered within this State*, or upon any cause of action arising thereon." Such suits may be commenced by complaint and summons together with an attachment, as now provided by law, &c., &c. The code, section 468, repeals all statutory provisions inconsistent with it. The question arises, has the code abolished the previous law of 1849, relating to foreign corporations? It does not, unless the acts are inconsistent. We call attention to this because it seems to have been conceded without examination that the prior law of 1849 was repealed by the code.

The question is important, for the reason that the remedy by the first law of 1849 is more extensive than the code. That law very properly distinguishes between "a contract made, executed and delivered within this State" and "a cause of action arising within this State," and gives remedy in both instances, *to any plaintiff, resident or non-resident*, The code gives a remedy to a non-resident only when (1) the cause of action arises or (2) the subject of the action is situated within this State, and not in the case of "a contract made, executed or delivered within this State;" for "where a contract is made at one place and is to be performed at another, the cause of action on such contract arises at the latter place" (*Burkle* v. *Eckhart*, 3 Coms. 133; see *ante*, p. 164, *f*).]

a. An action against a foreign corporation is now, as a suit was formerly, a proceeding against its property only, unless there is a voluntary appearance by the defendant (*Hulbert* v. *Hope Mut. Ins. Co.*, 4 How. 275). But when a foreign corporation has appeared in an action commenced in a court of this State, it is as much within and subject to the jurisdiction of the court as if it was a corporation under the laws of this State. Nor does the foreign origin of a corporation prevent the bringing of actions against it for any cause when it can be brought within the jurisdiction of the court (*Dart* v. *Farmer's B'k*, 27 Barb. 337).

b. The law authorizing suits against foreign corporations was not changed by the code as originally adopted (Code of 1848); but the amendment of 1849 introduced into that act provisions regulating such actions, which, *probably*, supersede pre-existing statutes on that subject (Laws 1845, c. 234; Laws 1848, c. 58; Laws 1849, cap. 107; 1 Rep. of Commrs. on Practice, p. 39; Code, §§ 227 to 243; 2 R. S. 459). Before 1849 the only mode of proceeding against a foreign corporation was by attachment (1 How. 250; 2 R. S. 459, § 15). By chapter 107 of Laws of 1849, the revised statutes were amended so as to require a summons and complaint to accompany the attachment; but now it is not required that the attachment should accompany the service of the summons. It may be served afterwards. (*Ib.*) Although it is essential to the jurisdiction of a court of this State over a foreign corporation, that either the plaintiff should be a resident of this State, or the cause of action should have arisen, or the subject of the action should be situated within it, yet it is not necessary to the validity of proceedings against a foreign corporation that proof of either of these facts should be made prior to the commencement of proceedings. It is sufficient if a state of facts which sustains the jurisdiction is made to appear, upon motion to set the proceedings aside (*Bates* v. *N. O., Jackson and Gr. North R. R. Co.*, 4 Abb. 72; 13 How. 516; and see *Elizabethport Manufac. Co.* v. *Campbell*, 13 Abb. 86).

c. The act (ch. 234 of 1845) in relation to suits against foreign corporations does not undertake to establish any new liability on the part of stockholders or debtors of such corporations, but only provides for subrogating creditors of the corporation, proceeding against it by attachment in this State, to such rights as the corporation itself under the local law or *lex loci contractus* might have enforced against the stockholder or debtor (*Seymour* v. *Sturgis*, 26 N. Y. 134).

d. The service of a summons upon the president of a foreign corporation who happens to be temporarily in this State, and who does not voluntarily appear, does not give the court jurisdiction of the defendant (the corporation) for the purpose of rendering a personal judgment upon contracts made in this State, or for debts due to residents of this State. Such a service must be regarded, for all practical purposes, as simply a statutory notice that proceedings are about to be instituted against the defendant's property (*Hulbert* v. *Hope Mut. Ins. Co.*, 2 Code Rep. 148; 4 How. 275; *ib.* 415; *Brewster* v. *Michigan Central R. R. Co.*, 3 Code Rep. 215; 5 How. 183).

e. An appearance by a corporation in court, gives jurisdiction whether the service of process be good or not, provided the corporation is still in existence (*Murray* v. *Vanderbilt*, 39 Barb. 141).

As to service of summons on a foreign corporation, see *ante*, p. 163, *b*.

As to attachments against foreign corporations, see *ante*, p. 415, *b*, *c*, *d*.

a. In the superior court, at any rate, no attachment can issue against a foreign corporation unless there be an action regularly commenced. That can be by a resident for any cause of action; but to render the suit effectual there must be property within the State, or the cause of action must have arisen therein (*McDonough* v. *Phelps*, 15 How. 377; *Eggleston* v. *Orange R. R. Co.*, 1 Code Rep. N. S. 219; *Cantwell* v. *Dubuque, West. R. R. Co.*, 17 How. 16).

b. A foreign corporation has the same right to sue in the courts of this State as any other non-resident, if the nature of the claim is such as should be enforced by a corporation; and as to suits against a foreign corporation, except § 427, the code and the revised statutes make no distinction between a resident and a non-resident plaintiff (*Bank of Commerce* v. *Rutland and Wash. R. R. Co.*, 10 How. 7); but a foreign corporation is not authorized either by the revised statutes or the code to sue another foreign corporation in the courts of this State by attachment, unless the cause of action has arisen, or the subject of the action is situated, within this State (*Western Bank* v. *City Bank of Columbus*, 7 id. 238).

c. In an action against a foreign corporation, it must appear, in order to give the court jurisdiction, either that the cause of action arose, or that the subject of the action is situate, within this State, or that the plaintiff is a resident of this State and the defendant has property within it (*Harriott* v. *N. Jersey R. R. Co.*, 8 Abb. 284; 2 Hilton, 262; *Cumberland Coal Co.* v. *Hoffman Steam Coal Co.*, 30 Barb. 159; 20 How. 62). It *seems* that if the cause of action arose, or the subject of the action is situated within this State, the question of the defendant's having property becomes immaterial, whether the plaintiff is a resident or not (*Cumberland Coal Co.* v. *Sherman*, 8 Abb. 243).

d. The act of 1855 (Laws 1855, ch. 279) requiring foreign corporations doing business within this State to designate a person to receive service of process, does not operate to give the court jurisdiction of cases not included in sections 134 and 427 of the Code. (*Id.*)

e. A foreign corporation, by appearing and answering, does not waive the objection that the court has not jurisdiction (*Harriott* v. *N. Jersey R. R. Co.*, 8 Abb. 284; 2 Hilton, 262).

f. Where an action against a foreign corporation is dismissed on the ground that the court has no jurisdiction, but the question of jurisdiction was not raised by the issues in the action, nor presented to be tried on affidavits, but settled by an admission of the party in open court, judgment for costs, on dismissing the complaint, *cannot* be rendered (*Id.*; *ante*, p. 585 *f*; contra, *McMahon* v. *Mut. Benefit Life Ins. Co.*, 8 Abb. 297; 3 Bosw. 644). Where there is a question as to the power of the court to render a judgment for costs, where judgment has in fact been entered by the clerk, the proper practice to bring up the question is by an appeal from the judgment. (*Id.*) Such an appeal does not confer a new jurisdiction, *semble* (*Harriott* v. *N. Jersey R. R. Co.*, 8 Abb. 284; 2 Hilton, 262).

g. Where an attachment is issued against the property of a foreign corporation by a non-resident plaintiff, in an action for alleged damages arising from a breach of contract made out of this State, can the attachment be sustained on the ground that the subject of the action is within the State? Held that "the subject of the action" is the claim asserted by the plaintiff. The property levied on by the attachment is not the subject of the action. The court therefore has no jurisdiction in such a case (*Whitehead* v. *Buffalo & Lake Huron R. R. Co.*, 18 How. 218).

h. The law of 1858, ch. 121, as to the Buffalo and Lake Huron Railway Company, if constitutional, does not give authority to proceed against said company otherwise than as a foreign corporation. (*Id.*)

i. Where the demand on which the action was brought arose upon written contracts for the payment of money, made, delivered, and payable in Canada, and all the labor done and materials furnished were pursuant to those contracts, and upon work located in Canada, for a corporation created by the laws of Canada, and existing there, except a small part which was performed in this State, pursuant to said contracts—held not a case where the subject of

the action was situate in this State, and although the defendant, the foreign corporation, had property in this State, it could not be attached (*Campbell* v. *Proprietors of Champlain & St. Lawrence R. R.*, 18 How. 412).

a. In an action on an award, the award is the cause of action, and if it was made out of the State, the cause of action arose out of the State. (*Id.*)

b. The courts of this state will not entertain jurisdiction of a suit between two corporations both chartered by the laws of Maryland respecting lands lying in that State, the object of which suit is to annul, on the ground of fraud, a conveyance of such lands to the defendants, executed and recorded in Maryland (*Cumberland Coal Co.* v. *Hoffman Coal Co.*, 30 Barb. 159; 20 How. 62).

c. Chap. 107 of Laws of 1847, providing for suits against foreign insurance corporations, on contracts made within this State, authorizes an attachment as a provisional remedy, in an action on a policy of insurance issued in this State (*Burns* v. *Provincial Ins. Co.*, 13 Abb. 425).

d. The supreme court has no power over a foreign corporation in a proceeding commenced by a stockholder to wind up its affairs (*Murray* v. *Vanderbilt*, 39 Barb. 141).

e. The statute of limitations is a good defence to an action against a foreign corporation (*Olcott* v. *Tioga R. R. Co.*, 26 Barb. 147, affirmed co't of appeals, June, 1863).

f. **Pleadings in actions by and against foreign corporations.**—In a suit by a foreign corporation, the complaint need not state the act of incorporation or charter at large, or even the title of the act or grant, or the date of its passage (*Holyoke Bank* v. *Haskins*, 4 Sand. 675; but see 9 Abb. 168; and *Marine Ins. Co.* v. *Jauncey*, 1 Barb. 487).

g. The provisions of the revised statutes (art. 1, tit. 10, ch. 8, p't 3), modifying the rule of pleading in actions by corporations, do not apply to foreign corporations (*Waterville Manuf. Co.* v. *Bryan*, 14 Barb. 182). And in an action by a foreign corporation, under a general denial, it must prove its corporate existence. (*Id.*) The complaint in an action against a foreign corporation should, it seems, state the residence of the plaintiff, or state if he be a resident or non-resident, or it should show that the cause of action arose or is situated within this State (*House* v. *Cooper*, 16 How. 293). See further, *ante*, p. 212, *k.* and p. 286, *c.*

h. In an action against a foreign corporation for equitable relief, it is improper to join a claim for damages against individual defendants (*House* v. *Cooper*, 30 Barb. 157).

CHAPTER II.

Actions in place of scire facias, quo warranto, and of informations in the nature of quo warranto.

SECTION 428. Scire facias and quo warranto abolished, and this chapter substituted.
429. Action may be brought, by direction of the legislature, by the attorney-general, to vacate a charter.
430. Action to annul a corporation, when and how brought by the attorney-general, by leave of the supreme court.
431. Leave to sue, how obtained.
432. Action upon information or complaint of course.
433. Action, when and how brought to vacate letters patent.
434. Relator, when to be joined as plaintiff.
435. Complaint and arrest of defendant in action for usurping an office.
436. Judgment in such actions.
437. Assumption of office, &c., by relator, when judgment is in his favor.
438. Proceedings against a defendant, on his refusal to deliver books or papers.
439. Damages, how recovered.
440. One action against several persons claiming office or franchise.
441. Penalty for usurping office or franchise, how awarded.
442. Judgment of forfeiture against a corporation.
443. Costs against a corporation, or persons claiming to be such, how collected.
444. Restraining corporation, and appointment of a receiver.
445. Copy of judgment-roll against corporation, where to be filed
446. Entry of judgment relating to letters patent.
447. Action for forfeiture of property to the people.

§ 428. *Scire facias and quo warranto abolished, and this chapter substituted.*

The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies heretofore obtainable in those forms, may be obtained by civil actions under the provisions of this chapter. But any proceedings heretofore commenced, or judgment rendered, or right acquired, shall not be affected by such abolition.

a. The remedy heretofore given by *scire facias*, to obtain execution of a judgment, is superseded by the provisions for an action therefor under the code (*Cameron* v. *Young*, 6 How. 372; *Alden* v. *Clarke*, 11 id. 269; and see *Thurston* v. *King*, 1 Abb. 127). *The action* in the nature of a *quo warranto* is in substance the same, and is governed by all the rules regulating proceedings under the former practice (*The People* v. *Pease*, 30 Barb. 588)

b. If after the death of one of several defendants pending the action, his heirs appear voluntarily without any order to revive against them, and the action proceeds to judgment they are bound by it (*Requa* v. *Holmes*, 19 How. 430).

c. The executors of a deceased judgment creditor may maintain an action against the judgment debtor, "for and to obtain an execution to be issued in their names to be levied of any lands which the judgment debtor held when the judgment was docketed" (*Ib.*; and see *Ireland* v. *Litchfield*, 22 How. 178; *Tallman* v. *Varick*, 5 Barb. 277).

d. An assignee of a judgment, after the death of the judgment debtor may maintain an action to have execution of the original judgment (*Jay* v. *Martine*, 2 Duer, 655).

e. Where a judgment was obtained in 1842, and the plaintiff on May 4, 1849, issued a writ of *scire facias quare executionem non*, the court, on defendant's motion, set aside such writ, saying, The amended code took effect prior to the issue of this writ, and must control the rights of the parties. The motion contemplated by section 284 renders a *scire facias* unnecessary (*Catskill Bank* v. *Sandford*, 4 How. 100). It was held otherwise under the code of 1848, but that code had no section corresponding to this (*Anon.* 1 Code Rep. 118).

f. In an action in the nature of a *quo warranto*, the place of trial may properly be laid in any county in the State. The people are a party whose residence extends to every county (*The People* v. *Cook*, 6 How. 448).

g. In *quo warranto* commenced before July, 1848, motions for judgment must be made to the general term (*People* v. *Gilbert*, 2 Code Rep. 31; 3 *id.* 181).

h. As to costs see *Ireland* v. *Litchfield*, 22 How. 183; see *ante*, p. 719, *d.*

§ 429. *Action may be brought by attorney-general to vacate a charter, by direction of legislature.*

An action may be brought by the attorney-general, in the name of the people of this State, whenever the legislature shall so direct, against a corporation, for the purpose of vacating or annulling the act of incorporation, or an act renewing its corporate existence, on the ground that such act or renewal was procured upon some fraudulent suggestion or concealment of a material fact, by the persons incorporated, or by some of them, or with their knowledge and consent.

i. If it be conceded that the attorney-general may maintain an action in the name of the people to restrain a municipal corporation, it can only be to restrain them from making a fraudulent or illegal disposition of the corporate property (*The People* v. *Lowber*, 28 Barb. 65).

j. The attorney-general may maintain an action in the name of the People to restrain a municipal corporation from exercising authority not possessed by it under its charter or by law (*The People* v. *Mayor of N. Y.* 10 Abb. 144; 32 Barb. 35; 19 How. 155).

k. In an action brought by the People to restain a municipal corporation

from proceeding under a public contract, required by law to be awarded to the lowest bidder, on the ground that the contractors were not the lowest bidders, the contractors and other bidders need not be made parties. (*Id.*)

§ 430. *Action to annul a corporation, when and how brought by attorney-general by leave of supreme court.*

An action may be brought by the attorney-general, in the name of the people of this State, on leave granted by the supreme court, or a judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporation shall—

1. Offend against any of the provisions of the act or acts creating, altering, or renewing such corporation; or,

2. Violate the provisions of any law by which such corporation shall have forfeited its charter by abuse of its powers; or,

3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or,

4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges, and franchises; or,

5. Whenever it shall exercise a franchise or privilege not conferred upon it by law.

And it shall be the duty of the attorney-general, whenever he shall have reason to believe that any of these acts or omissions can be established by proof, to apply for leave, and upon leave granted to bring the action in every case of public interest, and also in every other case in which satisfactory security shall be given, to indemnify the people of this State against the costs and expenses to be incurred thereby.

a. An action to annul the charter of a corporation of this State must be brought by the attorney-general in the name of the people (*Smith* v. *Metropolitan Gas Light Co.*, 12 How. 187; and see *The People* v. *Mayor of N. Y.*, 28 Barb. 65).

§ 431. *Leave, how obtained.*

Leave to bring the action may be granted upon the application of the attorney-general; and the court or judge may, at discretion, direct notice of such application to be given to the corporation or its officers, previous to granting such leave, and may hear the corporation in opposition thereto.

§ 432. *Action by attorney-general in name of the People.*

An action may be brought by the attorney-general in the name of the people of this State, upon his own information, or upon the complaint of any private party, against the parties offending in the following cases:

1. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,

2. When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law shall make a forfeiture of his office; or,

3. When any association or number of persons shall act within this State as a corporation, without being duly incorporated.

a. It is for the attorney-general, and not the supreme court, to determine whether in any particular case it is proper that an actionto try the right to any office shall be brought or not (*The People* v. *Att'y-Gen'l*, 22 Barb. 114; 3 Abb. 131; 13 How. 179).

b. In an action brought by the people and a claimant, to try the title to a public office, upon the rendition of a regular judgment of ouster against the officer and in favor of the claimant, the officer becomes ousted, and the party declared to be entitled, upon taking the official oath and filing bonds (when required) becomes *eo instanti* invested with the office (*The People* v. *Conover*, 6 Abb. 220).

c. A writ of assistance, or leave to issue an execution, should not be granted upon such a judgment, directing the sheriff to put the successful party in possession of the office, and the books and papers belonging to it. So far as the office is concerned, such a judgment executes itself. So far as possession of the books and papers is concerned, the remedy provided by section 438 of the code must be pursued. (*Id.*)

d. The former practice in proceedings in a *quo warranto*, and in an information in the nature of a *quo warranto*, are not guides in proceedings in the actions which the code has substituted for those writs. (*Id.*)

e. *It seems* that in an action under sections 428 and 432 of the code, an execution is only proper for the purpose of collecting costs, and a fine, if any has been imposed. (*Id.*)

f. Under subdivision 1 of this section, an action in the nature of a *quo warranto* may be brought to try the title to a military office (*The People* v. *Sampson*, 25 Barb. 254; and see *Parish of Bellport* v. *Tooker*, 29 Barb. 257; *Re Whiting*, 2 Barb. 514).

§ 433. *Action when and how brought to vacate letters patent.*

An action may be brought by the attorney-general, in the name of the people of this State, for the purpose of vacating or annulling letters patent granted by the people of this State, in the following cases:

1. When he shall have reason to believe that such letters

patent were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made, or with his consent or knowledge; or,

2. When he shall have reason to believe, that such letters patent were issued through mistake, or in ignorance of a material fact; or,

3. When he shall have reason to believe, that the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.

a. This section is limited to letters patent granted *by the people*, and does not extend to letters patent granted by the king of Great Britain prior to the Revolution (*The people* v. *Clarke*, 10 Barb. 120; 5 Selden, 349).

* § 434. *Relator, when to be joined as plaintiff.*

When an action shall be brought by the attorney-general, by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the people as plaintiff.

b. In an action in the nature of a *quo warranto* brought by the attorney-general on the relation of a person claiming the office against a party who has usurped it, the claimant is interested in the question and should be joined. But to authorize the claimant to be a party plaintiff in such a case, the complaint should state facts showing that he is entitled to the office from which the defendant is sought to be ousted (*The People* v. *Walker*, 23 Barb. 304; *The People* v. *Ryder*, 2 Kernan, 433; reversing 16 Barb. 370). Omitting to join the relator may be cured by amendment. (*Id.*)

§ 435. *Complaint and arrest of defendant in action for usurping an office.*

Whenever such action shall be brought against a person for usurping an office, the attorney-general in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the supreme court, for the arrest of such defendant, and holding him to bail; and thereupon he shall be arrested and held to bail, in the manner,

* *Amended—See Appendix.*

and with the same effect, and subject to the same rights and liabilities as in other civil actions where the defendant is subject to arrest.

§ 436. *Judgment in such actions.*

In every such case, judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

a. In an action in the nature of a *quo warranto*, brought against an alleged intruder upon a public office; the judgment of the court, if for the plaintiff, can only be a judgment of ouster and for costs. If the plaintiff has a claim for damages against the defendant to recover the fees collected by the latter, or otherwise, that claim must be asserted in a separate action (*The People* v. *Snediker*, 3 Abb. 233).

b. The place of trial in an action in the nature of a *quo warranto* may be in any county (*The People* v. *Cook*, 6 How. 448).

c. The parties, in fact, stand in the same relation of equality to each other, as in civil actions. Each on being defeated, is liable to the other, as well for the ordinary costs of the action, as for an extra allowance (*The People* v. *Clarke*, 11 Barb. 337; 5 Selden, 349). *Id.*

d. An action, in the nature of a writ of *quo warranto* is a civil action, and the decisions of the supreme court in it are to be reviewed in the court of appeals, upon the principles applicable to such actions, and not by those which prevail in criminal proceedings (*The People* v. *Cook*, 4 Selden, 71).

§ 437. *Assumption of office, &c., by relator, when judgment is in his favor.*

If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office; and it shall be his duty, immediately thereafter, to demand of the defendant in the action, all the books and papers in his custody, or within his power, belonging to the office from which he shall have been excluded.

e. The provisions of the statute under which a successor in office may apply to a justice of the supreme court to compel his predecessor to deliver over to him the books and papers appertaining to his office, apply as well to superintendents and collectors of tolls on the canals, as to other officers. In case of proceedings under that statute against a collector of tolls on the canals, it is not necessary to show that any notice has been served by a canal commissioner (*In Re Cobee*, 8 How. 367).

f. No proceedings can be had to compel the delivery of books and papers belonging or appertaining to a public office until a judgment of ouster has been regularly entered against the person executing the duties of the office

(*In Re Welch*, 14 Barb. 396; 7 How. 173). An allegation, in a petition for an order to compel such delivery, that judgment was rendered and duly perfected in an action in the nature of a *quo warranto* brought by the people to try the right of an individual to an office, on such a day, without stating in what court the judgment was rendered, or whether under the direction of a single judge, or at special or general term, is not sufficient if the facts are denied. (*Ib.*)

a. Upon the rendition of a regular judgment of ouster in the suit of the people against a public officer, and in favor of another individual for the office, the officer becomes actually ousted and excluded from office, and the party declared to be entitled, upon taking the official oath and filing his bond (when required) becomes *eo instanti* invested with the office, and entitled under section 437 of the code to demand and have the books and papers appertaining to the office (*In Re Welch*, 7 How. 282). An appeal from the judgment of ouster cannot in any way operate as a stay of proceedings. (*Ib.*)

§ 438. *Proceedings against defendant, on refusal to deliver books or papers.*

If the defendant shall refuse or neglect to deliver over such books or papers, pursuant to the demand, he shall be deemed guilty of a misdemeanor, and the same proceedings shall be had, and with the same effect, to compel delivery of such books and papers as are prescribed in article five, title six, chapter six, of the first part of the revised statutes.

See *Re Bartlett*, 9 How. 414; *Re Baker*, 11 How. 418; *The People* v. *Peabody*, 26 Barb. 437; *Conover* v. *Devlin*, 26 Barb. 429.

§ 439. *Damages, how recovered.*

If judgment be rendered, upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained by reason of the usurpation by the defendant of the office from which such defendant has been excluded.

§ 440. *One action against several persons claiming office or franchise.*

Where several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

§ 441. *Penalty for usurping office or franchise, how awarded.*

When a defendant, whether a natural person or a corporation, against whom such action shall have been brought, shall

be adjudged guilty of usurping or intruding into, or unlawfully holding or exercising, any office, franchise, or privilege, judgment shall be rendered, that such defendant be excluded from such office, franchise, or privilege, and also that the plaintiff recover costs against such defendant. The court may also, in its discretion, fine such defendant a sum not exceeding two thousand dollars, which fine, when collected, shall be paid into the treasury of the State.

§ 442. *Judgment of forfeiture against a corporation.*

If it shall be adjudged, that a corporation against which an action shall have been brought pursuant to this chapter, has, by neglect, abuse, or surrender, forfeited its corporate rights, privileges, and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges, and franchises, and that the corporation be dissolved.

§ 443. *Costs against corporation, or persons claiming to be such, how collected.*

If judgment be rendered in such action against a corporation, or against persons claiming to be a corporation, the court may cause the costs therein to be collected by execution against the persons claiming to be a corporation, or by attachment or process against the directors or other officers of such corporation.

§ 444. *Restraining corporation, and appointment of receiver.*

When such judgment shall be rendered against a corporation, the court shall have the same power to restrain the corporation, to appoint a receiver of its property, and to take an account, and make distribution thereof among its creditors, as are given in article three, title four, chapter eight, of the third part of the revised statutes; and it shall be the duty of the attorney-general, immediately after the rendition of such judgment, to institute proceedings for that purpose.

§ 445. *Copy of judgment roll against corporation, where to be filed.*

Upon the rendition of such judgment against a corporation, or for vacating or annulling of letters patent, it shall be the duty of the attorney-general to cause a copy of the judgment roll to be forthwith filed in the office of the secretary of state.

§ 446. *Entry of judgment relating to letters patent in records of commissioner of land-office.*

Such secretary shall thereupon, if the record relates to letters patent, make an entry in the records of the commissioners of the land-office, of the substance and effect of such judgment, and of the time when the record thereof was docketed; and the real property granted by such letters patent may thereafter be disposed of by such commissioners, in the same manner as if such letters patent had never been issued.

§ 447. *Actions for forfeiture of property to the people.*

Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the people of this State, or to any officer for their use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer, in the supreme court.

CHAPTER III.

Action for the Partition of Real Property.

§ 448. *Provisions of the revised statutes, applicable to actions for partition.*

The provisions of the revised statutes relating to the partition of lands, tenements, and hereditaments, held or possessed by joint tenants or tenants in common, shall apply to actions for such partition brought under this act, so far as the same can be so applied to the substance and subject-matter of the action, without regard to its form.

a. The statutory provisions relating to partition are, 2 R. S. 317; and laws of 1852, p. 411; and see Rules 77, 78, 79, and *ante*, pp. 40, *a*; 45, *a*.

b. **Personal property.**—An action cannot be maintained for the partition of personal property (*Tinney* v. *Stebbins*, 28 Barb. 290).

c. **Partition suit is in rem.**—A suit in partition is a proceeding in rem, and the jurisdiction of the court is confined to the subject-matter set forth and described in the petition (*Corwithe* v. *Griffing*, 21 Barb. 9).

d. **Partition, in what cases.**—Partition between tenants in common is a matter of right (10 Paige, 470; 2 Barb. 599; see however 14 Abb. 208). It may be had by the several owners of property subject to a lease (*Woodworth* v. *Campbell*, 5 Paige, 518); and by a tenant in common of a *vested* remainder (*Blakely* v. *Calder*, 13 How. 476; 15 N. Y. 617); by assignees in trust for the benefit of creditors of a tenant for life (*Van Aredale* v. *Drake*, 2 Barb. 599); or by a tenant by the curtesy initiate (*Riker* v. *Darke*, 4 Edw. Ch. R. 668); by a devisee (*Ackley* v. *Dygert*, 33 Barb. 176); and it was decreed where the plaintiff's interest consisted of being owner in fee of an undivided share of the mines and minerals on and in the premises, with power to go on the land and work such mines; and the defendant was owner in fee of the residue of the estate and interest in the premises (*Canfield* v. *Ford*, 16 How. 473; 28 Barb. 336). An action for partition cannot be maintained by one having a mere future contingent interest in an undivided share (*Striker* v. *Mott*, 2 Paige, 387); a widow claiming only in respect of her dower (*Coles* v. *Coles*, 15 Johns. 319); even after her dower has been assigned (*Wood* v. *Clute*, 1 Sand. Ch. R. 199); a remainder-man (*Brownell* v. *Brownell*, 19 Wend. 365; see, however, *Blakely* v. *Calder*, 15 N. Y. 617); nor can an action for partition be maintained where there is an adverse possession (*Clapp* v. *Bromaghan*, 9 Cow. 530, rev'g. S. C. 5 Cow. 295; *Burhans* v. *Burhans*, 2 Barb. Ch. R. 398; *Bradstreet* v. *Scuyler*, 3 id. 608; *Matheweon* v. *Johnson*, Hoff. 560), except the adverse claim is on equitable grounds (*Hosford* v. *Merwin*, 5 Barb. 52; *Coxe* v. *Smith*, 4 Johns. Ch. R. 271); nor unless the plaintiff has himself possession, *actual or constructive* (*Johnson* v. *Valentine*, Court of appeals, Oct. 1852; *Stryker* v. *Lynch*, 11 N. Y. Leg Obs. 116; *O'Dougherty* v. *Aldrich*, 5 Denio, 385; *Burhans* v. *Burhans*, 2 Barb.

Ch. R. 398.) But an existing admitted life-estate, although covering "the whole premises," does not prevent the remainder-man from being deemed "in possession" within the meaning of this rule (*Blakely* v. *Calder*, 13 How. 476; 15 N. Y. 617; and see *Fleet* v. *Dorland*, 11 How. 489). So, where an intestate was seized and possessed of lands which descended to tenants in common, it was held that one of them, though not in possession, could maintain proceedings for a partition, the lands being unoccupied (*Beebe* v. *Griffing*, 4 Ker. 235); otherwise of one who claims by virtue of a breach of a condition subsequent (*O'Dougherty* v. *Aldrich*, 5 Denio, 385). Nor *can* proceedings for a partition be maintained between a tenant in fee and his landlord (*Lansing* v. *Paine*, 4 Paige, 639.) Nor by one of several partners pending an action for a dissolution of the partnership and an accounting as to the same property (*Danvers* v. *Dorritty*, 14 Abb. 206).

a. **Proceedings for partition.**—The proceedings for partition must be by summons and complaint, they cannot be by petition under the revised statutes (*Crogan* v. *Livingston*, 17 N. Y. 218; 6 Abb. 350; *Re Cavanagh*, 14 Abb. 258; 23 How. 358, overruling the cases of *Watson* v. *Brigham*, 1 Code Rep. 67; 3 How. 290; *Myers* v. *Rasback*, 2 Code Rep. 13; 4 How. 83; *Myers* v. *Borland*, *ib.*; *Backus* v. *Stillwell*, 1 Code Rep. 70; 3 How. 318; *Traver* v. *Traver*, 1 Code Rep. 112; 3 How. 351; *Row* v. *Row*, 4 How. 133).

b. Courts of equity have an inherent jurisdiction independently of any statute, to order a sale of the equitable estates of infants (*Wood* v. *Mather*, 38 Barb. 474), or to decree a partition (*Canfield* v. *Ford*, 28 Barb. 336).

c. **Partition of part of premises.**—In partition cases, where two or more of the parties interested desire to have their shares set off to them, to be enjoyed in common, an order of reference will be made for that purpose (Laws of 1847, p. 557, § 4; *Haywood* v. *Judson*, 4 Barb. 228; *McWhorter* v. *Gibson*, 2 Wend. 443). The statute contemplates that the provisions for setting apart the shares of those who desire to remain without partition, shall be made before the final decree is made (*Northrop* v. *Anderson*, 8 How. 351).

d. **Parties.**—No decree can be made unless all the tenants in common are before the court (*Burhans* v. *Burhans*, 2 Barb. Ch. R. 398, 407; *Braker* v *Devereaux*, 8 Paige, 513); any person having an interest, or entitled to dower, in the premises, may be made a party; but it is not necessary, though in most cases it is advisable to make persons parties who are entitled only to dower in the premises, which has not been admeasured, and which extends to the whole of the premises of which partition is sought (*Tanner* v. *Niles*, 1 Barb. 560). See, however, *Ripple* v. *Gilburn*, 8 How. 456; *Brownson* v. *Gifford*, id. 389); as to making the wife of defendant a party (see *Green* v. *Putnam*, 1 Barb. 500, 506; *Matthews* v. *Matthews*, 1 Edw. Ch. R. 565); and as to making a doweress a party (*Bradshaw* v. *Callaghan*, 5 Johns. 80; approved in error, 8 id. 558; *Coles* v. *Coles*, 15 Johns. 319; *Green* v. *Putnam*, 1 Barb. 500; *Tanner* v. *Niles*, id. 560; *Wood* v. *Clute*, 1 Sand. Ch. R. 199). On a bill filed by assignees of a tenant for life, the creditors at large of such life-tenant are not necessary parties (*Van Arsdale* v. *Drake*, 2 Barb. 599); nor is it necessary in any case to join as parties, encumbrancers (*Wotten* v. *Copeland*, 7 Johns. Ch. R. 140; *Sebring* v. *Mersereau*, 9 Cow. 344; *Harwood* v. *Kirby*, 1 Paige, 469); or reversioners (*Striker* v. *Mott*, 2 Paige, 387); or lien holders (*Bogardus* v. *Parker*, 7 How. 305; *Van Arsdale* v. *Drake*, 2 Barb. 599; *Vanderwerker* v. *Vanderwerker*, 7 Barb. 221); or the legal owners of a trust estate (*Braker* v. *Devereaux*, 8 Paige, 513). If a male defendant marry *pendente lite*, and after a notice of lis pendens filed, must his wife be brought in as a defendant to bar her contingent right of dower? (*Jackson* v. *Edwards*, 7 Paige, 387, 403).

e. In a suit between tenants in common for the partition of an interest in real estate, which has been carved out of the fee, the owner of the fee, who is the common source of title to all the tenants in common, is not a necessary party (*Canfield* v. *Ford*, 28 Barb. 336).

f. **Infant plaintiff.**—An action for partition may be instituted on behalf of an infant (Laws 1852, p. 411) but only on an order of the court (*Clark* v. *Clark*, 14 Abb. 299; 21 How. 479; *Lansing* v. *Gulick*, 26 How. 250). Before making

an order for the instituting such a suit the court will refer it to a referee to report whether such an action would be proper, and the *facts*. A report of a referee that, in his "opinion it would be proper to allow said infant to prosecute an action for the partition or sale of the real estate mentioned in the petition," is not sufficient to warrant the court in ordering proceedings in such an action. Under the statute, the *facts* which warrant such a conclusion, should be set forth in the report (*Re Marsac*, 15 How. 483).

a. **Unknown owners.**—In the case of "unknown owners" of any portion of the property, the fact that such owners are unknown must be alleged in the complaint, and there must be a notice by publication as to them (2 R. S. 319, § 12; *id.* 330, § 84; *Hyatt* v. *Pugsley*, 23 Barb. 303; *Allen* v. *Allen*, 11 How. 277). An averment in a complaint that there "are certain unknown owners," although their exact interests are not specified, may be sufficient to authorize the subsequent proceedings as to them (23 Barb. 303). No steps can be taken against unknown owners until the statute notice has been given (*Denning* v. *Corwin*, 11 Wend. 648; see *Rogers* v. *McLean*, 31 Barb. 307).

b. **Complaint.**—The provisions of the code apply to pleadings in actions for partition (*Jennings* v. *Jennings*, 2 Abb. 14). It is not necessary to aver in the complaint that the plaintiffs are in possession, if it be averred that the parties "are seized in common." Such an averment implies possession. If the plaintiffs are in possession, that may be set up as a defence (*Jenkins* v. *Van Schaack*, 3 Paige, 245). The complaint should correctly state the interests and shares of the parties, but no error in this respect will render the decree irregular (*Noble* v. *Cromwell*, 26 Barb. 475; 6 Abb. 59). So the complaint should properly allege that there are no other parties in interest, or incumbrancers, than those joined or mentioned therein, but an omission in this respect does not affect the regularity of the decree. (*Id.*) It is sufficient for the complaint to state in general terms that such tenant was seized of his part in fee, or as the case may be, whether such seizing be acquired by descent or purchase (*Bradshaw* v. *Callaghan*, 8 Johns. 558). The complaint may allege, in addition to what is necessary to obtain a partition, that one of the defendants claims a lien on the premises, and ask to have an account of such lien; such a complaint will not be objectionable on the ground that several causes of action are improperly joined (*Bogardus* v. *Parker*, 7 How. 305).

c. **Notice of pendency of action.**—See *ante*, sect. 132, note thereto. The notice of *lis pendens* is ineffectual until the complaint is filed. It may be filed before or with the complaint, but takes effect only as of the time the complaint is filed. If an amendment by adding parties is made, a new notice to affect such parties should be filed; but if such parties are afterwards struck out, and nothing is claimed by or against them, no new notice of *lis pendens* is necessary (*Waring* v. *Waring*, 7 Abb. 472).

d. **Infant feme covert defendant.**—An infant defendant who is a married woman may appear voluntarily in an action for partition, and it is not necessary that her husband should join with her (*Disbrow* v. *Folger*, 5 Abb. 54). How a guardian is to be appointed for her. (*Id.*)

e. **Infant or idiot defendant, guardian for.**—A general guardian cannot act for an infant or idiot defendant; there must be a guardian *ad litem* appointed (*Re Stratton*, 1 Johns. 509; *Re Sharpe*, 10 *id.* 486; *Clark* v. *Clark*, 14 Abb. 299; 21 How. 479; *Lansing* v. *Gulick*, 26 How. 253). The guardian is not appointed in the same manner as in other actions. He can be appointed by *the court only*, and the appointment of a guardian *ad litem* for an infant by a county judge in an action for partition is a nullity (*Lyle* v. *Smith*, 13 How. 105; *Varian* v. *Stevens*, 2 Duer, 635; contra, see *Towsey* v. *Harrison*, 25 How. 266). But where an order appointing a guardian in partition, in the first district was entitled as if made by the judge personally and at chambers, it was held that the order might be amended so as to read as the order of the court and to be entitled at special term (*Disbrow* v. *Folger*, 5 Abb. 53). The bond *must* be signed by the guardian himself with sureties, a bond by sureties alone would be insufficient, *semble* (*Jennings* v. *Jennings*, 2 Abb. 6; and see *Clark* v. *Clark*, 14 Abb. 299; 21 How. 479). The bond, however, may be amended with the consent of

the obligors, and by leave of the court, to be obtained on petition specifying the alterations required to be made, the reasons for them, and accompanied with the consent of the sureties (*Shaw* v. *Lawrence*, 14 How. 94). The petition should be filed before the guardian enters on his duties, but it may be ordered to be filed *nunc pro tunc* at any stage of the action, or even after judgment and sale (*Croghan* v. *Livingston*, 6 Abb. 350; 25 Barb. 336; 17 N. Y. 218).

a. A party entitled and intending to commence an action for partition may, before service of the summons, procure a guardian for minor defendants to be appointed in the manner prescribed 2 R. S. 317, §§ 2, 3. When the guardian thus appointed has filed the prescribed bond, and given notice thereof to the party intending to institute such action, he has thereby effectually consented to act as guardian, and has accepted his appointment as such. The summons and complaint in such action should be served on him as such guardian, and such service is a proper service on the minors he represents (*Althause* v. *Radde*, 3 Bosw. 410). The omission of such guardian to file an answer to the complaint, or to give notice of his appearance in the action, will not affect the validity of a judgment that partition be made, especially if an answer be filed by virtue of an order of the court, as of a time when it might have been regularly served as a matter of course, though such order be made after judgment perfected. (*Id.*)

b. The want of a verification to a petition by an infant defendant for the appointment of a guardian *ad litem*, may be supplied after judgment, or perhaps such verification may be dispensed with altogether (*Van Wyck* v. *Hardy*, 11 Abb. 473; *Rogers* v. *McLean*, 11 Abb. 440; *Croghan* v. *Livingston*, 17 N. Y. 218).

c. A guardian appointed in another state cannot by virtue of his foreign appointment appear for an infant in this state (*Rogers* v. *McLean*, 31 Barb. 305; see S. C. on appeal, 11 Abb. 440).

d. When upon the petition of an infant defendant over the age of 14, a guardian *ad litem* has been appointed, the order is valid, although no summons had been previously served upon the infant (*Varian* v. *Stevens*, 2 Duer, 635), and a variance between the name of an infant as stated in the complaint and in the petition for the appointment of a guardian,—as where the name was "Letitia Varian" in the complaint and "T. Letitia Varian" in the petition,—may be disregarded as immaterial. (*Id.*) A plaintiff cannot apply for the appointment of a *guardian ad litem* for an infant defendant until after the expiration of twenty days from the service of the summons (*Wilkes* v. *Wilkes*, 1 Barb. Ch. R. 73). The clerk of the court will be appointed guardian *ad litem* for a nonresident infant (*Minor* v. *Betts*, 7 Paige, 596).

e. **Defence of non tenent insimul.**—On an answer *non tenent insimul*, the only question is as to the joint holding (*Thompson* v. *Wheeler*, 15 Wend. 340; *Ferris* v. *Smith*, 17 Johns. 221).

f. **Defence of action pending.**—The pendency of another action for the same cause is a defence (*Hornfager* v. *Hornfager*, 6 How. 279).

g. **Defendant not answering.**—In a partition suit commenced by summons and complaint, where any of the defendants omit to answer in due time, it is not necessary to enter an order for their default in not answering; the plaintiff is entitled to the relief asked for, as in other actions (*Watson* v. *Brigham*, 1 Code Rep. 67; 3 How. 290). The plaintiff, however, in such a case, must exhibit proof of his title, &c., as required by the revised statutes (*Ripple* v. *Gilburn*, 8 How. 456; *Jennings* v. *Jennings*, 2 Abb. 15; *Porter* v. *Lee*, 6 How. 491). It must be such proof as would enable him to recover in ejectment (*Larkin* v. *Munn*, 2 Paige, 27). Where the original defendants admit their several titles, and the title of the plaintiff as stated in the complaint, if one of them dies and the action is continued and his heirs made parties, query, must there be a reference as to the title of such heirs? (4 Paige 481; 5 *id.* 161; 12 Wend. 269).

h. **Liens—advertising for.**—It is not necessary to advertise for persons having general liens; if there are none, it would be a very useless expense to advertise for them. Advertising is only a method of cutting off certain general

liens that may be in existence (*Alvord* v. *Beach*, 5 Abb. 453; *Hall* v. *Partridge*, 10 How. 188). As to allowing creditors to come in and establish their lien after the time for so doing has expired, see *Horton* v. *Buskirk* (1 Barb. 421).

a. **Court will not try disputed title.**—If the legal title is doubtful and disputed, *semble*, the court will not try it in an action for partition (*Wilkins* v. *Wilkins*, 1 Johns. Ch. 14); but if the questions arise upon an equitable title, then such questions will be determined in the partition suit (*Coxe* v. *Smith*, 4 Johns. Ch. 271; *Hosford* v. *Merwin*, 5 Barb. 51). And where it appears that premises are held adversely, the court will dismiss the complaint without prejudice to a new action, to be brought after the plaintiff has obtained possession (*Burhans* v. *Burhans*, 2 Barb. Ch. R. 398; *Vanderwerker* v. *Vanderwerker*, 7 Barb. 225).

b. **Contesting validity of devise.**—Heirs at law, whether in or out of possession, may contest the validity of a devise, by their ancestor of the property in suit. They must allege in their complaint that the apparent devise is void (Laws 1853, ch. 238, p. 526).

c. **Improvement or injury.**—Allowance to a party for (*Green* v. *Putnam*, 1 Barb. 500; 3 Paige, 199; *id.* 445; Hoff. 21; 3 Edw. Ch. R. 323; 3 Sand. Ch. R. 58; and see *Bulen* v. *Burdell*, 11 Abb. 381).

d. **Contingent interest of persons not in esse.**—An actual partition or a sale under a judgment in partition, is effectual to bar the future contingent interests of persons not *in esse*, though no notice is published to bring in unknown parties, and though such future owners may take as purchasers, under a deed or will, and not as claimants under any of the parties to the action (*Mead* v. *Mitchell*, 17 N. Y. 210; 5 Abb. 92).

e. **Partition and sale.**—If a partition of part can be made without prejudice, it may be made and the residue sold (*Haywood* v. *Judson*, 4 Barb. 228). The statute refers to a comparative prejudice between an actual partition and a sale, and will not justify a sale when the benefit from it is small, compared with the value of the property. The "prejudice" mentioned in the statute, means a prejudice to all the owners and not to a part only (*Van Arsdale* v. *Allen*, 2 Barb. 599; see 6 Paige, 541; 1 Edw. Ch. R. 565).

f. **Judgment.**—The judgment must set forth the estate of each known owner or of the defendants or some of them, collectively, when their rights between each other are disputed (*Phelps* v. *Green*, 3 Johns. Ch. 302). There can be no objection to a statement that certain definite portions belong, collectively, to owners who are unknown (*Hyatt* v. *Pugsley*, 23 Barb. 302).

g. Irregularities in a judgment for sale, or in the proceedings on which it is founded, which do not affect the jurisdiction of the court or the parties or the subject matter, do not affect the title taken under the sale. If any necessary parties were not brought before the court, the judgment is void as to them. But where all the necessary parties were joined, the fact that some of the papers in the suit, bringing some parties in have been lost, does not affect the title, if the facts appear by affidavits or by recitals in the other papers on file in the cause. Where the sale was directed to be advertised for *three* weeks instead of *six* as required by law, but was in fact advertised for six weeks, held that the error might be amended (*Alvord* v. *Beach*, 5 Abb. 451).

h. The referee omitting to annex to his report the searches for incumbrances, does not render the judgment on such report irregular (*Noble* v. *Cromwell*, 26 Barb. 475)

i. The judgment besides declaring the rights of the parties and directing a partition, may provide for an account of rents between the parties (*Brownson* v. *Gifford*, 8 How. 390). But if the complaint does not demand an account of rents against defendants in possession, and those defendants do not answer, no such account can be decreed (*Bullwinker* v. *Ryker*, 12 Abb. 311).

j. **New trial.**—In partition, a new trial will be granted on very slight grounds (*Clayton* v. *Yarrington*, 33 Barb. 144).

k. **Manner of sale.**—See Rule 73 of supreme court.

a. **Notice of sale.**—The provisions of the Revised Statutes as to notices of sales by sheriffs, apply to sales in partition (*Le Fevre* v. *Laraway*, 22 Barb. 167). Where the sale was directed to be advertised for *three* weeks instead of *six*, held that the error might be amended (*Alvord* v. *Beach*, 5 Abb. 451). The statutory provision as to selling in parcels is directory merely (1 Johns. Ch. R. 503; 7 Abb. 183).

b. Notices of sales of land in Hamilton County may be published in Fulton County (Laws 1860, ch. 297).

c. **Sheriff liable to account for proceeds of sale.**—The sheriff is liable to account to the parties interested for the proceeds of a sale on partition, although the attorney in the action in fact conducts the sale and receives the proceeds (*Van Tassel* v. *Van Tassel*, 31 Barb. 439).

d. For the omission of a sheriff to pay over to the county treasurer the proceeds of a sale of lands in a partition action, the period of limitation begins to run at the time the omission occurs (*Van Tassel* v. *Van Tassel*, 31 Barb. 439).

e. **Death of plaintiff.**—In an action for a partition and account of rents, the heir may revive as to the partition, and the personal representatives as to the account,—*semble* (*Hoffman* v. *Treadwell*, 6 Paige, 308).

f. In an action for partition, after judgment for sale and partition, and the advertising the sale had commenced, the plaintiff died, and such of his heirs as were not then already parties defendant were substituted in his place as plaintiffs—held that it was not necessary to advertise anew, changing the title of the cause (*Thwing* v. *Thwing*, 9 Abb. 323; 18 How. 458).

g. **Death of defendant.**—Where pending a partition suit, and after the expiration of the time to answer by one defendant, and before putting in any answer, that defendant dies, and the action is continued without making his heirs or devisees parties, the subsequent proceedings are void as to the interest of such deceased defendant (*Requa* v. *Holmes*, 16 N. Y. 123; 26 N. Y. 338; and see *Waring* v. *Waring*, 7 Abb. 472).

h. In an action for partition if one of several defendants dies pending the action, all that is necessary for the cause to proceed is that within a year an order be obtained under section 121 (*Gordon* v. *Sterling*, 13 How. 405).

i. **Bringing in new parties by amendment.**—A partition suit is an action for the recovery of real property within section 122, so that the court may order a person, not a party, but having an interest in the subject, to be made a party by amendment (*Waring* v. *Waring*, 3 Abb. 246).

j. **Discharging purchaser, Resale, &c.**—The court will not discharge a purchaser because of any defect in the pleadings or proceedings which are amendable (*Noble* v. *Cromwell*, 6 Abb. 59; 26 Barb. 475); and as to discharging purchaser, see *Mead* v. *Mitchell*, 5 Abb. 92; 17 N. Y. 210; *Blakeley* v. *Calder*, 15 *id.* 617; 13 How. 476; *Croghan* v. *Livingston*, 6 Abb. 350; 17 N. Y. 218; *Waring* v. *Waring*, 7 Abb. 476; *Disbrow* v. *Folger*, 5 *id.* 53; *Rogers* v. *McLean*, 10 Abb. 306. If a purchaser neglects to comply with the terms of sale within a reasonable time, the court will deprive him of the benefit of his bid, and order a new sale in cases where a resale is deemed more beneficial for the parties (*Jackson* v. *Edwards*, 7 Paige, 387; 22 Wend. 498); as to resale, see *Le Fevre* v. *Laraway* (22 Barb. 167). The court may release a purchaser from his bid on the ground of unreasonable delay to his prejudice on the part of the sellers (*Jackson* v. *Edwards*, 7 Paige, 387). Where one of the defendants has not been properly served with process, a purchaser will not be required to complete (*Cook* v. *Farnham*, 21 How. 286). A defect in the proof of service may be supplied after the sale (*Clark* v. *Clark*, 14 Abb. 300; 21 How. 479).

k. Where a purchaser at a sale under a decree in an action for partition, objected to complete on the ground, among others, that the petition, &c., for the appointment of a guardian did not show that the guardian had no interest adverse to the infant, but that was afterwards made to appear by affidavit, the objection was overruled, and the court said it is only a rule of court, not a statute, which requires such proof, and it is not essential to jurisdiction (*Disbrow* v. *Folger*, 5 Abb. 54).

a. **Proceeds to be brought into court.**—Where an undivided share of real estate was devised to a husband in trust for his wife for life, to his own use for life if he survived, and on the death of the survivor, to the heirs of the wife, held that on a partition the proceeds of such undivided share must be brought into court (*Noble* v. *Cromwell*, 26 Barb. 475, see 1 Paige, 483; 2 *id.* 316).

b. **Inchoate right of dower.**—How provided for, see 4 Sand. Ch. R. 396; 11 How. 176: 5 Abb. 54; Laws 1840, ch. 177 and 379.

c. **Amendments.**—An error in the description of the interests of the parties may be amended on the trial (*Thompson* v. *Wheeler*, 15 Wend. 340; *Noble* v. *Cromwell*, 26 Barb. 475; 6 Abb. 59). And if the plaintiff omits to file any of the papers necessary to the regularity of the judgment, the court may allow them to be filed *nunc pro tunc* (*Waring* v. *Waring*, 7 Abb. 473; *Croghan* v. *Livingston*, 6 Abb. 350; 17 N. Y. 218; *Noble* v. *Cromwell*, 26 Barb. 475). And where in a judgment of sale, the sale was directed to be advertised *three* weeks instead of *six*, as required by law, but in fact the advertisement was published six weeks,—*held* on motion to compel a purchaser to take title, that the error might be then corrected (*Alvord* v. *Beach*, 5 Abb. 451). So, too, the court will correct of its own motion a palpable error in the referee's report as to the extent of the interest of an infant party (*Safford* v. *Safford*, 7 Paige, 259; *Carpenter* v. *Schermerhorn*, 2 Barb. Ch. R. 314); and without sending back the report. (*Id.*) Where through inadvertence the names of certain defendants were omitted from the summons filed, held that on its being shown that such omitted names were actually parties, the summons might be amended after judgment and sale (*Van Wyck* v. *Hardy*, 11 Abb. 478; 20 How. 222).

d. **Plaintiff must prosecute his suit with reasonable diligence.**—Where a party commences an action for a partition and files a notice of *lis pendens*, but fails to proceed in the action with reasonable dispatch, a party named as a defendant, but who has not been served with summons, may apply by petition to have the plaintiff's proceedings vacated (*Lyle* v. *Smith*, 13 How. 104).

e. **Value of inchoate tenancy by the curtesy.**—The value of an inchoate tenancy by the curtesy, depends not only upon the principle applicable to life-annuities and survivorships, but upon the fact of issue; and if none, upon the likelihood of issue (*Benedict* v. *Seymour*, 11 How. 176).

f. **Cost.**—The court has no discretionary power to charge either party with costs on the ground, that he unreasonably refused to make partition by deed *McGowan* v. *Morrow*, 3 Code Rep. 9). But when the plaintiff in a suit in partition, makes persons defendants who have no interest in the subject-matter of the suit, the costs of such defendants will not be charged upon the fund or against their co-defendants, but must be paid by the plaintiff personally, unless such unnecessary parties are brought in at the request of the other defendants (*Hammersley* v. *Hammersley*, 7 N. Y. Leg. Obs. 127). A doweress, when properly a party to the suit, is chargeable with a portion of the costs (*Tanner* v. *Niles*, 1 Barb. 560; see 3 Johns. Ch. R. 302; 1 Sand Ch. R. 40; see *ante*, section 321, *note*).

g. **Attorney's lien.**—The attorney for the plaintiff in a partition suit acquires a lien for his disbursements, on the share of the plaintiff in the property in suit, of which the plaintiff cannot divest him by an assignment of his interest pending the action (*Creighton* v. *Ingersoll*, 20 Barb. 541; see *ante*, p. 582, *f*).

CHAPTER IV.

Actions to determine Conflicting Claims to Real Property, and for Waste and Nuisance.

SECTION 449. Actions to determine claims to real property, how prosecuted.
450. Action of waste abolished. Waste, how remediable.
451. Provisions of revised statutes applicable to action for waste under this act.
452. When judgment of forfeiture and eviction to be given.
453. Writ of nuisance abolished.
454. Remedy for injuries heretofore remediable by writ of nuisance.

§ 449. *Actions to determine claims to real property, how prosecuted.*

Proceedings to compel the determination of claims to real property, pursuant to the provisions of the revised statutes, may be prosecuted by action under this act, without regard to the forms of the proceedings as they are prescribed by those statutes.

a. It is probably now settled that an action to determine conflicting claims to real property is governed by the same rules as other actions (see *Peck* v. *Brown*, 26 How. 350; Laws 1855, p. 943; *Hammond* v. *Tillotson*, 18 Barb. 332; overruling *Crane* v. *Sawyer*, 1 Code Rep. N. S. 30; 5 How. 372).

b. The provisions of the revised statutes as to conflicting claims to real estate, and this section 449 of the Code now apply to married women (Laws 1864, ch. 219).

c. Who may maintain the action (see *Onderdonk* v. *Mott*, 34 Barb. 106).

Pleadings (see *Hager* v. *Hager*, 38 Barb. 92).

d. **Appeal.**—In case of a trial in the proceedings to determine conflicting claims, either party conceiving himself aggrieved may appeal, as in personal actions under the code (Laws of 1855, p. 945, § 11).

e. **Laws amended.**—The provisions of the revised statutes relative to the determination of claims to real property (2 R. S. 313) were amended by Laws of 1848, p. 67; Laws of 1854, p. 276; Laws of 1855, p. 943; and Laws of 1864, ch. 219.

f. **Opening default.**—Since the act of 1855 these proceedings have lost the mere statutory character they once possessed, and are become an action regulated by the code. The court has power to open a judgment entered upon failure to answer in such an action (*Mann* v. *Provost*, 3 Abb. 446).

§ 450. *Action of waste abolished. Waste, how remediable.*

The action of waste is abolished; but any proceeding heretofore commenced, or judgment rendered, or right acquired, shall not be affected thereby. Wrongs heretofore remediable by action of waste, are subjects of action as other wrongs, in which action there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises.

See *Harder* v. *Harder*, 26 Barb. 409; *Robinson* v. *Wheeler*, 25 N. Y. 252.

§ 451. *Provisions of revised statutes applicable to action for waste under this act.*

The provisions of the revised statutes relating to the action of waste, shall apply to an action for waste brought under this act, without regard to the form of the action, so far as the same can be so applied.

§ 452. *When judgment of forfeiture and eviction to be given.*

Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion, against the tenant in possession, when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate, or unexpired term, or to have been done in malice.

§ 453. *Writ of nuisance abolished.*

The writ of nuisance is abolished; but any proceeding heretofore commenced, or any judgment rendered, or right acquired, shall not be affected thereby.

§ 454. *Remedy for injuries heretofore remediable by writ of nuisance.*

Injuries heretofore remediable by writ of nuisance, are subjects of action, as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both.

a. An action pursuant to this section is a substitute for the statute remedy by writ of nuisance, and the plaintiff must aver in his complaint all that was before requisite to sustain an action of that nature (*Ellsworth* v. *Putnam*, 16 Barb. 565).

See *Hubbard* v. *Russell*, 24 Barb. 404; in *Brown* v. *Woodworth*, 5 Barb. 550; *Hess* v. *Buffalo &c. R. R. Co.*, 29 Barb. 391; *Brady* v. *Weeks*, 3 Barb. 157; *Clark* v. *Storrs*, 4 Barb. 562; *Brown* v. *Cayuga R. R. Co.* 2 Kernan, 486).

Chapter V.

General Provisions relating to Actions concerning Real Property.

§ 455. *Provisions of Revised Statutes applicable thereto.*

The general provisions of the revised statutes relating to actions concerning real property, shall apply to actions brought under this act, according to the subject-matter of the action, and without regard to its form.

b. **Ejectment.**—See 2 R. S. 303 (tit. 1, ch. 5, part 3); Laws 1840, ch. 239; Laws 1847, ch. 337; Laws 1846, ch. 159. Section 18 of the aforesaid title (part 3, ch. 5, tit. 1), providing that no actual entry under title need be proved, is not repealed by the code, but is expressly retained by section 455 (*Lawrence* v. *Williams*, 1 Duer, 587); and sections 8, 30, 34, of the same title, are also retained, and are still in force (*Budd* v. *Bingham*, 18 Barb. 498). So is section 31 (*Lang* v. *Wilbraham*, 2 Duer, 171) and section 37 (*Rogers* v. *Wing*, 5 How. 50; *Lang* v. *Ropke*, 701).

c. **When ejectment lies.**—The action of ejectment will lie whenever a right of entry exists and the interest is of such a character, that it can be held and enjoyed, and possession thereof delivered in execution of a judgment for its recovery (*Rowan* v. *Kelsey*, 18 Barb. 484; *Child* v. *Chappel*, 5 Selden, 246). It will not lie for a mere easement (*Wilklow* v. *Lane*, 37 Barb. 244). It lies against a railroad company for laying their rail-track over land dedicated by the plaintiff to public use as a street, and running their cars on such track (*Wager* v. *Troy Union R. R. Co.* 25 N. Y. 526; *Adams* v. *Saratoga R. R. Co.* 24 N. Y. 655, rev'g 11 Barb. 415). Ejectment will lie for land under water, granted by the commissioners of the land office, for the purpose of erecting docks, &c., for commercial purposes (*Champlain and St. Lawrence R. R. Co.* v. *Valentine*, 19 Barb. 484). A contract dated at a future day, leasing lands for a term, commencing at such day, gives the lessee, when the day arrives, the right of possession and to maintain ejectment against a stranger wrongfully withholding (*Trull* v. *Granger*, 4 Selden, 115; see *Spencer* v. *Tobey*, 22 Barb. 260). But under a naked contract of purchase which is silent on the subject of possession, the purchaser acquires no right to the possession and no right of entry, and cannot maintain ejectment (*Kellogg* v. *Kellogg*, 6 Barb. 116). A right of possession *in presenti* is necessary and all that is necessary to maintain ejectment (*Trull* v. *Granger*, 4 Selden, 115; *The People* v. *Mayor of N. Y.*, 10 Abb. 118; *Hunter* v. *Sandy Hill*, 6 Hill, 411; *Bryan* v. *Butts*, 27 Barb. 503; *McLean* v. *McDonald*, 2 Barb. 534). The possession of real estate is *prima facie* evidence of the highest estate in the property, namely, a seisin in fee (*Hill* v. *Draper*, 10 Barb. 454 *Barnhart* v. *Greenshields*, 28 Eng. Law and Eq. R. 83; *Maltonner* v. *Dimmick*, 4 Barb. 566). Ejectment does not lie against a mortgagee in possession (*Bolton*

v. *Brewster*, 32 Barb. 390); nor by a mortgagee against his mortgagor (*Sahler* v. *Signer*, 37 Barb. 329); nor against one who erects a gutter on his own premises projecting over the land of his neighbor (*Aiken* v. *Benedict*, 39 Barb. 400); nor against a municipal corporation for using a street as a public street (*Cowenhoven* v. *City of Brooklyn*, 38 Barb. 9). Ejectment lies against one who enters into possession of land of another, with his assent, under a contract to purchase the same after default in payment of the purchase money (*Powers* v. *Ingraham*, 3 Barb. 576).

a. Ejectment cannot be maintained unless the plaintiff has a legal estate in the premises (*Wright* v. *Douglass*, 3 Barb. 556).

b. Where an owner of land conveys the same to another, excepting the portions included in the highway, he may maintain an action of ejectment against the grantee for encroachments upon the highway or for an exclusive occupation of it, by the latter (*Ete* v. *Daily*, 20 Barb. 32).

c. **Parties plaintiff.**—In an action to recover land, there cannot properly be joined several plaintiffs claiming under distinct titles for distinct interests (*The People* v. *Mayor of N. York*, 10 Abb. 111; see *ante*, § 111).

d. **Attorney for plaintiff to produce his authority.**—(2 R. S. 305, §§ 17—21.)—This provision applies to actions commenced under the code (*Howard* v. *Howard*, 11 How. 80). What is a sufficient authority to the attorney? (*Id.*) The order must direct that the authority be produced to the officer granting the order, and state the place at which it is required to be presented (*Turner* v. *Davis*, 2 Den. 187; and see 10 Wend. 568).

e. **Ejectment by husband and wife.**—In an action to recover property, the alleged separate estate of the wife, she must sue alone, without her husband (*Hillman* v. *Hillman*, 14 How. 459). In a joint action by husband and wife for the recovery of land, to which they claim title in right of the wife, no separate judgment can be given in favor of the wife and against the husband. They must recover jointly or not at all (*Bartow* v. *Draper*, 5 Duer, 130). Where a married woman had the actual possession of land held by her for her separate use, and has been wrongfully ejected therefrom, she may maintain in her own name an action to recover the possession without joining her husband (*Darby* v. *Gallaghan*, 16 N. Y. 71).

f. **Ejectment for lands conveyed during infancy.**—Before an action can be brought by an individual to recover the possession of lands conveyed by him during his infancy, he must make an entry on the lands, or do some open act of disaffirmance of such deed, and this act of disaffirmance must be averred in the complaint (*Voorhies* v. *Voorhies*, 24 Barb. 150).

g. **Between tenants in common.**—In ejectment by one tenant in common against another, an actual ouster must be shown, or some act amounting to a total denial of his right (*Edwards* v. *Bishop*, 4 Coms. 61). In ejectment for lands held in common, it is not necessary that all the tenants in common should unite in the action, except when the action is a substitute for a writ of right (*Kellogg* v. *Kellogg*, 6 Barb. 117).

h. **Arrest of defendant**—see *ante*, p. 371, *j*.

i. **Defendant.**—If the premises are *actually occupied*, the *actual occupant* must be made defendant (*Taylor* v. *Crane*, 15 How. 360; *Lucas* v. *Johnson*, 8 Barb. 244; *Ellicott* v. *Mosier*, 11 id. 574; *Schuyler* v. *Marsh*, 37 Barb. 350; *The People* v. *Ambrecht*, 11 Abb. 97; *Pulen* v. *Reynolds*, 22 How. 353; *Van Horne* v. *Everson*, 13 Barb. 526; see *Waldorph* v. *Bortel*, 4 How. 358; *Redfield* v. *Utica & Syracuse R. R. Co.* 25 Barb. 54). The several occupants of a building may be sued jointly (*Pearce* v. *Ferris*, 10 N. Y. 280).

j. Ejectment for vacant premises may be brought against one claiming title. But the claim must be more than "an idle declaration that he owns the land" (*Banyer* v. *Empie*, 5 Hill, 48).

k. Under the former practice, when the premises were actually occupied, the action of ejectment could only be brought against the person in possession. It was only where the premises were not so occupied that the action might be brought against some person exercising acts of ownership over the premises claimed, or claiming title thereto, or some interest therein (*Shaver* v.

McGraw, 12 Wend. 558). Where some of the defendants in an action of ejectment are not in actual possession of premises sought to be recovered, but claim an interest therein adverse to the plaintiff, the other defendants being tenants in possession under them, the former may properly be made parties (*Fosgate* v. *Herkimer Manuf. Co.* 12 Barb. 352; S. C. 2 Kernan, 580). A party not in possession, yet claiming an interest, need not necessarily be made a party (*Van Buren* v. *Cockburn*, 14 Barb. 118). Where a lot has on it a house occupied by several tenants who rent different apartments, they are joint occupants of the land, and may be proceeded against jointly in an action of ejectment (*Pearce* v. *Colden*, 8 Barb. 522). The possession must be exclusive of the public, to authorize the action against an individual as an occupant (*Redfield* v. *Utica & Syracuse R. R. Co.* 25 Barb. 54). In an action of ejectment brought by an individual to recover land conveyed by him during infancy, held that he could not in one action sue his grantee and the grantees of such first grantee (*Voorhies* v. *Voorhies*, 24 Barb. 152).

a. The trustees of a church cannot be said to be in the actual occupation of it, and therefore in an action to recover a church the corporation is the proper party defendant, not the trustees of the church (*Lucas* v. *Johnson*, 8 Barb. 244); and as the action will not lie against a person who is not in actual possession (where there is an *actual* occupant) the action will not lie against one who is not in possession by himself or his servant, although he has given a lease of the property and it is occupied by his lessee (*Champlain and St. Lawrence R. R. Co.* v. *Valentine*, 19 Barb. 484; and see *Van Buren* v. *Cockburn*, 14 Barb. 118). Where a lot has on it a house occupied by several tenants of the rooms (not of the lot) they are several tenants of the house but joint occupants of the lot, and in an action to recover such lot the tenants may be joined as defendants and the plaintiff will not be put to his election as to which one he will take a verdict against, but may take a verdict against all (*Pearce* v. *Colden*, 8 Barb. 522). Where tenants are sued, the statute gives the landlord the right to be made a defendant with his tenants, and *semble*, "under proper averments in the complaint I see no good reason why the landlord may not be made defendant in the first place with the tenant" (Crippen, J., *Fosgate* v. *Herkimer Manuf. Co.*, 2 Kernan, 538). A landlord who is not made a defendant but who defends for his tenant, is liable for costs (*Farmers' Loan Co.* v. *Kursch*, 1 Selden, 558).

b. **Claim of title.**—To constitute a claim of title, there must be a serious intentional claim of ownership. A casual declaration of the party that he owns the premises, is not sufficient (*Lucas* v. *Johnson*, 8 Barb. 244; see *McGregor* v. *Comstock*, 16 Barb. 428).

c. **Complaint.**—A complaint which states (1), that on some day specified, after his title accrued, he was *possessed* of the premises in question; (2) a description of the premises with convenient certainty, "so that from such description possession of the premises claimed may be delivered; (3) that being so possessed, the defendant afterwards, on a specified day, entered into said premises, and (4) unlawfully withholds possession from the plaintiff; (5) to his damage in the sum of ——", is sufficient (2 R. S. 304, §§ 7, 8; *Warner* v. *Nellgari*, 12 How. 402; *Ensign* v. *Sherman*, 14 id. 439, reversing S. C. 13 id. 35; *The People* v. *Mayor of N. Y.* 17 id. 61; 8 Abb. 7; 28 Barb. 240. See, however, *Walter* v. *Lockwood*, 4 Abb. 307; 23 Barb. 228; *Lawrence* v. *Wright*, 2 Duer, 674; 14 How. 439; 8 Abb. 19).

d. **Alleging title.**—To recover, the plaintiff must show either, (1) a prior *actual* possession, or (2), a paramount legal title (*Bartow* v. *Draper*, 5 Duer, 130; *Layman* v. *Whiting*, 20 Barb. 559). As to the form of allegation, it is sufficient to allege "the plaintiff has the lawful title as the owner in fee" (*Sanders* v. *Leavy*, 16 How. 308). But where the complaint averred that the premises were conveyed by F. P. to the plaintiff by a warranty deed, and that by virtue of that conveyance, the plaintiff was seized of the premises, and had a lawful title thereto, and that the defendant was in possession, and unlawfully withheld the same, it was on demurrer held insufficient (*Lawrence* v. *Wright*, 2 Duer, 674). The allegation that the property was conveyed to the plain-

tiff, was not sufficient to show a title (*Gardner* v. *Hart*, 1 Coms. 529; 6 Barb. 116).

a. **Description of premises.**—The premises should be described with convenient certainty, "so that from such description possession of the premises claimed might be delivered" (2 R. S. 304, § 8). Where the description was of premises in the town of Putnam, bounded as follows: "North by lands of plaintiff, east by lands of plaintiff, south by lands of defendant, and west by lands of plaintiff," the court treated it as if no premises were mentioned, and dismissed the complaint on the trial, with leave to plaintiff to amend (*Budd* v. *Bingham*, 18 Barb. 494). And where a complaint described the premises as *about* fifty acres in the southern part of a lot, which was fully and perfectly described, held that this was a sufficient description, but that if necessary the complaint could be amended by striking out the word *about* (*St. John* v. *Northrup*, 23 Barb. 26).

b. **Unlawful withholding.**—The complaint must allege that the "possession is unlawfully withheld from plaintiff;" therefore, a complaint which, after alleging plaintiff's title, and describing the premises, continued as thus: afterwards defendant claimed and now claims title to or some interest in the northern portion of said premises, and exercises acts of ownership over the same, in violation of the right of the plaintiff,—was held to be defective (*Taylor* v. *Crane*, 15 How. 362), as not showing any unlawful withholding of the premises from the plaintiff. (*Id.*)

c. **Form of complaint.**—A complaint which stated that on, &c., J. G. was seized in fee and possessed of a certain lot, describing it; that said J. G. died so seized on, &c., intestate, leaving him surviving his widow, M. G. and his children and sole heirs at law, the plaintiffs, F. G., M. G. W., now the wife of A. W., and D. G.; that plaintiffs are seized in fee and entitled to the possession of the said lot, subject to the life-estate of the said M. G. [the testator's widow], in one equal undivided third part of the same; that the plaintiff D. G. is an infant under the age of twenty-one years; and said A. W., by an order duly made by this court, has been appointed his guardian to prosecute this action on his behalf; that the defendants are a corporation, organized under the laws of this State, and plaintiffs have been informed and believe that the defendants are wrongfully in possession of said lot, and wrongfully claim title thereto; and, although requested, have refused and still refuse to deliver up possession to plaintiffs, and unjustly withhold possession from them. By reason of which continual wrong-doing, the plaintiffs have sustained damage to the amount of $3000; wherefore plaintiffs demand judgment for $3000, with costs, and that defendants deliver up possession to them of said lot,—was held good, on an appeal from the judgment, and that it would have been good on demurrer (*Garner* v. *Manhattan Build. Asso.*, 6 Duer, 539).

d. A complaint in ejectment need not aver title in the plaintiff, an averment of his prior possession is sufficient (*Norris* v. *Russell*, 5 Cal. 249; *Hutchinson* v. *Perley*, 4 *id.* 33). A complaint that plaintiffs have lawful title as owners in fee simple of the premises, and that the defendant is in possession and unlawfully withholds the same, held insufficient (*Payne* v. *Treadwell*, 5 Cal. 310).

e. **Joinder of causes of action.**—A plaintiff cannot unite with a claim to recover possession a claim to recover damages for injury to the premises (*Hotchkiss* v. *Auburn R. R. Co.*, 36 Barb. 600).

f. The plaintiff cannot in one and the same action seek to recover possession of real property, on the ground that he is the owner of the fee, and that the defendant wrongfully withholds it from him, and also to confirm his title thereto by a decree that the title is in him, and that the defendant be required to convey an apparent outstanding title claimed by him to the plaintiff (*Lattin* v. *McCarthy*, 8 Abb. 225).

g. **Claim of possession and mesne profits in one action.**—The plaintiff in one action may recover the land and damages for the use of it, while defendant has kept him out of possession (*Livingston* v. *Tanner*, 12 Barb. 481; *The People* v. *Mayor of N. Y.*, 17 How. 57; 28 Barb. 240; 8 Abb. 7; *Hotchkiss* v. *Auburn R. R. Co.*, 36 Barb. 600; *Holmes* v. *Davis*, 21 Barb. 273; see, how-

ever *Tompkins* v. *White*, 1 How. 520). Requisites of complaint for mesne profits, see *Ainslie* v. *Mayor of N. Y.* 1 Barb. 168.

a. **Several statements of one cause of action.**—The section of the revised statutes declaring that the declaration in ejectment may contain several counts, and that several parties may be named as plaintiffs jointly in one count and separately in others, relates merely to the remedy, and is repealed by the code (*St. John* v. *Pierce*, 22 Barb. 362.)

b. **Claim for possession, and to set aside fraudulent deed in one action.**—In an action to recover the possession of land, the plaintiff may attack a deed under which the defendant claims title, as well upon equitable as upon legal grounds, but his complaint should be appropriately framed for the purpose (*Phillips* v. *Gorham*, 17 N. Y. 270). In that case the complaint, after stating plaintiff's title as heir to W. P., deceased, averred that defendant was in possession, claiming ownership by virtue of a pretended deed from said W. P., and charged that such deed was inoperative, because obtained from said W. P. by fraud and without consideration. On the trial, it was contended that the plaintiff could not impeach the defendant's deed in that action, but should have first brought suit to set aside the deed, and if successful, might then sue to recover the possession of the premises. This objection was overruled, and the plaintiff had a judgment declaring the deed void, and for a recovery of the premises; and that judgment the court of appeals affirmed.

c. **Ejectment for non-payment of rent.**—Ejectment for non-payment of rent lies by assignee of lease (*Main* v. *Green*, 32 Barb. 448); or of the rent (*Van Rensselaer* v. *Slingerland*, 26 N. Y. 580); by the personal representatives of the assignee of a life lease (*Mosher* v. *Yost*, 33 Barb. 277); and generally as to ejectment for non-payment of rent see *Van Renselaer* v. *Smith*, 27 Barb. 104; *Van Rensselaer* v. *Jones*, 2 Barb. 643; *Mayor of N. Y.* v. *Campbell*, 18 Barb. 156.

d. In an action to recover possession of demised premises on the ground of a forfeiture of the lease by non-payment of rent, a demand of the rent need not be alleged (*Mayor &c. of N. Y.* v. *Campbell*, 18 Barb. 156).

e. The statute authorizing the vacating of the judgment, and a new trial, in ejectment, does not apply to ejectment for non-payment of rent, as the latter is but a substitute for a re-entry, which is always final. Especially is it not applicable to such an action where the judgment is rendered upon demurrer, and there is no leave to answer over (*Christie* v. *Bloomingdale*, 18 How. 12).

f. **Complaint in ejectment for non-payment of rent.**—In an action to recover possession of demised premises, for non-payment of rent, the complaint stated that the plaintiffs on, &c., were the owners in fee, and possessed of all that certain *water-lot, vacant ground, and soil under water*, called, &c. [describing it], and that being so seized and possessed thereof, the plaintiffs did on that day sell and convey to R. M., and to his heirs and assigns for ever, the said premises with the appurtenances, subject to the payment therefor by said R. M., his heirs and assigns, on the first day of May then next, and yearly and every year on the first day May for ever, of the rent of —, with a clause of re-entry in case of non-payment of rent, and then averred that the defendant Dingee was in the possession of said premises, and that D. P. C. and J. G. S. claimed to have some title or interest in the premises by purchase of the said R. M.'s title, and that R. M. had not, nor had the defendants or either of them, paid the aforesaid rent at the time or times aforesaid, but that the same was wholly due and unpaid since, &c.; wherefor the plaintiffs claim judgment, &c To this the defendants demurred that it did not contain facts sufficient to constitute a cause of action, in this: that (1) it did not allege a demand of the rent; nor (2) notice of an intention to re-enter. But at a general term of the supreme court the complaint was held sufficient (*Mayor of N. Y.* v. *Campbell*, 18 Barb. 156).

g. **Trespass and ejectment,** *and trespass quare clausum fregit*—in respect to the same premises, cannot be joined in the same complaint (*Budd* v *Binpham*, 18 Barb- 494; and see *Smith* v. *Halleck*, 8 How. 73).

h. **Equitable defence.**—To an action of ejectment a defendant may inter-

pose an equitable defence (*Miller* v. *Peet*, 5 Duer 284; *Crary* v. *Goodman*, 2 Kernan, 266; reversing, 9 Barb. 657; and see *Chase* v. *Peck*, 21 N. Y. 581; *Traphagen* v. *Traphagen*, 40 Barb. 537; *Thurman* v. *Anderson*, 30 Barb. 621; *McCray* v. *McCray*, 30 Barb. 633; *Requa* v. *Holmes*, 19 How. 430).

a. But the defendant to avail himself of such defence, must set it up in his answer (*Dewey* v. *Hoag*, 15 Barb. 365; and see 18 N. Y. 529).

b. **Answer of title in defendant.**—When the complaint alleges title, and that the premises are in the possession of the defendant, and demands possession, and also alleges that the defendant unlawfully withholds same, an answer which merely denies possession and unlawful withholding, does not put in issue plaintiff's title, and no question of adverse possession arises. If it was the defendant's intention to put in question the validity of the deed to plaintiff on the ground of an adverse possession, at the time, he should, by his answer, have set up title in himself, or title out of plaintiff (*Ford* v. *Sampson*, 17 How. 447; 8 Abb. 332; 30 Barb. 183).

c. **Answer in action of ejectment by the people.**—In an action of ejectment by the people, an answer denying the plaintiffs' title, but admitting that defendant had taken possession of the premises, and held the same adversely to the plaintiffs, and alleging that no right or title had accrued to the plaintiffs within forty years, and that neither the plaintiffs nor those through whom they claimed had received the rents and profits of the premises within forty years,—was on demurrer held insufficient, and that to have made it sufficient, it should have set up an adverse possession of forty years in the defendant (*The People* v. *Van Rensselaer*, 8 Barb. 190; and see *The People* v. *Livingston*, *id.* 253; *The People* v. *Arnold*, 4 Coms. 508).

d. **Adverse possession.**—Adverse possession, to constitute a bar, must be actual and hostile, and not a mere trespass (*Miller* v. *Platt*, 5 Duer, 273; and see *Kent* v. *Harcourt*, 33 Barb. 491; *Champlain R. R. Co.* v. *Valentine*, 19 Barb. 484; *Fosgate* v. *Herkimer Manuf. Co.*, 9 Barb. 287; *McGregor* v. *Comstock*, 16 Barb. 427).

e. Adverse possession is good only for the part actually occupied (*Corning* v. *Troy Iron and Nail Factory*, 34 Barb. 529; 22 How. 212).

f. **Proof of title.**—Proof of title in plaintiff (*Downing* v. *Miller*, 33 Barb. 386; *The People* v. *Trinity Church*, 30 Barb. 537; 22 N. Y. 44; *Chute* v. *Voris*, 31 Barb. 511; *Lane* v. *Gould*, 10 Barb. 254; *Safford* v. *Hynds*, 39 Barb. 625).

g. **Receiver.**—The court will not pending an action ejectment, at the instance of the plaintiff, appoint a receiver of the rents of the premises in suit (*Thompson* v. *Sherrard*, 35 Barb. 593; 12 Abb. 426; 22 How. 155; *The People* v. *Mayor &c. of N. Y.* 10 Abb. 111; and see *Willis* v. *Corlies*, 2 Edw. Ch. R. 281; *Congden* v. *Lee*, 3 *id.* 304; *Parker* v. *Moore*, *id.* 234; *Cairns* v. *Chabert*, *id.* 312).

h. **Injunction.**—Restraining action of ejectment by injunction (*Sieman* v. *Austin*, 33 Barb. 9).

i. **Waste.**—Restraining waste pending the action (*The People* v. *Davison*, 4 Barb 109).

j. **Plaintiff taking possession.**—It is no bar to an action of ejectment that pending the action the plaintiff has taken possession of the premises (*Tyler* v. *Canaday*, 2 Barb. 160).

k. **Staying proceedings till costs of previous action paid.**—An action of ejectment by several heirs is not for the same cause and between the same parties as an action by one of the heirs, and the proceedings in the action by several cannot be stayed until the costs of an unsuccessful action by one of the heirs is paid (*Ten Broeck* v. *Reynolds*, 13 How. 462).

See *ante*, p. 584, *c.*

l. **Defence by landlord.**—Landlord may be admitted to defend on showing he is landlord, or has a privity of estate or interest with the defendant (*Godfrey* v. *Townsend*, 8 How. 398).

m. **Death of plaintiff.**—Where the plaintiff in an action to recover real property dies, and his heir applies for leave to continue the action, it is not neces-

sary that the widow should join in the petition, or be made a party (*Ash* v. *Cook*, 3 Abb. 389).

a. In ejectment by several plaintiffs, if after judgment for the plaintiffs, one of them dies, execution may issue without any *scire facias*, but it must be in the names of all the defendants (*Howell* v. *Eldridge*, 21 Wend. 678).

b. **Death of sole defendant.**—The death of a sole defendant before verdict abates the action, and it cannot be continued against the heirs of the defendant (*Mosely* v. *Mosely*, 11 Abb. 105; *Kissam* v. *Hamilton*, 20 How. 369).

c. **Change of occupancy of premises pending the action.**—Where, pending the action for the recovery of real property, all the right, title, and interest of the defendant in the premises is, *by operation of law* or by the death of the defendant, transferred to another, who enters into and holds possession thereof, the original cause of action does not continue against the succeeding occupant, and he cannot be substituted as a party (*Mosely* v. *Albany North. R. R. Co.*, 14 How. 71; *Putnam* v. *Van Buren*, 7 *id.* 33).

d. **Where plaintiff's life terminates pending the action.**—(2 R. S. 308, § 31). The provision for the case of a plaintiff's title expiring before the trial, is still in force. Where the plaintiff's title so expires, the court may render judgment for the plaintiff for damages for the withholding possession and against him for the recovery of possession. No supplemental answer is necessary to give a defendant the benefit of this provision (*Lang* v. *Wilbraham*, 2 Duer, 171).

e. **New trial.**—The revised statutes (2 R. S. 309, § 37), provide "that the court in which such judgment (*i. e.*, judgment on verdict in ejectment) shall be rendered, at any time within three years thereafter, upon the application of the party against whom the same was rendered, his heirs, and assigns, and upon payment of all costs and damages recovered thereby, shall vacate such judgment and grant a new trial in such cause." This provision remains in force (*Rogers* v. *Wing*, 5 How. 50; *Lang* v. *Ropke*, 1 Duer, 701; *Cook* v. *Passage*, 4 How. 360). The statute is imperative, and an order granting a new trial pursuant to it is not appealable to the court of appeals (*Evans* v. *Millard*, 16 N. Y. 619). The statute applies only where there has been a trial by jury and a verdict (see *Chautauqua Co. B'k* v. *White*, 23 N. Y. 349). The three years are to be computed from the first judgment in the action. (*Id.*)

f. The statute provides further for a second new trial in the discretion of the court, and the court may grant a third trial, but each party cannot have two new trials (*Bellinger* v. *Martindale*, 8 How. 113).

See *Ejectment for non-payment of rent.*

g. **Mesne profits on restitution.**—Where a recovery is had in ejectment, and the plaintiff is put in possession, if the judgment is subsequently reversed and the premises restored to defendant by a writ of restitution, the action by the defendant for the rents and profits during plaintiff's possession is in the nature of an action for use and occupation (*Shelden* v. *Van Slyke*, 16 Barb. 26; and see 21 *id.* 265; *Mattice* v. *Lord*, 30 Barb. 386).

h. The remedy for mesne profits after recovery in ejectment is by action, not by suggestion (*Holmes* v. *Davis*, 19 N. Y. 488). Although the form of the remedy is changed, the principles of the provisions of the Revised Statutes in relation to the recovery of mesne profits remain in force, and are to be applied to an action for mesne profits after judgment in ejectment, though in form like the old action of trespass. (*Id.*)

i Proof in action for mesne profits and amount of damage, see *Ainslie* v *Mayor of N. Y.*, 1 Barb. 168.

j. On a suggestion for mesne profits, the plaintiff could recover only for the six years next before the filing the suggestion, not for the six years succeeding the commencement of the action (*Budd* v. *Walker*, 9 Barb. 493).

k. **Judgment.**—Judgment in an action of ejectment where no new trial is granted, concludes the parties to the action, and all persons claiming under them by title accruing after the commencement of the action (*Ainslie* v. *Mayor*

of N. Y., 1 Barb. 169; and as to the effect of the judgment, see *Beebe* v. *Elliott*, 4 Barb. 457; *Briggs* v. *Wells*, 12 Barb. 567; *Dunckle* v. *Wiles*, 6 Barb. 515; *Wilson* v. *Davol*, 5 Bosw. 619; Laws 1862, ch. 485).

a. The Laws of 1861, ch. 221, p. 538, repealed laws 1862, ch. 485, was held not to be retrospective, and not to apply to judgments prior to its passage (*Bay* v. *Gage*, 36 Barb. 447).

b. **Verdict—Recovery.**—The provision of the revised statutes as to the form of the verdict in ejectment must be considered as modified by this section. If the plaintiffs collectively are entitled to the whole of the property claimed, then a general verdict for the recovery of the whole property would be sufficient. If only a moiety belonged to them, collectively, a general verdict for such moiety would be proper (*Wood* v. *Staniels*, 3 Code Rep. 152). Where the plaintiff proves title to a smaller quantity of land than he has claimed in his complaint, he may recover according to the proof, and the complaint may be amended accordingly (*Kellogg* v. *Kellogg*, 6 Barb. 116). And where in an action against four defendants to recover the possession of land, the complaint stated that one of them unjustly claimed title to the premises and the others were in possession under him, and that the defendants unjustly withheld the possession from the plaintiff; the answer merely denied the allegation as to withholding possession, and alleged that the one defendant was the owner of and entitled to the premises; on the trial it was proved by the defendants, subject to objection, that they occupied severally distinct parcels of the premises,—held, that under the pleadings the plaintiff was entitled to recover against all the defendants. If there was an improper joinder of parties, the objection should have been raised by demurrer or answer (*Fosgate* v. *Herkimer Manufacturing Co.*, 2 Kernan, 580, affirming S. C., 12 Barb. 353; see 9 Barb. 295).

c. On the trial the plaintiff may recover part of the premises described in the complaint (*Vrooman* v. *Weed*, 2 Barb. 380; *Van Rensselaer* v. *Jones*, 2 Barb. 643; *Truax* v. *Thorn*, 2 Barb. 156; *Kellogg* v *Kellogg*, 6 Barb. 116). The variance may be disregarded (2 Barb. 156).

d. Where the complaint alleged defendant was in possession claiming in right of his wife, and it appeared on the trial that he was in possession claiming in his own right, held an immaterial variance (*Rose* v. *Bell*, 38 Barb. 25).

e. Where on the trial of an ejectment, the evidence as to the location of the premises differs from the description in the complaint, it is a variance, and not a failure of proof (*Russell* v. *Conn*, 20 N. Y. 81).

f. **Costs.**—See *ante*, p. 629, *f*.

g. **Writ of assistance.**—A writ of assistance may be issued *ex parte* (*N. Y. Life Ins. Co.* v. *Cutler*, 9 How. 407; *N. Y. Life Ins. Co.* v. *Rand*, 8 How. 35, 352). [*Semble*, in the second district a writ of assistance will not be issued *ex parte* against one not a party to the suit.]

h. **Execution.**—The court will not on motion of the plaintiff, order the sheriff to execute a writ of *habere facias possessionem* in a particular manner (*Bowie* v. *Brahe*, 4 Duer, 676; 2 Abb. 161). Stay of execution (*The People* v. *Lee*, 7 How. 49).

i. Where the plaintiff fails in an action for the recovery of real property, and for damages for the withholding, he is liable on the return of an execution unsatisfied, to an execution against his person for the costs of the action (*Merritt* v. *Carpenter*, 30 Barb. 61; see *ante*, p. 371, *j*).

j. **Ejectment by purchaser on sale under an execution.**—To recover in ejectment, under a purchase at a sheriff's sale on a judgment against the defendant, it is sufficient for the plaintiff to show the defendant in possession at the time of the recovery of the judgment against him, and a continued possession in him from that time to the commencement of the action, and that the plaintiff acquired the title of the defendant, under the sheriff's sale (*Kellogg* v. *Kellogg*, 6 Barb. 116; *Dickinson* v. *Smith*, 25 Barb. 102; *Bigelow* v. *Finch*, 11 Barb. 498: *Smith* v. *Colvin*, 17 Barb. 157). The plaintiff must prove a judg-

ment, and that a judgment roll has been filed (*Townshend* v. *Wesson*, 4 Duer, 342; and see 11 Barb. 498; 25 *id.* 103; 2 Coms. 273).

a. **Ejectment on surrogate's decree.**—As to ejectment by a purchaser at a sale under a surrogate's decree, see *Sibley* v. *Waffle* (16 N. Y. 180).

b. **Ejectment for dower, against whom it will lie.**—Ejectment to recover dower will lie against a tenant who has an estate or interest less than a freehold and before dower has been assigned (*Ellicott* v. *Mosier*, 11 Barb. 574; 3 Selden, 201). It must be brought against the *actual occupant* of the land (*Ellicott* v. *Mosier*, 3 Selden, 201). It is not necessary that she demand her dower before bringing her action. (*Id.*) Where she claims dower in a block of lots, she may maintain her action against the occupant of a single floor of a house, erected upon one of the lots, who has hired such floor of the owner for a single year. (*Id.*)

c. **Defence.**—To bar the widow of her action for dower, where rent has been assigned with her consent and accepted by her, it must appear that the rent will endure for her life (*Ellicott* v. *Mosier*, 11 Barb. 574; 3 Selden, 201). And in ejectment for dower after admeasurement, the defendant may controvert, the title of the husband, his seizin, the plaintiff's marriage [and the death of the husband] (*Parks* v. *Hardy*, 4 Brads. Sur. Rep. 15; and see *Sparrow* v. *Kingman*, 1 Coms. 242; *Finn* v. *Sleight*, 8 Barb. 401; *Poor* v. *Horton*, 15 Barb. 486). There cannot be a set-off of rents received (*Bogardus* v. *Parker*, 7 How. 303).

d. **Limitation in action to recover dower** (*Brewster* v. *Brewster*, 32 Barb. 428).

e. **Counter-claim in action for dower** (*Ellicott* v. *Gibbons*, 30 Barb. 498).

f. **Admeasurement of dower—Proceedings for, before surrogate.**—See *Board* v. *Board*, 4 Abb. 295; *Parks* v. *Hardy*, 4 Bradf. Sur. Rep. 15); notice to owner before admeasurement (*Stewart* v. *Smith*, 39 Barb. 167).

g. **Complaint for admeasurement of dower.**—A complaint asking to have dower set off and admeasured, is to be regarded as a substitute for the former petition for admeasurement, or the former bill in equity; and is not objectionable on the ground that the defendant was not in the actual possession of the lands, or that six months had not elapsed since the death of the husband (*Townsend* v. *Townsend*, 2 Sand. 711; *Stewart* v. *Smith*, 39 Barb. 167); andas to parties to such action, see *Van Name* v. *Van Name* (23 How. 247).

See *ante*, p. 294, *a*.

TITLE XIV.

Provisions relating to Existing Suits.

SECTION 456. Appeal from order at special term, on a summary application after judgment.
457. Writ of error abolished, and appeal substituted.
458. Execution on judgment docketed prior to July 1, 1848.
459. Application of this act to actions pending. Extraordinary terms.
460. Appeal from certain final decrees allowed.
461. Issue of fact in county court, how tried.

§ 456. *Appeal from order at a special term, on summary application after judgment.*

The appeal mentioned in section 9 of the act to facilitate the determination of existing suits in the courts of this State,* may also be taken from an order made at a special term, on a summary application in an action after judgment, when such order involves the merits of the application, or some part thereof.

§ 457. *Writ of error in all cases abolished. Appeal substituted.*

No writ of error shall be hereafter issued in any case whatever. Wherever a right now exists to have a review of a judgment rendered, or order or decree made, before the first day of July, 1848, such review can only be had upon an appeal taken in the manner provided by this act; and all appeals heretofore taken from such judgments, orders, or decrees, under the provisions of the code of procedure, which are still pending in an appellate court, and not dismissed, shall be valid and effectual. But this section shall not extend the right of review to any

* Laws 1849, ch. 439.

case or question to which it does not now extend, nor the time for appealing, nor shall it apply to a case where a writ of error has been already issued.

a. This section authorizes a review only in cases where the judgment, decree, or order appealed from, was entered before the code was passed, and where a right of review existed by the previous law (*Dunlop* v. *Edwards*, 3 Code Rep. 197).

b. A writ of error will not lie to review in the court of appeals a decision of the supreme court, made at special term, awarding a peremptory mandamus (*People* v. *Steele*, 1 Code Rep. 88).

§ 458. *Execution when issuable on a judgment docketed before July* 1, 1848.

An execution may be issued without leave of the court upon a judgment docketed before the first day of July, 1848, or now or hereafter to be rendered in an action pending on that day, at any time within five years after the rendering of the judgment.

See sections 283, 284.

§ 459. (Am'd 1851.) *Application of this act to actions pending. Extraordinary terms.*

The provisions of this act apply to future proceedings in actions or suits heretofore commenced and now pending, as follows:

1. If there have been no pleading therein, to the pleadings and all subsequent proceedings:

2. When there is an issue of law or of fact, or any other question of fact to be tried, to the trial and all subsequent proceedings:

3. After a judgment or order, to the proceedings to enforce, vacate, modify, or reverse it, including the costs of an appeal. Whenever the judges of the supreme court in any district find that the court at any term or circuit, has not been, or will not be, able to dispose of all the cases upon the calendar, they may request the governor to assign other judges, and if necessary, appoint extraordinary terms and circuits, for the purpose of disposing of such cases. The governor may thereupon make such assignment, and the judges assigned must hold the courts accordingly.

c. This section applies to a notice of trial (*Reynolds* v. *Davis*, 2 Abb. 163; and see *Fellows* v. *Emperor*, 13 Barb. 92).

§ 460. (Am'd 1851, 1852, 1858.) *Appeal from certain final decrees allowed.*

An appeal may be taken from any final decree entered upon the direction of a single judge, in any suit in equity pending in the supreme court, on the first day of July, 1847, at any time before the first day of November, 1852. But this *provision* shall not apply to cases where a rehearing has already been had or ordered, or to the case of a decree entered before the passage of this act, and to review which no attempt in good faith has been or shall have been made within thirty days after notice of the entry of such decree. Such appeal shall be taken in the manner provided in sections 327 and 348. In all cases of appeal to the court of appeals, in actions which were originally commenced in the late court of chancery of this State, the court of appeals shall review the cause upon the facts and the law, without any statement or specification of facts found, or any exception taken at the trial of any or either of them. And it shall be, and is hereby declared to be the duty of the court of appeals, in any and all such cases, to review the whole matter upon the evidence as well as the law.

a. This section is not unconstitutional, it is merely a provision extending the time for bringing an appeal. It affects the remedy only (*Burch* v. *Newbury*, 4 How. 145; 10 N. Y. 374; and see *Mason* v. *Jones*, 1 Code Rep. N. S. 335).

b. In an equity suit commenced before the code took effect, the mode of reviewing a decision of a single judge is by an appeal and not by a rehearing (*Gilchrist* v. *Stevenson*, 7 How. 278).

c. An action commenced under the judiciary act, in the supreme court in equity, is not an action "commenced in the late court of chancery," so as to admit a review of the evidence under this section (*Griffith* v. *Merritt*, 19 N. Y. 529).

§ 461. *Issue of fact in county court, how tried.*

An issue of fact joined in a county court, or court of common pleas, before the first day of July, 1848, or then pending in that court on appeal, shall be tried by a jury, unless the parties otherwise agree.

TITLE XV.*

General Provisions.

SECTION 462. Definition of real property.
463. Definition of personal property.
464. Definition of property.
465. Definition of district.
466. Definition of clerk.
467. Rule of construction.
468. Inconsistent statutory provisons repealed.
469. Inconsistent rules and practice abrogated.
470. Judges to meet and make general rules.
471. Certain proceedings and statutory provisions not affected by this act.
472. Certain statutes repealed.
473. Act, when to take effect.

§ 462. [383.] *Definition of "real property."*

The words "real property," as used in this act, are co-extensive with lands, tenements, and hereditaments.

§ 463. [384.] *Definition of "personal property."*

The words "personal property," as used in this act, include money, goods, chattels, things in action, and evidences of debt.

a. "Where there is nothing in the particular provision to show that the words personal property have a different meaning, section 463 no doubt extends them to include things in action. But it is equally plain that there are particular provisions which preclude those words, in the section relative to executions, from embracing things in action" (*Ransom* v. *Miner*, 1 Code Rep. N. S. 98).

b. A claim for service rendered, is not personal property within the meaning of this section (*The People* v. *Hulbert*, 1 Code Rep. N. S. 75).

c. A right of action for a tort is not, but a right of action on contract to recover damages the subject of computation only, is property (*Ten Broeck* v *Sloo*, 2 Abb. 234).

d. Growing hops held to be chattels (*Frank* v. *Harrington*, 36 Barb. 415).

e. Negotiable paper is personal property (*Ballard* v. *Webster*, 9 Abb. 404).

See *ante*, p. 422, *c*.

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* *f.* "The definitions made in title xv. are necessarily general in their character, and are controlled by specific provisions limiting or enlarging them, whenever they occur in the same statute" (*Ransom* v. *Miner*, 1 Code Rep. N. S. 98).

§ 464. [385.] *Definition of "property."*

The word "property," as used in this act, includes property real and personal.

§ 465. [386.] *Definition of "district."*

The word "district," as used in this act, signifies judicial district, except when otherwise specified.

§ 466. [387.] *Definition of "clerk."*

The word "clerk," as used in this act, signifies the clerk of the court where the action is pending, and in the supreme court, the clerk of the county mentioned in the title of the complaint, or in another county to which the court may have changed the place of trial, unless otherwise specified.

a. An official statute certificate, signed by a deputy clerk without stating that the clerk was absent, held sufficient (4 How. 353; *Lynch* v. *Livingston*, 2 Selden, 422).

See note to section 312.

§ 467. *Rule of construction.*

The rule of common law, that statutes in derogation of that law are to be strictly construed, has no application to this act.

§ 468. [388.] (Am'd 1849.) *Statutory provisions inconsistent with this act repealed.*

All statutory provisions inconsistent with this act, are repealed; but this repeal shall not revive a statute or law which may have been repealed or abolished by the provisions hereby repealed. And all rights of action given or secured by existing laws, may be prosecuted in the manner provided by this act. If a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice.

b. This section preserves the right to a creditor's bill given by the revised statutes, in cases where an execution had been issued and returned unsatisfied, prior to the code (*Quick* v. *Keeler*, 2 Sand. 231; *Dunham* v. *Nicholson*, 2 *ib.* 636). It has also been held that this section gives the right to proceed by summons and complaint for an admeasurement of dower (*Townsend* v. *Town-*

send, id. 713). And in like manner for partition of lands. See note to section 448. Also, in like manner, to pursue the remedy of a creditor's suit. This section also preserves the remedy of *audita querela* (21 Barb. 432; 5 How. 51).

a. The legistature foresaw that there might be instances, like that of *Crane* v. *Sawyer*, 1 Code Rep. N. S. 30, in which the forms of proceedings sanctioned by the code could not be applied to the case; and therefore, in such instances, they authorized a procedure under the former system, so far as to prevent a failure of justice. Again, "*the practice heretofore in use*," means the practice which prevailed before the code (*Church* v. *Rhodes*, 6 How. 285).

§ 469. [389.] (Am'd 1849.) *Rules and practice inconsistent with this act abrogated.*

The present rules and practice of the courts in civil actions, inconsistent with this act, are abrogated, but where consistent with this act, they shall continue in force, subject to the power of the respective courts to relax, modify, or alter the same.

b. This section saves the old *rules and practice* of the court where consistent; but the *pleadings* are neither part of the *rules* nor of the *practice* (*Allen* v. *Smillie*, 1 Abb. 357; 12 How. 156).

c. Under this provision, the former practice of the court for the correction of errors must govern in the court of appeals, where neither the rules of the court of appeals nor the provisions of the code are inconsistent therewith (*Hastings* v. *McKinley*, 8 How. 175).

d. The code has not changed the former practice, that an action can only be discontinued by *order*, and this section preserves this practice (*Averill* v. *Patterson*, 10 How. 85); and so of attorneys being bail (*Miles* v. *Clarke*, 2 Bosw. 709).

e. This section does not abrogate the principles which governed the practice with respect to affidavits to hold to bail, and showing cause of action, and vacating orders to hold to bail (*Martin* v. *Vanderlip*, 3 How. 265); nor the distinctien between negotiable and non-negotiable paper (*Richards* v. *Warring*, 39 Barb. 42).

f. In actions commenced before the code took effect, this section continues the practice of moving on a case to set aside the verdict (*Thompson* v. *Blanchard*, 4 How. 260).

§ 470. (Am'd 1851, 1852.) *Judges to meet and make general rules.*

The judges of the supreme court, of the superior court of the city of New York, and of the court of common pleas for the city and county of New York, shall meet in general session at the capital in the city of Albany, on the first Wednesday in August, 1852, and every two years thereafter; and at such sessions shall revise their general rules, and make such amendments thereto, and such further rules not inconsistent with this code, as may be necessary to carry it into full effect. The rules so made shall govern the supreme court, the superior court of

the city of New York, the court of the common pleas for the city and county of New York, and the county courts, so far as the same may be applicable.

a. The supreme court in the several judicial districts has no power to create general rules; that power, by section 470 of the code, is expressly given to a convocation of the judges (*In the Matter of the Bowery*, 19 Barb. 591).

b. Rules of supreme court apply to marine and district courts, laws 1863, ch. 484, § 3.

§ 471. [390.] (Am'd 1849, 1852, 1862, 1863.) *This act not to affect certain proceedings and statutory provisions. Mandamus.*

Until the legislature shall otherwise provide, the second part of this act shall not affect proceedings upon mandamus or prohibition; nor appeals from surrogates' courts, except that the costs on such appeal shall be regulated and allowed in the manner provided in section three hundred and eighteen of this act; nor any special statutory remedy not heretofore obtained by action; nor any existing statutory provisions relating to actions not inconsistent with this act, and in substance applicable to the actions hereby provided; nor any proceedings provided for by chapter five of the second part of the revised statutes, or by the sixth and eighth titles of chapter five of the third part of those statutes, or by chapter eight of the same part, excluding the second and twelfth titles thereof, or by the first title of chapter nine of the same part; except that when in consequence of any such proceeding a civil action shall be brought, such action shall be conducted in conformity to this act; and except, also, that where any particular provision of the titles and chapters enumerated in this section shall be plainly inconsistent with this act, such provision shall be deemed repealed.

In actions or proceedings by mandamus, amendments of any mistakes in the process, pleadings or proceedings therein may be allowed, and shall be made in conformity to the provisions of chapter six, title six [§§ 169, 177], of the second part of the code of procedure.

c. Judgment on mandamus to be reviewed by appeal, not by writ of error (*The People* v. *Church*, 20 N. Y. 529; and see *The People* v. *Albright*, 14 Abb. 305).

a. This section has not affected the measure of a sheriff's liability for the escape of a person committed on a *ca. sa.* as declared by 2 R. S. 437, § 66, [63] (*Renwick* v. *Orser*, 4 Bosw. 384; *McCreery* v. *Willett*, *id.* 643; *Daguerre* v. *Orser*, 15 Abb. 113).

b. The following are the provisions of the revised statutes referred to in this section as not affected by the second part of the code:—

Ch. V. *Pt.* 2, *of the Revised Statutes* (2 R. S. 1).

TIT. 1. ART. 1. Of attachments against absconding, concealed, and non-resident debtors.
2. Of attachments against debtors confined for crime.
3. Of voluntary assignments made pursuant to the application of an insolvent and his creditors.
4. Of proceedings by creditors to compel assignments by debtors imprisoned on execution in civil causes.
5. Of voluntary assignments by an insolvent for the purpose of exonerating his person from imprisonment.
6. Of voluntary assignments by a debtor imprisoned on execution in civil causes (Laws 1857, ch. 427).
7. General provisions applicable to proceedings under the several preceding articles.
8. Of the powers, duties, and obligations of trustees as assignees under this title.
9. Provisions respecting assignees under former insolvent laws.
10. Provisions of the "act to abolish imprisonment for debt and to punish fraudulent debtors," passed April 26th 1831, other than those which relate to justices' courts, (6 How. 348).

TIT. 2. Of the custody and disposition of the estates of idiots, lunatics, persons of unsound mind, and drunkards.

Ch. V. *Pt.* 3, *of the Revised Statutes.*

TIT. 6. Of trespass on land.
8. Proceedings to discover the death of persons upon whose lives any particular estate may depend.

Ch. VIII. *Pt.* 3, *of the Revised Statutes.*

TIT 1. Of the bringing and maintaining suits by poor persons (14 How. 16; 18 How. 464).
3. Of suits by and against executors and administrators, and against heirs, devisees, and legatees (10 How. 217, 532; Laws 1859, ch. 110, 261; 10 Barb. 247).
4. Of proceedings by and against corporations and public bodies having certain corporate powers, and by and against officers representing them [and joint stock companies] (11 How. 186—29; 10 *id.* 1—487).
5. Of suits against sheriffs, surrogates, and other officers, on their official bonds.
6. Of actions for penalties and forfeitures, and provisions for the collection and remission of forfeited recognizances and fines imposed by courts (*See, post*, 836, *c*; 5 Abb. 384; 8 How. 431).
7. Of proceedings for the admeasurement of dower.
8. Of proceedings for the collection of demands against ships and vessels [and mechanic's liens] (Laws 1859, ch. 79). Laws 1862, p. 956.
9. Of proceedings for the recovery of rent and of demised premises.
10. Of summary proceedings to recover the possession of land in certain cases (1 Selden, 383; Laws of 1857, ch. 684).

TIT. 11. Of distraining cattle and other chattels doing damage, and of distraining in other cases.

13. Of proceedings as for contempts, to enforce civil remedies, and to protect the rights of parties in civil actions (*The People* v. *Compton*, 1 Duer, 512; *Re Smethurst*, 3 Code Rep. 55; 2 Sand. 724).

14. Of arbitrations.

15. Of the foreclosure of mortgages by advertisement. (Laws of 1857, ch. 308).

16. Of proceedings for draining of swamps, marshes, and other low lands.

17. General miscellaneous provisions concerning suits and proceedings in civil cases.

18. Proceedings to change the names of parties (Laws 1860, ch. 80).

Ch. IX. *of Pt.* 3, *of the Revised Statutes.*

TIT. 1. Of the writs of habeas corpus and *certiorari* in certain cases.

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a. The provisions of the revised statutes "of proceedings by and against corporations in courts of law" (2 R. S. Part III., Tit. 4, Art. 1), remain in force, "though probably the pleadings and practice, except where otherwise specially provided, should be under the code." (*Bank of Commerce* v. *Rutland, R. R. Co.*, 10 How. 5).

b. What is the effect of this section on proceedings to dissolve a moneyed corporation (*Kattenstroth* v. *The Astor Bank*, 2 Duer, 682).

c. This section (471) declared that the code should not apply to proceedings on forfeited recognizances; but by laws of 1855, ch. 202, p. 305, it is enacted (§ 1) that all the provisions of the code are to apply to all recognizances forfeited in any court of general sessions or of oyer and terminer; and (§ 2) all laws or parts of laws or provisions of statutes in anywise conflicting with such application of the provisions of the code to said forfeited recognizances, are repealed.

d. By this section, all proceedings upon appeals from surrogates' courts are entirely excluded from the operation of any of the provisions in the code; they must be governed by other statutes (*Sherman* v. *Young*, 6 How. 318).

e. This section preserves the petition for admeasurement of dower, but a party may either adopt the petition or the summons and complaint (*Townsend* v. *Townsend*, 2 Sand. 713); and §§ 24 and 25 of 2 R. S. 617, are retained by this section (*Murray* v. *Haskins*, 4 How. 263; and see note to § 303); and 2 R. S. 252, §§ 74, 75, are retained by the code (*McGowan* v. *Morrow*, 3 Code Rep. 9).

f. "The true principles applicable to the titles named in this section, are: Where the *title creates* the proceeding and contains full directions as to the form and mode of conducting it, or where the title modifies a common-law remedy, so as to make it essentially new and statutory,—in such cases the right and remedy remain unseparated and unaltered. But where the titles merely provide for proceedings *preliminary* to an action, or establish certain principles of law or rules of evidence, to govern suits between certain parties, under certain circumstances, without materially affecting the form of the action or manner of conducting it in other respects,—there the proceedings are retained and applied to the new system, and the action, not *depending* upon the old statute, is to be conducted in conformity with the code. In the latter class may be placed, the statutes in relation to suits by poor persons, by and against adminstrators, fixing the damages for trespass in certain cases, &c., which do not seriously affect the forms of action, but are as applicable to the new system as to the old. In the former class may be placed, proceedings in partition, proceedings against corporations in courts of law, admeasurement of dower, proceedings for the collection of demands against ships and vessels, forcible entries and detainers, writ of nuisance, and actions of waste; all of

which are entirely creatures of the statute, by which the right and remedy are made inseparable, or are common-law actions so far modified by the statute as to be inconsistent with any other general form of remedy (Barculo, J., *Traver* v. *Traver*, 1 Code Rep. 112).

See also §§ 108, 109, 449, and Supreme-court Rule 89.

§ 472. *Certain parts of revised and other statutes not repealed.*

Nothing in this act contained shall be taken to repeal section 23 of article 2 of title 5 of chapter 6, part third, of the revised statutes, or to repeal an act to extend the exemption of household furniture and working tools from distress for rent and sale under execution, passed April 11, 1842.

§ 473. [391.] (Am'd 1849.) *This act, when to take effect.*

This act shall take effect on the first day of July, 1848; except that sections 22, 23, 24, and 25, shall take effect immediately.

RULES OF COURT.*

COURT OF APPEALS.

RULE I. *The return.*

When the appeal is from a judgment, the return of the clerk of the court below shall consist of certified copies of the notice of appeal, and the judgment roll. When the appeal is from such an or-

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* *a.* No general rule or order of the court of appeals, or of the supreme court, shall be of any force or effect until it shall have been published in the newspapers at Albany in which legal notices are by law required to be published, once in each week for three successive weeks [Laws of 1847, cap. 470, p. 689, § 4].

b. The rules of the court ought not to be used for purposes of oppression, or in order to bring about a determination of the case upon technicalities at the expense of the substantial merits (*Micklethwaite* v. *Rhodes*, 1 Barb. 57).

c. The constitution (art. 6, § 2), prescribes, that provision shall be made by law for designating one of the number of the judges of the court of appeals, elected by the electors of the State, as chief judge. This is done by the judiciary act (Laws of 1847, p. 320, § 5).

d. Under the constitution, it is the right and the duty of a judge of the court of appeals to take part in the determination of causes brought up for review from a subordinate court of which he was a member, and in the decision of which he took part in the court below (*Pierce* v. *Delamater*, 1 Coms. 17).

e. By Laws of 1850, p. 45, chap. 41, it is enacted: Whenever any judge of the court of appeals, being a justice of the supreme court, shall be absent from the court, or there shall be a reason to believe that he will not attend, the governor shall designate some justice of the supreme court from the class of justices having the shortest time to serve, to supply the place of such absent judge; and such justice shall attend and be a judge of the court of appeals, until such absent judge or some one duly qualified to take his place, shall attend the court. The last clause of section two, title one, chapter three, of the third part of the revised statutes (prohibiting judges from sitting or acting in certain cases), shall not apply to any judge of the court of appeals.

f. As to crier and attendants for the court of appeals, see Laws 1864, ch. 95).

der as is mentioned in the eleventh section of the code of procedure, the return shall consist of certified copies of the notice of appeal, the order appealed from, and the papers on which the court below acted in making the order.

RULE II. *Appellant to file return; effect of his omission.* The appellant shall cause the proper return to be made and filed with the clerk of this court, within twenty days after the appeal shall be perfected. If he fail to do so, the respondent may, by notice in writing, require such return to be filed within ten days after service of the notice; and if the return be not filed in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit proving when the appeal was perfected, and the service of such notice, and a certificate of the clerk that no return has been filed, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

See note to sections 328, 339.

a. An affidavit of the respondent is sufficient to *prove* when the appeal was perfected. Unless the respondent can show some delay or inconvenience in not making the return in pursuance of this rule, or not serving the copies of the case as required by rule 7, the defaults taken under those rules should be relieved against upon terms, in all cases where it appears that the appeal is brought in good faith (*Waterman* v. *Whitney*, 7 How. 407). Where the respondent has omitted to avail himself of the neglect of the appellant in procuring the *return* of the clerk within twenty days after the appeal was perfected, until after the return has been made, and has after the filing of the return noticed the cause for argument, the objection that the return was not made in time is waived. An objection that the return does not contain a copy of the notice of appeal and also that the printed copies of the case served do not contain a copy of the notice of appeal or a copy of the certificate of the clerk of the court below, that the papers returned by him are correct copies of the judgment-roll, &c., are omissions which this court will, on motion, allow the appellant to supply without dismissing the appeal (*Beecher* v. *Conradt*, 11 *id.* 181).

b. Where the appellant is required under this rule to cause the proper return to be filed, he must see to it at his peril, that the return is actually filed in due time, or procure an extension of the time. An appeal regularly dismissed for want of a return will not be reinstated without the appellant establishes a clear case of diligence on his part, and shows that the inexcusable default of the clerk or an unavoidable accident has prevented the filing of the return or the extension of the time to file it (*Spoor* v. *Fannan*, 16 N. Y. 620).

c. Jurisdiction of court below after return made to the court of appeals (see 17 How. 289).

d. Application to amend the return must be made to the court below *semble*, (see *Suyston* v. *Sniffen*, 1 Barb. 428).

e. Appeal dismissed for defect in return (*Ferguson* v. *Ferguson*, 7 How. 217).

f. Argument of appeal suspended to have case resettled according to the facts, (*Livingston* v. *Miller*, 7 How. 219).

g. An affidavit to ground a motion to dismiss an appeal because the suit in the supreme court is a continuation of one commenced before a justice, must show the fact in terms, that the justice was ousted of jurisdiction by giving the undertaking required by section 56 of the code (*Lalliette* v. *Van Keuren*, 7 How. 409).

RULE III. *Further return may be ordered.*

If the return made by the clerk of the court below shall be defective, either party may, on an affidavit specifying the defect, apply to one of the judges of this court for an order that the clerk make a further return without delay.

See note to section 828.

RULE IV. *Attorneys and guardians below to continue to act.*

The attorneys and guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties respectively in this court, until others shall be retained or appointed, and notice thereof shall be served to the adverse party.

a. **Attorney on appeal.**—An appeal may be prosecuted by a new attorney without an order for substitution (*Pratt* v. *Allen*, 19 How. 456; *McLaren* v. *Charrier*, 5 Paige, 530).

RULE V. *Appellant to make a case; its form.*

In all calendar causes a case shall be made by the appellant, which shall consist of a copy of the return of the clerk, and the reasons of the court below for its judgment, or an affidavit that the same cannot be procured. If the case is voluminous, an index to the pleadings, exhibits, depositions, and other principal matters, shall be added.

Every opinion in the cause, at special term as well as at general term, relating to the questions involved in the appeal, is included by the foregoing provision.

RULE VI. *Cases and points to be printed; mode of printing.*

All cases and points, and all other papers furnished to the court in calendar causes, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide. The folio, numbering from the commencement to the end of the case, shall be printed on the outer margin of the page. Small pica, solid, is the smallest letter and most compact mode of composition which is allowed. No charge for printing the papers mentioned in this rule shall be allowed as a disbursement in a cause, unless the requirements of the preceding sentence shall be shown by affidavit to have been complied with, in all papers printed after August 1, 1857.

RULE VII. *Appellant to serve copies of case; effect of his default.*

Within forty days after the appeal is perfected, the appellant shall serve three printed copies of the case on the attorney of the adverse party. If he fail to do so, the respondent may, by notice in writing,

require the service of such copies within ten days after the service of the notice, and if the copies be not served in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit proving the default, and the service of such notice, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs; and the court below may thereupon proceed as though there had been no appeal.

a. This rule applied to appeals pending when this rule was adopted (*Dresser* v. *Brooks*, 2 Code Rep. 130).

b. Where, after the respondent had entered an order under this rule, dismissing the appeal for want of prosecution, and the cause had been remitted to the court below, the appellant moved to set aside the said order entered by the respondent, and per *curiam:* "Although the respondent has been regular, the appellant would be relieved on terms if we had power to grant it; but as the cause has been regularly remitted to the supreme court, we no longer have jurisdiction, and cannot grant relief. The only remedy is a new appeal" (*Dresser* v. *Brooks*, 2 Coms. 561).

c. Where an appeal is regularly dismissed by the court of appeals, and the remittitur sent down, the appellate court loses possession of the cause and all power over it; but where an order dismissing an appeal is irregularly entered, or entered upon a false or garbled affidavit, the appellate court may grant relief by vacating the order of dismissal. So long as the order of the appellate court stands, the court below is bound by it, and has no power to make an order impairing its force. The court below cannot, therefore, upon motion, vacate a judgment entered upon the remittitur on account of the irregularity of the order of the appellate court (*Newton* v. *Harris*, 1 Code Rep. N. S. 191).

d. It has been decided by this [superior] court upon full consideration, that after a remittitur has been regularly filed and an order entered to carry into effect the judgment of the appellate court, the order will not be vacated, and the remittitur taken from the files, without some suggestion from the appellate court itself that the remittitur does not conform to its judgment, or has been irregularly issued (*Selden* v. *Vermilyea*, 3 Sand. 683; 6 How. 41; *Boyardus* v. *Rosendale Manufacturing Co.* 1 Duer, 502).

e. Where an appeal to the court of appeals is dismissed for want of prosecution and remitted to the court below (the superior court) to be there proceeded with, the proper course appears to be that the judgment of the court of appeals be directed to be made the judgment of the court below, and that the costs of the appeal be adjusted by the clerk, and by him entered in the judgment (*Union India Rubber Co.* v. *Babcock*, 1 Abb. 267; 4 Duer, 620).

f. In the foregoing case the judges of the superior court settled the form of an order of judgment to be entered in the court below on remittitur from the court of appeals as follows:—

Title of cause.

At a Special Term, &c.

g. This cause having been brought on upon the remittitur herein sent down from the court of appeals, and now filed in this court, by which remittitur it appears that an appeal was taken by the defendant from the judgment of this court to the court of appeals, and that such appeal has been dismissed by such court, with costs, for want of prosecution, and that the record and proceedings had been directed by said court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals according to law. Now, therefore, on motion of the counsel for the plaintiff, it is ordered and adjudged that the judgment of the court of appeals be and the same is hereby made the judgment of this court, and that the plaintiff have execution against the defendants for the costs, when adjusted by the clerk, and inserted in the judgment, as well as for the amount adjudged to be recov-

ered in and by the judgment of this court, in this case entered the —— day &c., and that this order or judgment be annexed to the judgment-record herein.

See note to Rule II. *supra*.

a. Where the case served is imperfect, the remedy is by motion on notice, to have it corrected. The respondent cannot enter an order dismissing the appeal except where no case is served (*Bowers* v. *Tallmadge*, 20 How. 516; 23 N. Y. 166).

RULE VIII. *Repealed, see Rule XXIX.*

RULE IX. *Copies of cases for judges and copies of points for the court and adverse party.*

At the commencement of the argument the appellant shall furnish a printed copy of the case to each of the judges, and shall deliver eight other copies to the clerk. Each party shall at the same time furnish to each of the judges a printed copy of the points on which he intends to rely, with a reference to the authority which he intends to cite; and shall deliver six other copies to the clerk, and three copies to the counsel of the adverse party.

The cases, points, and calendars delivered to the clerk shall be disposed of as follows: one copy of each shall be kept by the clerk with the records of the court, one copy shall be deposited in the State library, one copy shall be deposited in each branch of the library of the court of appeals, one copy shall be deposited in the library of the New York Law Institute, and one copy shall be delivered to the reporter.

b. The heads of an argument, together with the authorities cited, but not the argument at length, are embraced under the term "points" (*Gray* v. *Schenck*, 3 How. 231). Will the court take notice of any matter not raised by the points submitted? (*Dolloway* v. *Turrill*, 26 Wend. 398 and 403).

RULE X. *Statement of facts on the points. Discussion on questions of fact.*

In all cases each party shall briefly state upon his printed points the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found. And the court will not hear an extended discussion upon any mere question of fact.

RULE XI. *Judgment of affirmance or reversal by default.*

The party who has noticed and placed the cause on the calendar for argument, may take judgment of affirmance or reversal, as the case may be, if the other party shall neglect to appear and argue the cause, or shall neglect to furnish and deliver cases of points as required by the ninth and tenth rules.

RULE XI. *Only one counsel to be heard on each side, unless by order.*

In the argument of calendar causes and motions, only one counsel will be heard on each side, unless the court shall otherwise direct.

RULE XIII. *Criminal cases preferred on calendar.*

Criminal cases shall have a preference, and may be moved, on behalf of the people, out of their order on the calendar.

a. By laws 1858, ch. 37, § 1, it is provided: "Any civil action or proceeding in which the people of this State are a party, and when the attorney-general shall be the attorney on record, shall have a preference in all the courts of this State, and may be moved, on the part of the people, out of its order on the calendar; but such preference shall not be had unless the attorney for the State shall give notice, at the time of service of notice of trial or argument, of the day on which he shall move the trial or hearing of the action; and in case the same shall not be moved by the attorney for the State on such day, the defendant shall have the right to move the trial or argument of the action, and the trial or argument shall not be moved out of its order on any other day than the day specified in such notice, unless the court shall otherwise direct" (see *Barron* v. *The People*, 1 Barb. 136).

b. Actions in which executors or administrators are sole plaintiffs or sole defendants, and appeals which prevent the issuing of letters testamentary or of general administration have a preference over all actions except criminal cases, and may be moved out of their order on the calendar (Laws 1860, ch. 167).

c. Appeals in actions on evidences of debt against a corporation have a preference (*Brainerd* v. *N. Y. & Harlem R. R. Co.* 28 How. 491; see R. S. tit. 4, ch. 8, § 9, pt. 3).

RULE XIV. *Submitting case on printed arguments.*

Causes which have not been exchanged may be submitted at any time in term on printed arguments. Exchanged causes cannot be submitted until reached upon the calendar.

RULE XV. *Motions.*

Motions will be heard on the morning of the first day, and on the morning of each following Tuesday and Friday during the term, before taking up the calendar.

Where notice has been given of a motion, if no one shall appear to oppose, it will be granted as of course.

If a motion be not made on the day for which it has been noticed, the opposing party will be entitled, on applying to the court at the close of the motions for that day, to a rule denying the motion, with costs.

d. A motion to interfere with the calendar will not be granted of course (*Crane* v. *Rowley*, 4 How. 79).

RULE XVI. *Remittitur.*

The remittitur shall contain a copy of the judgment of this court, and the return made by the clerk below; and shall be sealed with the seal, and signed by the clerk, of this court.

RULE XVII. *On affirmance or reversal by default, remittitur to be stayed.*

When a decree or order shall be affirmed or reversed by the default of either party, the remittitur shall not be sent to the court

below, unless this court shall otherwise direct, until ten days after notice of the affirmance or reversal shall have been served on the attorney of the party in default. Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served.

a. Usual terms of opening default (*Conant* v. *Vedder*, 4 How. 141).

b. The 17th rule of the court of appeals was intended to protect the party against surprise, and to give him ample time to make his application for relief, or to obtain an order staying proceedings, to enable him to do so; and if a party rejects the opportunity to avail himself of the benefit of the time thus given, and permits the remittitur to be sent to the court below, the appellate court has lost all power over the cause (*Latson* v. *Wallace*, 9 How. 334). Thus where a default was taken 8th April, notice thereof served 10th April, and the remittitur filed 12th May, held that a motion made afterwards to open the default was too late. (*Ib.*)

RULE XVIII. *Enlarging time. Revoking orders.*

The time prescribed by these rules for doing any act, may be enlarged by the court or by either of the judges thereof; and either of the judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings according to the terms of the order. Any order may be revoked or modified by the judge who made it, or, in case of his absence or inability to act, by either of the other judges.

RULE XIX. *Rules, when to take effect.*

These rules shall take effect on the first day of July next; from which time all former rules are abrogated, except so far as it may be necessary to follow them upon appeals and writs of error which shall be then pending.

RULE XX. *Call of calendar.*

Fifteen causes only will be called on any day, but after such call causes ready on both sides will be heard in their order. Any cause which is regularly called and passed without postponement by the court for good cause shown, at the time of the call, will be placed on all subsequent calendars as if the return had been filed on the day when it was so passed.

Causes upon the calendar may be exchanged one for another of course, on filing with the clerk in court a note of the proposed exchange with the number of the causes, signed by the respective attorneys or counsel. Upon all subsequent calendars, each of said causes will take the place due to the date of the filing of the return in the other.

Any cause, except the first ten upon the calendar, may be struck therefrom before it is reached, of course and without prejudice, by the clerk in court, on consent of the parties who placed the same upon the calendar, at any time during the first week of the term.

RULE XXI. *Duty of clerk as to exchanged causes and calendar.*

The clerk must keep a memorandum of such exchanged and passed causes, and place them upon all subsequent calendars, in accordance with the foregoing provisions.

Rules VI., X., XX., and XII., with a notice that "14 copies of cases and points are required," must be printed on the first leaf of the calendar.

RULE XXII. *Each counsel limited to two hours.*

In the argument of a cause, not more than two hours shall be occupied by each counsel, except by the express permission of the court.

RULE XXIII. [*Adopted June*, 1860.] *Preferred causes.*

According to existing laws, causes which are preferred take their preference in the following order:

1. Criminal actions.
2. Cases of probate, in which the appeal prevents the issuing of letters testamentary or of general administration.
3. Appeals in which the sole plaintiffs or defendants are executors or administrators.
4. All other preferred cases.

Any party claiming a preference must so state in his notice of argument to the opposite party, and to the clerk, and he must also state the ground of such preference, so as to show to which of the above classes the case belongs. In making up the calendar, the clerk will place the preferred causes at the head in the order above prescribed. A preferred cause being once passed without reservation, will take its place in subsequent calendars without preference.

RULE XXIV. [*Adopted* 25 *January*, 1862.] *Calendar to continue one year. Causes to be noticed for January term.*

The printed calendar for the present January term, and for each succeeding January term, shall stand as the calendar for the entire year. Causes noticed and placed upon the calendar for the January term of any year, shall be considered as noticed for all the subsequent terms. Additional causes may be noticed for the March term, 1862, which shall be printed with their appropriate numbers, and annexed to the calendar. After the January term in each year hereafter, no causes, except such as are by law entitled to a preference, will be permitted to be placed upon the calendar without the direction of the court.

RULE XXV. [*Adopted* 25 *January*, 1862.] *No defaults allowed.*

Judgment by default will not be allowed, nor will causes be reserved, or set down for hearing upon a particular day, except in extraordinary cases. When a cause is called in its order upon the cal-

endar, it must be either argued, submitted, or passed. If either party appear alone, he may, at his option, be heard orally, or submit the case upon his printed brief. If the appellant only appears, he shall furnish the court with the usual number of printed copies of the case, and of his points; if the respondent, he shall hand to the court the copies of the case served upon him, and fourteen printed copies of his points. The party thus appearing and arguing or submitting his case, shall hand to the clerk a printed copy of his brief, to be delivered, whenever called for, to the opposite party, who may at any time within twenty days after the hearing, furnish each member of the court, and serve upon the opposite party, a printed answer to such brief, which may be replied to in like manner at any time within fifteen days after such service.

RULE XXVI. [*Adopted* 25 *January*, 1862.] *Call of calendar.*

The call of the calendar at the second, and each subsequent term in the year, will commence at the point where it terminated at the previous term, except that causes placed upon the calendar at the next March term, if entitled by their date or otherwise to priority over the causes remaining upon the calendar, will be first called. Causes which are passed, and which, of consequence, go to the foot of the calendar, will resume their original places upon the calendar for the ensuing year.

RULE XXVII. *Adopted September*, 1862. *Proof of service of notice of argument to be filed with the clerk.*

In all cases where the notice of argument is filed with the clerk of this court, there shall be filed with the same due proof or admission of the service of notice of argument upon the adverse party. And the clerk is directed not to enter on the calendar any cause in which proof of the service of said notice is not filed with him.

RULE XXVIII. *Adopted December* 31, 1862. *Cases ordered to be re-argued.*

All causes in which a re-argument is ordered, may, at the election of either party, be placed on the calendar at the next term after such re-argument is ordered, or the following term—the same to take its original place on the calendar.

RULE XXIX. *Adopted January* 22, 1864. *Notice of argument.*

Either party may bring on the argument on a notice to be served on the opposite party, a copy of which notice, specifying the judicial district in which the cause originated, shall be filed with the clerk of this court on or before the fifteenth day of December in each year, which notice, except in criminal cases, shall be for the first day of the term, and the eighth rule is hereby repealed.

Miscellaneous Practice

At the Terms of the Court, not included in the Rules (7 How. 240).

All the terms are held at the capitol, in the city of Albany. *Four* argument terms in a year.

The court opens at ten o'clock, A. M., on the *first* Tuesday of *January*, *fourth* Tuesday of *March*, *third* Tuesday of *June*, and the *last* Tuesday of *September*.

A term for consultation and decisions, to finish up the year's business, is held in the latter part of December in each year.

The *chief judge* has control of the calendar. All propositions in reference to the arrangement or disposition of causes should be addressed to him. (The other members of the court are usually consulted).

Causes struck off under the rule are *not included* in the *ten* called each day under the rule.

The clerk publishes in the newspapers at Albany, all the proceedings of the court each day, during the term.

A cause, when ready on both sides, may be submitted upon printed arguments and points, *on any day during the term*.

When causes are decided at the close of each term, the *opinions* are delivered to the *reporter*—not to the *clerk*. In cases of *motions*, the opinions are usually left with the clerk among the motion papers.

Tuesdays and *Fridays* of each week are motion days.

The court usually adjourns for the term on *Friday* of the fourth week.

Causes argued or submitted are usually *decided at the close of the next succeeding term*.

Calendar Practice.

Established January, 1854; *as amended March*, 1859.

a. No reservation will be made of any of the first thirty causes unless on account of sickness, or an engagement elsewhere in the actual trial, or argument of another cause, commenced before the term of this court; or other inevitable necessity, to be shown by affidavit. Other causes may be reserved, upon reasonable cause being shown; but if such reservation is not made before the day on which the cause is liable to be called, stronger grounds will be required than when the application is made at an earlier period.

b. Causes reserved, may be reserved either generally for the fourth week of term, or for an earlier day certain, at the election of counsel.

c. Those causes reserved for a day certain, will not be taken up until the ten causes in order for that day have been called.

d. In the fourth week, reserved causes will be first in order, and will be called before the calendar is taken up.

e. Reserved causes, when in order to be called, have priority among each other according to their calendar number.

f. Default may be taken in them, and they will, if passed, go down upon future calendars as if passed in the regular call.

g. The call in the fourth week will include all reserved causes which have not been previously called; but no reserved cause, whether reserved generally or for a particular day, will be called before its number is reached on the regular call of the calendar.

SUPREME COURT RULES.

ADOPTED AUGUST 4, 1858.

ORDERED *that the following Rules* shall commence and take effect on the first day of October next:*

RULE 1. *Examination of candidates for admission.*

Applicants for admission to practice as attorneys and counsellors of this court, who are entitled to examination, shall be examined in open court; the examination shall be had at general term, and shall commence on the first Wednesday of the second and fourth general terms, which shall be held in the several judicial districts in each year, and at no other time or place, and no private examination shall be permitted.

a. Clerks of court and their deputies prohibited from practicing as attorneys (Laws of 1857, vol. 2, p. 199).

RULE 2. *Proof of citizenship, &c., Applicants from other States. To sign roll, &c., on admission.*

To entitle an applicant to an examination, he must prove to the court:—

1. That he is a citizen of the United States, and that he is twenty-one years of age, and a resident of the district in which he applies, which proof may be made by his own affidavit of the fact.

2. The evidence of good moral character shall be the certificate of a reputable counsellor of this court, or of some other reputable person known to the court; but such certificate shall not be deemed con-

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* *b.* These rules may be considered as giving construction to the code (Hand, J., *Myers* v. *Feeter*, 4 How. 240).

See note to Rules of Court of Appeals, on page 839, *ante*, and code, § 470.

c. The court always deviates from its general rules whenever necessary (*Clark* v. *Brooks*, 26 How. 285; see *Battershall* v. *Davis*, 23 How. 384).

d. These rules apply to Marine and District Courts (Laws 1862, p. 971, § 3).

e. Courts of Record, except in the city of New York may at general term make orders for printing calendars (Laws 1862, ch. 86).

clusive evidence, and the court must be satisfied on the point, after a full examination and inquiry.

3. Such applicant must sustain a satisfactory examination upon the law of real and personal property, contracts, partnership, negotiable paper, principal and agent, principal and surety, insurance, exexutors and administrators, bailments, corporations, personal rights, domestic relations, wills, equity, jurisprudence, pleadings, practice, and evidence,

4. Applicants for admission from other States shall conform to the foregoing rules, unless they produce a certificate from a judge of the highest court of original jurisdiction in the State from which they come, to the effect that for three years, immediately preceding, they have practiced as attorneys or counsellors in such court, and that they are in good standing as such attorneys or counsellors.

5. Applicants admitted shall sign a roll, and subscribe and take the constitutional oath of office.

a. As to the qualification for admission as an attorney see *Re Pratt* (18 How. 1).

b. Graduates of the Law department of the University of the city of New York, may be admitted to practice as attorneys, &c., without examination (Laws 1860, ch. 187; *Re Cooper*, 20 How. 1; 17; 22 N. Y. 67; *Re the Graduates*, 11 Abb. 301; reversing 31 Barb. 353; 10 Abb. 348; 19 How. 97; 136).

c. **Non-resident attorneys.**—An attorney of the supreme court admitted and licensed on 22d March, 1862, and whose only office for transacting law business is within this State, may practice in the courts of this State, and service of papers may be made on him according to the practice of the court, and upon him at his residence out of the State by mail (Laws 1862, ch. 43). Attorneys who are non-residents of the State (except those within the statute of 1862) cannot practice in the courts of this State (*Richardson* v. *Brooklyn City R. R.*, 22 How. 368).

d. Rights and duties of attorneys,—None but an attorney or counsellor of the supreme court permitted to act before a justice of the peace, or police justice in the county of Kings (Laws 1862, ch. 53).

e. The attorney in a cause may, without authority of his client, waive a default and consent to open a judgment taken for want of an answer (*Clussman* v. *Merkel*, 3 Bosw. 402).

f. On the death of a party, the authority of the attorney ceases (*Putnam* v. *Van Buren*, 7 How. 31).

g. On the death, removal, or suspension of an attorney, or his ceasing to act, the client of such attorney must be notified to appoint another attorney before the opposite party can proceed in the action (2 R. S. 287, § 67; see *Jewell* v. *Schouten*, 1 N. Y. 241).

h. How far one is bound by the unauthorized appearance of an attorney (*Allen* v. *Stone*, 10 Barb. 547; *Bogardus* v. *Livingston*, 7 Abb. 429). Remedy where an attorney acts without authority (*Armstrong* v. *McOmber*, 18 Barb. 387).

i. An attorney may be required on motion to pay over moneys received of or for a client, although the same may not have been received in any legal proceeding (*Grant's case*, 8 Abb. 357; and as to proceedings against an attorney see *Cottrell* v. *Finlayson*, 4 How. 242).

j. Attachment against an attorney for not paying over money, will not issue if the claim is barred by statute (*The People* v. *Brotherson*, 36 Barb. 662).

k. An attorney's cause of action for his charges in prosecuting an action, accrues immediately judgment is entered. But interest does not commence until the amount is liquidated (*Adams* v. *Fort Plain B'k*, 23 How. 45).

l. The rule of law adverse to purchases by an attorney from his client is unchanged by the code (*Anon.* 16 Abb. 423; and *Brotherson* v. *Consalus*, 26 How. 213).

RULE 3. *Where papers to be filed. Papers on special motion to be filed.*

Papers should be filed in the county specified in the complaint as the place of trial, or in the county to which the place of trial has been changed. And in case the place of trial is changed, for the reason that the proper county is not specified, papers on file at the time of the order making such change, shall be transferred to the county specified in such order; and all other papers in the cause shall be filed in the county so specified.

When the affidavits and papers upon a non-enumerated motion, are required by law to be filed, and the order to be entered in a county other than that in which the motion is made, the clerk shall deliver to the party prevailing in the motion, unless the court shall otherwise direct, a certified copy of the rough minutes, showing what papers were used or read, together with the affidavits and papers used or read upon such motion, with a note of the decision thereon, or the order directed to be entered, properly certified. And it shall be the duty of the party to whom such papers are delivered, to cause the same to be filed, and the proper order entered in the proper county within ten days thereafter, or in default thereof he shall lose the benefit of the said order.

a. Where the county named in the complaint was Ulster, and the defendants entered judgment of non-suit and filed the roll in Ulster county, and on appeal to the general term at Albany judgment was affirmed, and the defendants entered judgment and filed another roll in Albany county,—held that it was a violation of this rule, and should have been entered in Ulster county (*Andrews* v. *Durant*, 6 How. 191).

b. An order becomes ineffectual unless entered within ten days (*Sage* v. *Mosher*, 17 How. 367).

RULE 4. *Undertakings and affidavits to be filed.*

It shall be the duty of the plaintiff's attorney forthwith to file with the clerk of the proper county, all undertakings given upon procuring an order of arrest, an injunction order or an attachment; with the approval of the justice or judge taking the same endorsed thereon; and in case such undertakings shall not be filed within five days after the order for arrest or injunction, or the attachment, has been granted, the defendant shall be at liberty to move the court to vacate the proceedings for irregularity, with costs, as if no undertaking had been given. It shall also be the duty of the attorney to file within the same time, and under the like penalty, the affidavits upon which an injunction or attachment has been granted, and also the affidavit upon which an order for the service of a summons by publication, or an order for a substituted service of a summons has been granted, together with the order for such service.

c. Filing an undertaking on an order of arrest without having it approved, entitles the defendant to move to vacate the order (*Newell* v. *Doran*, 21 How. 427).

d. Where a party omits, by inadvertence, to file an undertaking as required by this rule, the court may relieve him upon or without terms (*Leffingwell* v *Chave*, 19 How. 55; 10 Abb. 472).

See *ante*, p. 407, *d.*

a. It is the practice of the New York Common Pleas to require bonds exacted as the condition of granting a favor to be filed with the clerk of the court (*Rice* v. *Whitlock*, 15 Abb. 419).

RULE 5. *Bail, where to justify.*

Whenever bail are required to justify, they shall justify within the county where the defendant shall have been arrested, or where the bail reside.

RULE 6. *Sureties to justify, and value of security to be proved. Undertakings to be acknowledged.*

Whenever a justice, or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or, if the security offered is by way of mortgage on real estate, to require proof of the value of such estate. And all bonds and undertakings, and other securities in writing, shall be duly proved, or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

b. Non-compliance or defective compliance with this rule may be remedied by amendment (5 How. 388; 1 Code Rep. N. S. 49; and see 5 Paige, 532; 7 *id.* 607; 8 *id.* 197; 1 Barb. 244; 6 Barb. 173).

c. The affidavit of justification should be annexed to the undertaking, and filed therewith (3 Paige, 38).

RULE 7. *Sheriff to file affidavits on arrest.*

The sheriff shall file with the clerk the affidavits on which an arrest is made, within ten days after the arrest.

RULE 8. *Sheriff compelled to return process.*

At any time after the day when it is the duty of the sheriff, or other officer, to return, deliver, or file any process, undertaking, order, or other paper, by the provisions of the code of procedure, any party entitled to have such act done, may serve on the officer a notice to return, deliver, or file such process, undertaking, order, or other paper as the case may be, within ten days, or show cause, at a special term to be designated in said notice, why an attachment should not issue against him.

d. After an order made staying proceedings upon an execution, in the hands of the sheriff, the plaintiff's attorney served upon the sheriff notices requiring him to return the execution in ten days, or show cause why an attachment should not issue against him for contempt; held, on subsequent application for an attachment, that the stay of proceedings, if it continued in force up to the expiration of the ten days, exonerated the sheriff from the duty to return the execution, and that the plaintiff's attorney was bound, if the stay had been vacated and he desired to bring the sheriff into contempt, to furnish him with proof that the stay was no longer in force (*The People* v. *Carnley*, 3 Abb. 215).

e. A sheriff is bound to return an execution according to the requisition of the statute, at his peril (*Wilson* v. *Wright*, 9 How. 459).

See section 419, and note.

RULE 9. *Clerks to keep books. Judgments to be filed, &c., only during office hours.*

The several clerks of this court shall keep in their respective offices, in addition to the "judgment book," required to be kept by § 279 of the Code of Procedure, a book properly indexed, in which shall be entered the titles of all civil actions and special proceedings, with proper entries under each, denoting the papers filed and the orders made, and the steps taken therein, with the dates of the several proceedings; an index of all undertakings filed in the office, stating in appropriate columns the title of the cause or proceeding in which it is given, with a general statement of its condition, or a reference to the statute under which it is given; the date when and before whom acknowledged or proved, by whom approved, and when filed, with a statement of any disposition or order made of or concerning it; and such other books, properly indexed, as may be necessary to enter the minutes of the court, docket judgments, enter orders and all other necessary matters and proceedings; and such other books as the courts of the respective districts, at a general term, may direct.

Judgments shall only be filed and entered, or docketed, in the offices of the clerks of the courts of this State, within the hours during which, by law, they are required to keep open their respective offices for the transaction of business.

a. The clerk of Kings county is to record in suitable books all notices of suits pending. Fee six cents per folio. He is also to print 150 copies of the calendar of each term of circuit and general and special terms (Laws 1859, ch. 212). As to other counties see Laws 1864, ch. 53.

RULE 10. *Attorneys to endorse name and residence on papers served.*

On process or papers to be served, the attorney, besides subscribing or endorsing his name, shall add thereto his place of business; and if he shall neglect to do so, papers may be served on him at his place of residence, through the mail, by directing them according to the best information which can conveniently be obtained concerning his residence.

This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

See section 410, and note.

b. A *notice* of judgment served by the attorney without being signed by him or his place of business mentioned, is a nullity (*Yorks* v. *Peck*, 17 How. 192; *Demelt* v. *Leonard*, 19 How. 182).

c. An attorney or party having fixed his place of residence as prescribed by this rule service by mail can only be made by him, at the place thus indicated and the opposite party can only make service upon him by mail, by addressing him at that place (*Hurd* v. *Davis*, 13 How. 57).

RULE 11. *What to be deemed an appearance.*

Service of notice of an appearance or retainer generally, by an attorney for the defendant, shall in all cases be deemed an appearance. And the plaintiff, on filing such notice, at any time thereafter, with

proof of service thereof, may have the appearance of the defendant entered as of the time when such notice was served.

a. A notice of retainer is not equivalent to an *appearance entered*, within the meaning of the act of Congress regulating the removal of causes from a State court to the United States court (*Field* v. *Blair*, 1 Code Rep. N. S. 292, 361). Nor is the execution of an undertaking in order to procure his discharge from arrest in the State court an *appearance entered* within the statute (*Durand* v. *Hollins*, 3 Duer, 686). But where the defendant appeared in open court upon the argument of a motion for an injunction, and read affidavits to oppose it, held that it was an *appearance entered* (*Cooley* v. *Lawrence*, 12 How. 176; 5 Duer, 605).

b. A notice of bail imports a notice of retainer (3 Caines' R. 133). So does a notice of motion (1 Wend. 13; and see 2 Hill, 362; *Bogardus* v. *Livingston*, 7 Abb. 429).

c. Service of an order extending the time to answer, with a copy of the affidavit on which the order was made, is equivalent to a notice of appearance (*Quin* v. *Tilton*, 2 Duer, 648).

d. "It is said in *White* v. *Featherstonhaugh* (7 How. 358), that under the former practice it was well settled, that when notice of retainer was not served until after default it might be disregarded; and *Lynd* v. *West* (12 Wend. 235), is quoted to that effect. This is contrary to what is believed to have been the practice here" (Mitchell, J., *Abbott* v. *Smith*, 8 How. 463). The case of *White* v. *Featherstonhaugh*, is substantially overruled (Hoffman, J., *Carpenter* v. *N. Y. and N. Haven R. R. Co.*, 11 How. 483).

e. There may be a special and limited retainer (*Webb* v. *Mott*, 6 How. 440).

f. Service of a notice of motion signed by an attorney as "att'y for the def't" is a sufficient notice of appearance (*Kelsey* v. *Covert*, 15 How. 92).

RULE 12. *Change of attorney.*

An attorney may be changed by consent, or upon cause shown, and upon such terms as shall be just, upon the application of the client; by the order of the justice of the court, and not otherwise.

g. In case of the substitution of an attorney, it is sufficient to serve notice of substitution; the order of substitution need not be served (*Bogardus* v. *Richtmeyer*, 3 Abb. 179; *Dorlon* v. *Lewis*, 7 How. 132). If the attorney on the record is changed without an order, but the opposite party treats the new attorney as the attorney in the cause, he cannot afterwards object that no order was obtained (*Farley* v. *Hebbes*, 3 D. P. C. 538). But until an order of substitution is entered and notice thereof served, the opposite party may treat with the attorney in the cause (*Parker* v. *City of W'msburgh*, 13 How. 250).

h. Substitution in partition action (*Creighton* v. *Ingersoll*, 20 Barb. 541).

RULE 13. *Stipulation must be in writing or entered.*

No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel.

i. The superior court will adhere strictly to the rule against giving effect to parol agreements between attorneys (*Brooms* v. *Wellington*, 1 Sand. 664).

j. The rule does not apply to an agreement made by the parties or their attorney or counsel in the presence of the court, or an agreement relative to the proceedings on a reference made in the presence of the referee, and certified by him to be so made (*Corning* v. *Cooper*, 7 Paige, 587).

a. "The courts have determined (6 Cow. 385; 8 *ib.* 119; 1 Hill, 627), that this rule is not applicable to a case where a party has been led to rely on a stipulation, as the plaintiff did here, and allowed judgment to be entered against him" (*Montgomery* v. *Ellis*, 6 How. 326; and see *Wager* v. *Stickle*, 3 Paige, 407).

b. The attorney may waive by parol the service of a paper or any formal requisite in its service. Such *waiver* is not an *agreement* (8 Cow. 119).

c. It is unsafe to admit parol agreements, in relation to cancelling judgments and settling suits, to prevail in opposition to the oath of the adverse party, except under very special circumstances. The written evidence of what took place should be adhered to, and as a general rule required, of the settlement of a legal controversy (*Mulligan* v. *Brophy*, 8 How. 135).

d. An agreement in writing, signed by a party, extending the time to answer, is as obligatory in all respects as if signed by his attorney (*Braisted* v. *Johnson*, 5 Sand. 671).

e. The court may, in a proper case, relieve a party from a stipulation made in a cause (*Becker* v. *Lamont*, 13 How. 23). A party proceeding in disregard of a stipulation, on the ground that the same was obtained by fraud, does so at the peril of having his proceedings set aside, if the stipulation is held to be binding (*Witch* v. *Hall*, 18 How. 314).

RULE 14. *Application for discovery, how made.*

Applications may be made in the manner provided by law to compel the production and discovery of books, papers, and documents relating to the merits of any civil action pending in this court, or of any defence in such action, in the following cases:

1. By the plaintiff, to compel the discovery of books, papers, or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint, or to answer any pleading of the defendant.

2. The plaintiff may be compelled to make the like discovery of books, papers, or documents, when the same shall be necessary to enable the defendant to answer any pleading of the plaintiff.

3. Either party may be compelled to make discovery, as provided by § 388 of the Code.

RULE 15. *Moving papers, what to state.*

The moving papers upon the application for such discovery, shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit, stating that the books, papers and documents whereof discovery is sought, are not in the possession nor under the control of the party applying therefor. The party applying shall show to the satisfaction of the court, or judge, the materiality and necessity of the discovery sought, and the particular information which he requires.

RULE 16. *Order for discovery.*

The order for granting the discovery shall specify the mode in which the same is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or, by requiring him to produce and deposit the same with the clerk of the county in which the trial is to be had, unless otherwise directed in

the order. The order shall also specify the time within which the discovery is to be made. And when papers are required to be deposited, the order shall specify the time that the deposit shall continue; and shall also declare the consequences of an omission to comply with the same, and the court at any special term, upon proof of the default, may of course grant a rule absolute, giving effect to such order; either by nonsuiting the plaintiff, striking out the defendant's answer, debarring him from a particular defence, excluding the paper from being given in evidence, or punishing the party in default as for a contempt, as the order for the discovery may require.

RULE 17. *Order for discovery to operate as a stay of proceedings.*

The order directing the discovery of books, papers or documents, shall operate as a stay of all other proceedings in the cause, until such order shall have been complied with or vacated; and the party obtaining such order, after the same shall be complied with or vacated, shall have the like time to prepare his complaint, answer, reply or demurrer, to which he was entitled at the making of the order. But the justice, in granting the order, may limit its effect, by declaring how far it shall operate as a stay of proceedings.

RULE 18. *Affidavit of serving summons.*

Where the service of the summons, and of the complaint, or notice, if any, accompanying the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service when, and at what particular place, he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein; and also to state, in his affidavit, whether he left with the defendant such copy, as well as delivered it to him.

a. The sheriff of a county out of the State is a person other than the sheriff, and his certificate of service is not sufficient (*Morrell* v. *Kimball*, 4 Abb. 352); and so of any sheriff out of his own county (9 Abb. 71).

RULE 19. *Numbering causes of action or grounds of defence.*

In all cases of more than one distinct cause of action, defence, counter-claim, or reply, the same shall not only be separately stated, but plainly numbered.

b. A failure to comply with this rule subjects every allegation not essential to a single cause of action, to be stricken out as redundant (*Benedict* v. *Seymour*, 6 How. 298), or be set aside for irregularity (*Blanchard* v. *Straight*, 8 id. 85). If a party intends to insist on this objection he should return the answer with his objection, or he will be held to have waived it (*Corbin* v. *George*, 2 Abb. 446).

a. There is no particular mode in which separate causes of action are to be separated and distinguished from each other—any mode which apprises the defendant of what is intended is sufficient (*Hall* v. *McKechnie*, 22 Barb. 244).

RULE 20. *Folios to be marked and title of cause endorsed. Pleadings to be legibly written. Objections when waived.*

The attorney, or other officer of the court, who draws any pleading, deposition, affidavit, case, bill of exceptions, report, or other paper, or enters any judgment, exceeding two folios in length, shall distinctly number and mark each folio in the margin thereof: and all copies, either for the parties or the court, shall be numbered or marked in the margin, so as to conform to the original draft or entry, and to each other, and shall be endorsed with the title of the cause. And all the pleadings and other proceedings, and copies thereof, shall be fairly and legibly written; and if not so written, and folioed, and endorsed, as aforesaid, the clerks shall not file such as may be offered to them for that purpose; nor will the court hear any motion or application founded thereon. The party upon whom the paper is served, shall be deemed to have waived the objection, unless, within twenty-four hours after the receipt thereof, he returns such papers to the party serving the same, with a statement of the particular objection to its receipt.

a. The omitting to folio a pleading is to be remedied by a motion to set aside the pleading, not by demurrer (*Dorman* v. *Kellam*, 14 How. 184). A pleading will not be set aside on the ground that the folios are not marked in the margin. The proper course to pursue where the party objects to a pleading on this ground, is to return the pleading and at the same time to point out the defect. If this is not done within a resonable time, it will be held that the irregularity has been waived. The decision in *Blanchard* v. *Straight* (8 How. 83), "was abundantly sustained on other grounds; and the former practice in relation to formal defects is certainly more reasonable as well as convenient, and should be retained" (*Strauss* v. *Parker*, 9 How. 342). Again, it was held that a complaint will not be set aside, although neither that nor the copy served was folioed as required by the rule, if retained twelve days without objecting to the defect. Such acceptance and delay to object waive the defect (*Chatham Bank* v. *Van Veghten*, 5 Duer, 628).

b. On motion to set asde a complaint exceeding two folios in length, on the ground that the folios thereof were not numbered,—the affidavits on which the motion was made each exceeded two folios in length, but were neither of them numbered. On the motion it was objected on the part of the plaintiff, that the affidavits on which the motion was founded were obnoxious to the like objection as that raised to the complaint. Wells, J., thereupon denied the motion with costs, and said, "There is no color of merits in the motion; and when a party comes into court demanding strict practice on purely technical grounds, he must see to it that his own practice is not obnoxious to similar objections to those which he raised to that of his adversary. * * * The defendant should have returned the papers with the objections stated, so far as the folios were concerned" (*Sawyer* v. *Schoonmaker*, 8 How. 198; and see *Taylor* v. *Mayor of New York*, 11 Abb. 255).

c. Where a party returns a paper as irregular, he must state his objections to it explicitly. A mere statement that the service is irregular and not in compliance with certain specified sections of the code is not sufficient (*Chemung Canal Bank* v. *Judson*, 10 How. 133; *Broadway Bank* v. *Danforth*, 7 ib. 264).

d. Where papers are to be returned for irregularity if there is no attorney's name on them, they are to be returned to the party. If the party is a municipal corporation having a counsel chosen under a statute, the papers should be returned to him (*Taylor* v. *Mayor of N. Y.*, 11 Abb. 255).

RULE 21. *Advice of counsel, how stated.*

Whenever it shall be necessary, in any affidavit, to swear to the advice of counsel, the party shall, in addition to what has usually been inserted, swear that he has fully and fairly stated the case to his counsel, and shall give the name and place of residence of such counsel.

RULE 22. *Time to answer not extended without affidavit of merits. Subsequent extension.*

No order extending the time to answer or demur to a complaint shall be granted, unless the party applying for such order shall present to the justice or judge to whom the application shall be made, an affidavit of merits, or an affidavit of the attorney or counsel retained to defend the action, that, from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defense, upon the merits, to the cause of action set forth in the complaint, or to some part thereof.

And if any extension of time to answer or demur has been granted, by stipulation or order, the fact shall be stated in the affidavit.

a. An order extending the time to answer, unsupported by an affidavit as to merits or defence, may be disregarded (*Ellis* v. *Van Ness*, 14 How. 313; and see *Davenport* v. *Sniffen*, 1 Barb. 228).

b. A defendant who after action commenced, in which a sworn answer is required, voluntarily leaves the country and remains absent several months without communicating with his attorney, is guilty of such negligence that the court will allow the plaintiff to take judgment notwithstanding the attorney for the defendant may believe there is a defence (*Hays* v. *Barryman*, 6 Bosw. 679).

RULE 23. *Subsequent application for order after a refusal.*

If any application for an order be made to any judge or justice, and such order be refused in whole or in part, or be granted conditionally, or on terms, no subsequent application, upon the same state of facts, shall be made to any other judge or justice; and if, upon such subsequent application, any order be made, it shall be revoked; and in this affidavit for such order, the party shall state whether any previous application for such order has been made.

c. *Mills* v. *Thursby*, 11 How. 115; *Cazneau* v. *Bryant*, 4 Abb. 402. The rule does not prevent a motion to modify or vacate, on matter arising or discovered since the first motion, where there are no laches.

See *Renewing motion*, *ante*, in note to § 400.

RULE 24. *Judgment on failure to answer, where to be applied for.*

When the plaintiff in the action is entitled to judgment, upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any special term, in the district embracing the county in which the action is triable, or in an adjoining county; such ap-

plication may also be made at a circuit court in the county in which the action is triable. But when a reference or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable, unless the court shall otherwise order.

RULE 25. *Judgment after service by publication.*

In actions for the recovery of money only, when the summons has been served by publication, under section 135 of the code, no judgment shall be entered, unless the plaintiff, at the time of making the application for judgment, shall show by affidavit that an attachment has been issued in the action, and levied upon property belonging to the defendant; which affidavit shall contain a specific description of such property, and a statement of its value, and shall be attached to, and filed with the affidavits of publication; nor unless the plaintiff shall, at the same time, produce and file with the clerk an undertaking, with two sureties to be approved by the court, that the plaintiff will abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment, to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply, and be admitted, to defend the action, and shall succeed in such defence.

a. The plaintiff's omission to issue an attachment against the property of a defendant in an action commenced on a service by publication, is a ground for setting aside the judgment (*Warren* v. *Tiffany*, 9 Abb. 66; 17 How. 106). See *ante*, p. 447, *f.*

RULE 26. *Plaintiff may stipulate to proceed to trial.*

Whenever the plaintiff shall have neglected to bring his cause to trial according to the practice of the court, and the same shall not have been noticed by the defendant, the plaintiff may, if he has not before stipulated, tender a stipulation, and offer to pay the costs to which the defendant is entitled up to that time.

b. Where a plaintiff stipulates to try at the *next* circuit, it means the next circuit for which there is time to give a regular notice (*Jackson* v. *Phœnix B'k*, 5 Wend. 101; see 8 How. 96).

RULE 27. *Dismissing complaint for not bringing cause to trial.*

Whenever an issue of fact shall have been joined, in any action, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant may move for the dismissal of the complaint with costs.

If it is made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court shall permit the plaintiff, on payment of costs, to bring the said action to trial at the next court where the same is triable.

a. Semble, one of several defendants cannot move under these rules; he must move under § 274, subd. 4 (see *Jackson* v. *Wakeman*, 1 Cow. 177; *Clark* v. *Wood*, 9 Wend. 435; *McGregor* v. *Cleaveland*, 12 id. 201; *Platt* v. *Little*, 1 How. 71;

Hoyt v. *Loomis*, 1 Code Rep. 128), except perhaps where the several parties to a bill or note are sued in one action (*Livingston Co. Bank* v. *Ellis*, 18 Wend. 562). If all the defendants move and *one* of them is not entitled to move, the motion will be denied (*Bancroft* v. *Wilson*, 2 Cow. 495).

a. Where both parties are actors, as in replevin or on a feigned issue, there could not be a nonsuit for neglecting to proceed to trial (*Barrett* v. *Forrester*, 1 Johns. Cas. 274; Col. and C. Cas. 95; *Potter* v. *Lewis*, 18 Wend. 519; *Pote* v. *Curtis*, id. *note;* 9 Wend. 497; *Schroeder* v. *Kohlenback*, 6 Abb. 66; and see *Roy* v. *Thompson*, 1 Duer, 636).

b. Dismissing the complaint in action by the people 2 R. S. 552, § 13; *The People* v. *Thurman*, 3 Cow. 16; *The People* v. *Bank of Washington*, 7 Cow. 519.

c. A defendant may move to dismiss the complaint for a failure to bring the same to trial, he is not bound himself to notice the cause for trial (*Bowles* v. *Van Horne*, 11 Abb. 84; 19 How. 346; *Roy* v. *Thompson*, 1 Duer, 636). The fact that the defendant has himself noticed the cause for trial, does not preclude him from making the motion to dismiss. (*Id.*) But the motion will not be granted if the defendant has neglected opportunities to have the cause tried, or where the cause is of an equitable nature (*Champion* v. *Webster*, 15 Abb. 4).

d. If after issue of fact joined, plaintiff neglects to bring the case to trial, the plaintiff may move to dismiss, but defendant must make the motion promptly after the default, and not allow a circuit to intervene before moving (*Champion* v. *Webster*, 15 Abb. 5), and the motion may be denied, the plaintiff paying the costs of the motion and stipulating to try at the next circuit, or plaintiff may be excused from stipulating and from costs, on showing a sufficient reason for not proceeding to trial. (*Id.*)

e. A dismissal of the complaint for not proceeding to trial cannot be taken after the death of a sole plaintiff, although the defendant had no notice of the death (*Jarvis* v. *Felch*, 14 Abb. 46; and see *Boredorff* v. *Dayton*, 17 Abb. 36, *note*).

RULE 28. *Issues of fact, how tried.*

Issues of fact to be tried by the court, may be tried at the circuit or special term.

RULE 29. *In what cases inquest may be taken.*

Inquests may be taken in actions, out of their order on the calendar in cases in which they were heretofore allowed at the opening of the court, on any day after the first day of the court, provided the intention to take an inquest is expressed in the notice of trial, and a sufficient affidavit of merits shall not have been filed and served.

f. In the case of *Randall* v. *Raab* (not reported), Mitchell, J., at special term held that an affidavit of merits was necessary to prevent an inquest in an action to recover possession of real property (ejectment). See *ante*, p. 461 *et seq.*

g. In all cases susceptible of such an application, the rules of the supreme court relative to proceedings at circuits, should be construed to apply equally to the trial terms of the superior court (Duer, J., *Smith* v. *Brown*, 1 Duer, 665).

RULE 30. *Examination of witnesses, how conducted. Time for summing up.*

On the trial of issues of fact, one counsel only on each side shall examine or cross-examine a witness and one counsel only on each side shall sum up the cause; and during such examination the examining counsel shall stand; and the testimony, if taken down in writ-

ing, shall be written by some person other than the examining counsel; but the justice who holds the court may otherwise order, or dispense with this requirement.

No counsel shall occupy more than one hour in summing up, unless by permission of the court.

RULE 31. *Calling Plaintiff. Submitting to non-suit.*

It shall not be necessary to call the plaintiff, when the jury return to the bar to deliver their verdict; and the plaintiff shall have no right to submit to a nonsuit, after the jury have gone from the bar to consider of their verdict.

RULE 32. *Submitting to nonsuit or dismissal before referees. Form of referees' report. Proceedings on references other than of the issues.*

On a hearing before referees, the plaintiff may submit to a nonsuit or dismissal of his complaint, or may be nonsuited, or his complaint be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to the referees for their decision, in which case the referee shall report according to the fact, and judgment may thereupon be perfected by the defendant,

Upon a trial by referees, they shall, in their decision and final report, state the facts found by them and their conclusions of law separately; a copy of which shall be served with notice of the judgment; and the time within which exceptions may be taken to the report shall be computed from the time of such service.

In references other than for the trial of the issues in an action, upon the coming in of the report of the referee, the same shall be filed, and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause, or proceeding, and the said report shall become absolute, and stand as in all things confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein.

a. The attention of the court has been called to the proper construction of the 32d rule, in regard to filing reports of referees other than for the trials of issues.

I have consulted with some of my brethren, and we are of the opinion,—

1. That all such reports must be filed, and a note of the day of filing be made by the clerk.

2. That in all cases where any of the defendants appear so as to be entitled to notice, such report cannot be confirmed until eight days after service of notice of filing the same.

3. That all the parties who have appeared in the cause or proceeding, may consent, in writing, to waive the delay of eight days, and have the same confirmed at once.

4. That in cases where no one appears for the defendant, the report may be presented to the court for the final order of confirmation and judgment with-

out waiting eight days (*Somers* v. *Milliken*, not reported; Ingraham, J., 10 Nov., 1858).

a. The referee's statement of his conclusions of fact and law, will not be accepted by the court of appeals as a substitute for a case (*Bissell* v. *Hamlin*, 20 N. Y. 519).

RULE 33. *Issues, how settled. Issues on questions of adultery. Motion for new trial.*

In cases where the trial of issues of fact is not provided for in § 253 of the code, if either party shall desire a trial by jury, such party shall, within ten days after issue joined, give notice of a special motion to be made upon the pleadings, that the whole issue, or any specific questions of fact involved therein, be tried by a jury. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, and in proper form to be incorporated in the order; and the court or judge may settle the issues, or may refer it to a referee to settle the issues. Such issues must be settled in the form prescribed in § 72 of the Code of Procedure.

In all actions for a divorce, when issue is joined by the pleadings, upon the questions of adultery, such issue shall not be tried by a jury until the issue to be tried shall be settled in like manner as in other actions, where issues arising out of the pleadings are required to be settled.

When any specific questions of fact involved in an action, or any questions of fact not put in issue, is ordered to be tried by a jury, as a substitute for a feigned issue, and has been tried, or a reference other than of the whole issue has been ordered under § 271 of the code and a trial had, if either party shall desire to apply for a new trial, on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence (except when the judge directs such motion to be made upon his minutes, at the same term or court at which the issues are tried), a case or exceptions shall be made, or a case containing exceptions, as the case may require, which case or exceptions shall be served and settled in the manner prescribed by the rules of the court for the settlement of cases and exceptions in other cases. Such motions shall be made in the first instance at special term; and if neither party moves for a new trial in such case, they shall be deemed to have acquiesced in the decision of the judge or referee, and the verdict of the jury or report of the referee; and the same shall not be questioned upon the final hearing of the cause or in any subsequent proceeding therein.

b. Form of order of reference to settle issues of fact preparatory to taking testimony, *Miller* v. *Wilson* (1 Barb. 222). In this case, Edmonds, J., settled the following order, and announced it as the proper form of the order to be entered in such cases:—On reading and filing the affidavit of ———, the attorney for the above named plaintiff [or defendant], showing that this cause is at issue, and is in readiness to take testimony therein, and proving service of notice of a motion to settle the issues of fact joined therein, and on hearing Mr. ——, of counsel for the plaintiff, no person appearing to oppose,—is is ordered that

the issues of fact joined by the pleadings pending in this suit between the respective parties thereto be settled pursuant to Rule 88, to the end that testimony may be taken thereon. And it is further ordered, that for the purpose of settling the said issues, the pleadings in this suit be referred to ———, as referee, to ascertain and settle the said issues in the form of interrogatories, to be answered by the judgment of the court thereon, wherein shall be stated the several questions of fact to be passed upon the names of the parties to each issue, and which party is to be considered as holding the affimative on each question to be tried. And it is further ordered, that said referee do summon before him, on such reference, all the parties entitled to take testimony in the cause; and that upon the coming in and confirmation of his report, the testimony to be taken in the cause, shall be directed and be confined to the issues thus settled.

a. In suits for divorce on the ground of adultery, feigned issues are only to be made up for the trial of the parts contested by the pleadings. The allegations expressly made on one side and denied on the other, and those only, are to be tried (*Morrell* v. *Morrell*, 8 Barb. 236). Accordingly, held that where the bill contained no allegation as to condonation by the defendant of adulteries committed by the plaintiff, an issue cannot be framed directing an inquiry whether, in case the plaintiff has been guilty of adultery since the intermarriage of the parties, it was committed without the procurement or connivance of the defendant or not, or had been forgiven by her or not. (*Id.*)

b. The code has not rendered it necessary or proper that in actions for divorce the question of alimony should be submitted to the jury. The amount of alimony and the proper order for the custody and maintenance of the children, are matters for the consideration of the court. Whether in an action for a divorce the court might not, under its general authority to propose questions to the jury, direct them to find specially the value of defendant's property, with a view to use such finding as one of the elements to be afterwards considered, in connection with other circumstances, in determining what alimony should be awarded to the plaintiff,—query? The amount of alimony to be awarded upon granting a divorce is within the sound discretion of the court; and alimony may be made to commence from the filing of the complaint. In an action for divorce on the ground of adultery, the defendant, after verdict against him upon the issue of criminalty, should be permitted to produce proofs; and either upon a reference or upon a hearing before the court, should be allowed to show such facts as are proper to be considered in determining the amount of alimony, the time when it should commence, &c. The defendant may be required to give security for the payment of alimony by lien on his real estate. A wife to whom a divorce *a vinculo* is granted, for the adultery of her husband, is, notwithstanding, entitled to dower upon his death. The court cannot require the release of her dowerright as a condition of granting a divorce, nor impose the execution of such a release upon her peremptorily. It seems that the award of alimony is subject to modification from time to time as may be just, and that leave should be given in the decree to apply for such modification as the changing circumstances of the parties may render just (*Forrest* v. *Forrest*, 3 Abb. 144; and see 25 N. Y. 501).

c. In an action by a husband against his wife for a divorce on the ground of adultery, the defendant cannot set up a "counter-claim" for a separation on the ground of cruel and inhuman treatment, or for adultery (*Diddell* v. *Diddell*, 3 Abb. 167; *R. F. H.* v. *S. H.*, 40 Barb. 9). Where on motion to confirm the report of a referee in an action for divorce on the ground of adultery, it did not appear by the moving papers that a jury trial had been waived and consent to the reference had been given *in writing* and *filed*, as required by section 266 of the code,—held, that the reference was irregular, and the motion must be denied (*Diddell* v. *Diddell*, 3 Abb. 167).

d. In an action for a divorce on the ground of adultery, in which issues are raised by the pleadings themselves, it is now not necessary to frame, issues for jury trial, but the issues joined by the pleadings may be tried; since the amendment in 1852 of § 253 of the code, § 72, which provides that "where the

power now exists to order a feigned issue, &c., an order for the trial may be made, &c.," can have no application to an action for divorce for adultery, in which an issue of fact is raised by the pleadings (*Parker* v. *Parker*, 3 Abb. 478; see 16 How. 295). See, however, the amendment to this rule.

a. Where the circumstances of the case require it, the court will order issues to be tried by a jury although the application is not made within ten days after issue is joined (*Clark* v. *Brooks*, 26 How. 285).

b. Upon a notice of motion for the *settlement* of issues, a party may apply for an *award* of issues (*Bailey* v. *Ryder*, 1 Barb. 74).

c. On a reference to ascertain the amount to be allowed for alimony *pendente lite*, the wife need not prove her case, and proof of her misconduct is admissible only to show that it was so glaring that no aid should be afforded her (*Fowler* v. *Fowler*, 4 Abb. 411).

d. After a decree for a limited divorce in a court of a foreign State, which remains in force, the plaintiff in that action cannot maintain an action for an absolute divorce in a court in this State (*Coddington* v. *Coddington*, 10 Abb. 450). A decree for divorce in a foreign State, where the foreign court is shown not to have had jurisdiction of the defendant, is not a bar to an action for a divorce in a court in this State (*McGiffert* v. *McGiffert*, 31 Barb. 69).

e. The delay of a wife in prosecuting her suit is a ground for discontinuing her allowance (*Fowler* v. *Fowler*, 4 Abb. 411).

f. Amount of alimony may be altered, and as to the rules governing in fix-the amount see *Forrest* v. *Forrest* (5 Bosw. 672); and see *Forrest* v. *Forrest*, (25 N. Y. 501).

g. The proceedings on a reference to settle the amount of alimony may be reviewed on the report and without making any formal case (*Forrest* v. *Forrest*, 5 Bosw. 672); and so of a report of the amount of loss in an action on a policy of insurance (*Ehlen* v. *Rutger Fire Ins. Co.*, 2 Bosw. 482).

h. Order setting aside a decree of divorce taken as confessed and allowing alimony is not appealable to the court of appeals (*Carpenter* v. *Carpenter*, 4 How. 139).

i. Semble, the court cannot require a wife, a party to a suit for divorce to accept a sum in gross in lieu of her dower right (*Crane* v. *Cavana*, 36 Barb. 410).

RULE 34. *Settling case, exceptions, and special verdicts.*

Whenever it shall be intended to move for a new trial (except for irregularity, surprise, or upon the minutes of the judge,) or to review by appeal, or otherwise, a trial by a jury, by the court, or by referees, a case, or exceptions, or case containing exceptions, as may be proper and the party may elect, shall be prepared by the party intending to make the motion, or to review the trial, and a copy thereof shall be served on the opposite party within ten days after the trial if by a jury, or after written notice of the filing of the decision or report if the trial be by the court or by referees; and the party served may within ten days thereafter propose amendments thereto and serve a copy on the party proposing the case or exceptions, who may then within four days thereafter serve the opposite party with a notice, that the case or exceptions with the proposed amendments will be submitted at a time and place to be specified in the notice, to the justice or referee before whom the cause was tried, for settlement. The justice or referee shall thereupon correct and settle the case, as he shall deem to consist with the truth of the facts The time for settling the case must be specified in the notice, and it shall

not be less than four nor more than twenty days after service of such notice. The lines of the case shall be so numbered that each copy shall correspond.

Cases reserved for argument, and special verdicts, shall be settled in the same manner.

a. Where an exception is taken at the trial, the party may make a case presenting such exception (*Huff* v. *Bennett*, 2 Sand. 703).

b. Exceptions will only lie to review a decision made at the trial of the cause; and if it be so framed as to show that the exception was taken to a question in *banc* made after the trial, an appellate court cannot look into it (*Onondago Co. Mut. Ins. Co.* v. *Minard*, 2 Coms. 98).

c. Exceptions should give a plain and concise statement of the facts out of which the questions of law arise; and the evidence should not be set forth in detached and scattered parcels (*Price* v. *Powell*, 3 Coms. 98).

d. The practice of inserting the judge's charge *in extenso*, in exceptions, is improper (*Bulkeley* v. *Keteltas*, 4 Sand. 450).

e. The time to make and serve exceptions to the decision of the referees, or to make and serve a case, may be extended either by order of the court or by consent of the adverse party. But a consent to the extension of the time to make and serve a case, does not extend the time to except to the decision (see, *ante*, page 487, *d*). Whether or not the court will permit exceptions to the decision to be filed after the expiration of the time allowed therefor, is a matter resting in discretion; and the decision on an application to file exceptions after the time therefor has elapsed, is not the subject of an appeal to the court of appeals (*King* v. *Merchants' Exchange Co.*, 1 Selden, 547). An order for time to make a case, is not a stay of proceedings (*Huff* v. *Bennett*, 2 Code Rep. 139).

f. An application for a re-settlement of a case must be made to a justice of the supreme court at special term, notwithstanding an appeal is pending in the court of appeals; and it is not necessary to apply first to the court of appeals to have the cause remitted to the supreme court before making such application (*Witbeck* v. *Waine*, 8 How. 433; *Lyslie* v. *Sniffin*, 3 id. 250). It is too late after the decision of an appeal, to move for a re-settlement of the case (*Fish* v. *Wood*, 2 Abb. 419; *Fitch* v. *Livingston*, 7 How. 410; and see *Catlin* v. *Cole*, 19 How. 82; 10 Abb. 387; and see 17 How. 382).

g. The court refused leave to present a case and amendments for settlement after an unexcused delay of eight months (*Whiting* v. *Kimball*, 6 Bosw. 690).

h. The settlement of a case is a judicial not a ministerial act (*Fielden* v. *Lahens*, 14 Abb. 48).

i. Semble, if on the settlement of a case, a question arises whether or not on the reception of evidence after an objection thereto, the objecting party excepted and the testimony on that question is equally balanced, the party claiming the exception must prevail (*Sanger* v. *Vail*, 13 How. 500).

j. Where the judge who tries a cause, dies before the settlement of a case, the case may be settled by another justice of the court (*Morse* v. *Evans*, 6 How. 445).

RULE 35. *Case, how waived and when deemed settled.*

If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the justice or referee, they shall re-

spectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed.

RULE 36. *Exceptions, what to contain. Amendments, how to be marked.*

Exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial; and it shall be the duty of the justice, upon settlement, to strike out all the evidence and other matters which shall not have been necessarily inserted.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions, shall before submitting the same to the judge or justice for settlement, mark upon the several amendments his proposed allowance or disallowance thereof.

a. The office of an exception is to enable the judge on the trial to know and correct, if he desires it, his ruling on the precise point complained of. An exception to the "whole charge," containing several propositions, is too broad if any part of the charge is right; and the addition in the exception, "and each part of it," does not make it sufficiently specific (*Jones* v. *Osgood*, 2 Selden, 233; *Caldwell* v. *Murphy*, 1 Kernan, 416; *Decker* v. *Matthews*, 2 Kernan, 313). And where the exception is so vague that the appellate court cannot determine whether it is to the award of judgment or to the manner of giving it, it will be disregarded as too general (*Sands* v. *Church*, 2 Selden, 347; *Hunt* v. *Maybee*, 3 ib. 266); and an exception is bad for want of particularity, which says, "To which charge the defendant's counsel excepted" (*Fitch* v. *Livingston*, 7 How. 410). If it appear each request or offer was separately passed upon and each ruling excepted to, it is sufficient (*Dunckel* v. *Wiles*, 1 Kernan, 420).

b. A stipulation to the effect that the finding and decision of the judge in a cause tried without a jury, "shall be considered as having been duly excepted to," will not be regarded as equivalent to an exception (*Stephens* v. *Reynolds*, 3 Selden, 454).

c. A general objection to the admissibility of evidence, is sufficient where the objection could not have been obviated on the trial (*Merritt* v. *Seaman*, 2 Selden, 168); but a party is not at liberty to start a question on a motion for a new trial, or in a court of review, which, had it been mentioned on the trial, *might* have received a satisfactory answer (*Henry* v. *Salina Bank*, 1 Coms. 87; *Mabbett* v. *White*, 2 Kernan, 442; *Brown* v. *Cayuga R. R. Co.*, id. 486).

d. After argument and judgment, it is too late to alter exceptions in the cause (*Fitch* v. *Livingston*, 7 How. 410; and see 2 Abb. 419; and 17 How. 382).

e. Exceptions need not be authenticated by the signature or seal of the judge (*Zabriskie* v. *Smith*, 1 Kernan, 480).

f. It is irregular unless by leave of the court for the opposite party instead of submitting amendments to the case served, to strike out the whole or a large portion of the case by a single amendment and substitute a new case drawn by himself (*Stuart* v. *Binsse*, 3 Bosw. 657; 4 Bosw. 616).

g. *Semble*, where the amendments are on a separate paper, each place or passage where the amendments are proposed to be made or inserted, should be distinctly marked on the case submitted (*Stuart* v. *Binsse*, 3 Bosw. 658; 4 Bosw. 616).

h. Exceptions taken on the trial but not noticed on the argument of the appeal may be deemed abandoned (*Cummings* v. *Morris*, 3 Bosw. 560; *Flanders* v. *Crolius*, 1 Duer, 209; and see *Brown* v. *Colie*, 1 E. D. Smith, 269).

i. It is too late, after the commencing to argue the appeal, to object that the case has not been settled (*Seeley* v. *Chittenden*, 4 How. 265).

RULE 37. *Filing case or exceptions. Order declaring case abandoned.*

Where a party makes a case or exceptions, he shall procure the same to be filed within ten days after the same shall be settled, or it shall be deemed abandoned.

And on filing affidavit that such case or exceptions has not been filed, and showing the time of the settlement thereof, and that more than ten days has elasped from the time of such settlement, an order of course may be entered, declaring the same abandoned, and the party may proceed as if no case or exceptions had been made.

a. The court may order exceptions to the report of a referee, to be filed *nunc pro tunc*, after the ten days fixed by the court (*Sheldon* v. *Wood*, 14 How. 18; *Peck* v. *N. Y. & Liverpool Mail Steamship Co.*, 3 Bosw. 622; and see *Robinson* v. *Hudson R. R. Co.*, 3 Abb. 115).

b. The moving party must, within ten days after the case is settled, file a copy of the case as settled *and* the original papers containing the case and amendments as they came from the judge or referee (*Parker* v. *Link*, 26 How. 375).

c. Appeal cannot be dismissed for failure of appellant to serve a case and exceptions (*Rankin* v. *Pine*, 4 Abb. 309. *Query.*)

d. After a case has been settled and filed it may be taken in any subsequent step in the cause as *prima facie* evidence of the facts therein appearing (*Van Bergen* v. *Ackles*, 21 How. 314).

RULE 38. *Statement of facts on appeal to the Court of Appeals.*

A party desiring to appeal to the court of appeals, in an action tried by the court or referees, may have the facts upon which the decision of the general term was based, settled for the purposes of such appeal; and for the purpose of such settlement the party shall, within twenty days after notice of the judgment, propose and serve upon the opposite party such a statement of the facts as he deems proper.

The party upon whom such statement is served may, within twenty days after such service, prepare such amendments to the statement as he may deem proper, which amendments shall be in writing, and served on the moving party. The party preparing the original statement may give eight days' notice that the statements and amendments will be presented for settlement to the justice who delivered the opinion in the case, or if no opinion was delivered, to the presiding justice of the court. Such justice shall settle the facts; and upon the statement, as settled by him, he shall endorse an order that the statement be attached to the judgment roll.

a. Where this rule has been disregarded, *semble*, the court may allow the statement to be made *nunc pro tunc* (*Smith* v. *Grant*, 17 How. 383)

See *ante*, § 333 and Rule 34.

RULE 39. *Arguments and motions, how noticed, and defaults thereon. Orders to show cause, when granted and how returnable. A stay of proceedings. Irregularities to be stated. Judgment in divorce cases.*

All questions for argument, and all motions, shall be brought be-

fore the court on a notice, or, when a notice less than eight days is prescribed by the judge or court under § 402 of the code, by an order to show cause; and if the opposite party shall not appear to oppose, the party making the motion or obtaining the order, shall be entitled to the rule or judgment moved for, on proof of due service of the notice or order and paper required to be served by him, unless the court shall otherwise direct.

Such order to show cause shall only be granted when a special reason for a notice less than eight days appears on the papers presented, and the party shall, in his affidavit, state the present condition of the action, and whether at issue, and the time appointed for holding the next circuit in the county where the action is triable. The order shall also (except in the first judicial district) be returnable only before the judge who grants it, or at a special term appointed to be held in the district in which such judge resides.

No order served after the action shall have been noticed for trial, if served within ten days of the circuit, shall have the effect to stay the proceedings in the action unless made at the circuit where such action is to be tried, or by the judge who is appointed or is to hold such circuit.

And when the motion is for irregularity, the notice or order shall specify the irregularity complained of.

This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to a complaint for a divorce.

a. On a motion to set aside proceedings for irregularity, the court will regard only such irregularities as are pointed out by the papers on which the motion is founded (*Baxter* v. *Arnold*, 9 How. 445). "Where there are several grounds on which a motion may be granted, those on which the moving party means to rely must be distinctly stated, either in the notice or in the affidavits that accompany it; and to the grounds thus stated the party will be confined upon the hearing. I consider this to be the established practice; and the rule is, in itself, so reasonable and just, that I have no inclination to depart from it" (Duer, J., *Bowman* v. *Sheldon*, 5 Sand. 660; and see *Harder* v. *Harder*, 26 Barb. 412); and in *Bowman* v. *Sheldon*, the judge added, "If there were no other grounds for the denial of the motion, than the preliminary objection that the grounds of the motion did not appear on the motion papers, I should give the moving party leave to renew the motion on amended papers."

b. The notice of motion in the case does not specify the irregularity complained of; and therefore the plaintiff (the moving party) cannot, consistently with the settled practice, avail himself of the objection to the plaintiff's proceedings (*Roche* v. *Ward*, 7 How. 416).

c. If an order to show cause why an order of arrest should not be vacated on the ground of irregularity, the order cannot be vacated for that reason (*Barker* v. *Cook*, 40 Barb. 254).

d. It seems to be sufficient if the ground of irregularity appears by the motion papers although not in the notice (*Blake* v. *Locy*, 6 How. 108).

e. Motion to set aside judgment for a defect in the statement is not within the rule requiring a specification of the irregularity (*Winnebrenner* v. *Edgerton*, 8 Abb. 419).

f. Issuing an execution in violation of a stay of proceedings is not an irregularity merely, within this rule requiring it to be stated in the notice of motion (*Jackson* v. *Smith*, 16 Abb. 201; see *Macomber* v. *Mayor of N. Y.*, 17 Abb. 37, 48; *Lawrence* v. *Jones*, 15 Abb. 110). Nor is a motion to set aside a

judgment entered upon confession, for a defect in the statement, within this rule (*Winnebrenner* v. *Edgerton*, 30 Barb. 185). Cases within the rule see *Perkins* v. *Mead* (22 How. 476), *Selover* v. *Forbes* (22 How. 477).

a. Where a motion is denied because the ground of irregularity was not stated in the notice, leave may be given to renew the motion on amended papers (*Macomber* v. *Mayor of N. Y.*, 17 Abb. 37).

b. Where no irregularity is stated in the notice of motion and the motion is denied, on appeal from the order denying such order nothing appearing to the contrary the court will presume the motion was denied because the motion papers did not disclose the irregularity complained of and will affirm the order (*Lewis* v. *Graham*, 16 Abb. 126; and see *Shipman* v. *Shafer*, 14 Abb. 449).

c. An order to show cause returnable at special term, must be granted at special term, and an order to show cause returnable before a judge out of court, must be made by the judge before whom it is returnable (*Hasbrouck* v. *Ehrich*, 7 Abb. 76).

See note to § 402.

d. "The notice of motion contains no notice that a feigned issue would be asked for, but the notice does state 'that they will ask for such further or other relief as the court may grant.' Relief has sometimes been granted on a notice as general as this; but I am inclined to believe that it would tend to prevent surprise, if the court would not listen to a prayer until the petitioner had discovered and is able to give notice of what he wants" (*Mann* v. *Brooks*, 7 How. 457).

RULE 40. *Enumerated motions. Non-enumerated motions. Contested motions, where to be heard.*

Enumerated motions are, motions arising on special verdict; issues of law; cases; exceptions; appeals from orders sustaining or overruling demurrers; appeals from an inferior court; and appeals by virtue of § 348 of the code.

Non-enumerated motions include all other questions submitted to the court, and shall be heard at special term, except when otherwise directed by law.

Contested motions shall not be noticed or brought to a hearing at any special term held at the same time and place with a circuit, except in actions upon the calendar for trial at such circuit, and in which the hearing of the motion is necessary to the disposal of the cause, and except also that, in counties in which no special term distinct from a circuit is appointed to be held, motions in actions triable in any such county may be noticed and brought on at the time of holding the circuit and special term in the county in which such actions are triable.

e. "A motion for a reference in an action, held to be a non-enumerated motion" (*Conway* v. *Hitchins*, 9 Barb. 386).

f. The motion for a new trial on the merits, is not a non-enumerated motion (*Ellsworth* v. *Gooding*, 8 How. 4; *Van Schaick* v. *Winne*, ib. 7).

g. "An appeal from an order appointing an administrator is a calendar cause" (*Brockway* v. *Jewett*, 16 Barb. 593).

h. [An appeal from an order pursuant to section 349 is a non-enumerated motion, and on such an appeal the court does not require the papers to be printed, but each member of the court should be furnished with a copy of the papers on which the appeal is founded, and such copies should, to facilitate reference, have the folios marked in the margin.]

a. In the superior court all cases of appeal from decisions overruling or allowing demurrers are considered enumerated motions, and are to be placed on the calendar for argument; and the same papers are to be printed, served, and furnished, as are required in other calendar causes at the general term (*Reynolds* v. *Freeman*, 4 Sand. 702).

See Code, §§ 400, 401.

RULE 41. *Filing notes of issue. General-term calendar. Date of issue.*

Notes of issue for the general term shall be filed eight days before the commencement of the court at which the causes may be noticed. The clerk shall prepare a calendar for the general term, and cause the same to be printed for each of the justices holding the court. Appeals shall be placed on the calendar, according to the date of the service of the notice of appeal; and other cases as of the time when the question to be reviewed arose.

See 15 How. 225, and as to Kings county, Laws 1859, ch. 212).

RULE 42. *Enumerated motions, how noticed. Papers to be furnished. And by whom.*

Enumerated motions shall be noticed for the first day of term by either party.

The papers to be furnished on such motions, shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, or of such parts only as relate to the question raised by the demurrer, a copy of the special verdict, return or other papers on which the question arises; and the party whose duty it is to furnish the papers shall serve a copy on the opposite party, except upon trial of issues at law, at least eight days before the time the matter may be noticed for argument. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party shall be entitled to move, on affidavit and notice of motion, that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor; provided, however, that in mortgage and partition cases, where the plaintiff's rights are not contested, no copies of pleadings need be furnished to the court.

The papers shall be furnished by the plaintiff when the question arises on special verdict, and by the party demurring in cases of demurrer, and in all other cases by the party making the motion.

b. Where the party whose duty it is to furnish the papers neglects to do so, the opposite party should move to have the cause struck from the calendar; he cannot raise the objection when the cause is called to be heard. "The cause being on the calendar, and moved to be brought on to hearing on notice duly served on the opposite party, the court will not hear an objection to the regularity of the proceedings in that stage of the cause. If irregularly noticed and placed on the calendar, the party objecting has a right to move to strike the cause therefrom; and then all the facts will appear, enabling the court to decide understandingly. The object of the court is to avoid discussions as to the regularity of the proceedings when the cause is called. The decision in 16 Johns. 2, proceeds upon this principle, and the case in 6 Cow. 609, is not at variance with it" (Sutherland, J., *Townsend* v. *Wheeler*, 4 Wend. 197).

a. On an appeal from an order striking out to answer as frivolous, held that no copies of papers need be furnished the respondent (*Galit* v. *Finch*, 24 How. 193).

RULE 43. *Papers to be furnished on appeal, and by whom. To be printed. Points to be served. Striking cause from calendar. Cases under* § 372.

When an appeal is noticed for a general term, in cases embraced in chapter 8 of title 11 of the code, and of § 348 of the code, the appellant shall furnish the papers for the court, which consist of a copy of the judgment roll, together with a case, stating the time of the commencement of the suit, and of the service of the respective pleadings, the names of the original parties in full, the change of parties, if any has taken place pending the suit, to which shall be added the opinion of the court below, or an affidavit that no opinion in writing was given, or if given, that a copy could not be procured. At the commencement of the argument the appellant shall furnish a printed copy of the papers to each of the judges, together with a printed copy of the points on which he intends to rely, with a reference to the authorities which he intends to cite; and he shall also deliver to the attorney of the adverse party, at least eight days before the first day of the term, three printed copies of the said papers. And at the commencement of the argument, each party shall serve upon his adversary a printed copy of his points and authorities on which he intends to rely. In case the appellant neglects so to furnish to the adverse party the said number of copies of the papers, the latter shall be entitled to move, on affidavit and notice of motion, for the earliest practicable day in term for hearing non-enumerated motions, that the cause be stricken from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.

When a case is agreed upon by the parties, according to § 372 of the code, the plaintiff shall furnish the necessary papers for argument, duly printed as in cases of appeal.

RULE 44. *Appeal from surrogate's decision. Petition. Answer to petition. Order to answer petition. Guardian, ad litem, how appointed. Order to deliver copy petition. Appellant to furnish papers.*

On an appeal to this court from the order, sentence, or decree of a surrogate's court, the party appealing shall file a petition of appeal, addressed to this court, with the clerk of the county in which the order, sentence, or decree appealed from was made, within fifteen days after the appeal is entered in the court below, or the appeal shall be considered as waived; and any party interested in the proceedings in the court below may thereupon apply to this court, *ex parte*, to dismiss the appeal with costs. The petition of appeal shall briefly state the general nature of the proceedings, and of the sentence, order, or decree appealed from, and shall specify the part or

parts thereof complained of as erroneous; except where the whole sentence, order, or decree is alleged to be erroneous, in which case it shall be sufficient to state that the same and every part thereof is erroneous. And where the appeal is from a sentence or decree on the settlement of the accounts of an executor, administrator or guardian, if the appellant wishes to review the decision as to the allowance or rejection of any particular items of the account, such items shall be specified in the petition of appeal; or the allowance or disallowance of any such items shall not be considered a sufficient ground for reversing or modifying the sentence or decree appealed from. The respondent, in his answer to the petition of appeal in such cases, may also specify any items in the account, as to which he supposes the sentence or decree is erroneous as against him and in favor of the appellant. And upon the hearing of the parties upon such appeal, the sentence or decree may be modified as to any such items, in the same manner as if a cross-appeal had been brought by such respondent. The appellant may have an order of course, that the respondent in the petition of appeal answer the same within twenty days after the service of a copy of the petition of appeal and notice of the order, or that the appellant be heard *ex parte*. And where the respondent is an adult, upon filing an affidavit of such service upon the attorney of the respondent, if he has appeared either in this court, or in the court below by an attorney of this court, or upon the surrogate if he has not appeared by such attorney, and that no answer to the petition of appeal has been received, the appellant may have an order of course that the appeal be heard *ex parte* as against such respondent. Where the respondent is a minor, if he does not procure a guardian ad litem, upon the appeal, to be appointed within twenty days after the filing of the petition of appeal, the appellant may apply to a justice of this court, *ex parte*, for the appointment of such guardian. And if the minor has appeared by his guardian ad litem in this court, the appellant may have an order of course that the guardian ad litem of the respondent answer the petition of appeal within twenty days after service of a copy thereof and notice of the order, or that an attachment issue against such guardian. When a petition of appeal is filed, if it has not been served on the adverse party, the respondent may have an order of course, that the appellant deliver a copy of the petition of appeal to the attorney, or to the guardian ad litem of the respondent, within ten days after the service of notice of such order, or that the appeal be dismissed; and if the same is not delivered within the time limited by such order, the respondent, upon due notice to the adverse party, may apply at a special term to dismiss the appeal with costs. Upon the hearing of any such appeal as is referred to in this rule, it shall be the duty of the appellant to furnish the court with a copy of the petition of appeal, and of the answer thereto, if an answer has been received, and a copy of the proceedings below, including a copy of the appeal as entered.

a. Appeals from surrogate's decrees pending before circuit judges on the first Monday of July, 1847, were *special proceedings*, and were not transferred

to the supreme court, either by the constitution or the judiciary act; but they might be transferred by special order of the court (*Butler* v. *Benson*, 1 Barb. 526).

a. The decree of a surrogate admitting a will to probate, not appealed from, is conclusive, and cannot be reviewed collaterally (*Hill* v. *Burger*, 10 How. 264; and see *Morrell* v. *Dennison*, 8 Abb. 401).

b. Appeals from surrogates' courts are governed by the law in force prior to the Code (*Brockway* v. *Jewett*, 16 Barb. 590).

c. **Who may appeal.**—It seems that any person cited before the surrogate, and who is or may be in any way interested as heir, next of kin, devisee or legatee, may appeal (*Re Sherman*, 16 Abb. 397, *note*).

d. From an order of a surrogate appointing an administrator, separate appeals should not be brought by parties opposing such appointment, as next of kin, whose interests and rights are the same (*Brockway* v. *Jewett*, 16 Barb. 590).

e. **Parties to the appeal.**—The heirs-at-law, next of kin, and legatees of a decedent are necessary parties to an appeal from an order admitting a will to probate (*Gilman* v. *Gilman*, 35 Barb. 591).

f. Upon an appeal from an order or decree of a surrogate, all persons to whom sums are awarded by the surrogate, and who are therefore interested in sustaining his decree, should be made parties respondent in the petition of appeal, although they were not parties to the proceedings before the surrogate (*Wilcox* v. *Smith*, 26 Barb. 316).

g. Where there is a defect of parties, if no motion is made to stay or dismiss the appeal on that ground, and the omitted parties have neither taken an appeal themselves, nor applied to be made parties, the appellate court cannot reverse the decree appealed from, although they may deem it erroneous (*Brown* v. *Evans*, 34 Barb. 594).

h. Proceedings on death of the appellant (*Renwick* v. *Cooper*, 10 Paige, 304).

i. If any of the respondents are infants, a guardian *ad litem* must be appointed, and the order to show cause varied accordingly (*Renwick* v. *Cooper*, 10 Paige, 304).

j. **Effect of appeal.**—The effect of an appeal is to stay all proceedings before the surrogate pending the appeal (*Hicks* v. *Hicks*, 12 Barb. 322; *Newhouse* v. *Gale*, 5 Surrogates' Rep. 218).

k. **Time for appealing.**—An appeal from a decision of a surrogate confirming the probate of a will, must be brought within thirty days after the making the decree (*Williams* v. *Fitch*, 15 Barb. 654).

l. Before the code, if the appeal was not taken within the time limited by statute (2 R. S. 608 to 611), the right of appeal was lost (*Bronson* v. *Ward*, 3 Paige, 189). It is presumed the law is still the same.

m. **Petition of appeal.**—The petition of appeal should name the persons intended to be made respondents, and should pray that they answer the petition (*Kellett* v. *Rathbun*, 4 Paige, 102). It should be entitled in the appeal (*Gardner* v. *Gardner*, 5 Paige, 170); and all parties to the proceedings before the surrogate, interesting in sustaining or defeating the decree appealed from, should be made parties to the appeal (*Gilchrist* v. *Rea*, 9 Paige, 66; *Suffern* v. *Lawrence*, 4 How. 129; 2 Code Rep. 69); and a party so affected by the appeal, but not a party thereto, may have the same so modified as not to prejudice his rights (*Gardner* v. *Gardner*, 5 Paige, 170). On the final accounting of an executor, he should name the persons intended to be made respondents, and who are called upon to answer (*Brown* v. *Evans*, 34 Barb. 594).

n. A petition of appeal from a decree of a surrogate assuming to settle the accounts of a guardian on an application by him in his character of administrator, need not specify the items of the accounts (*Banks* v. *Taylor*. 10 Abb. 199).

o. **Amending Petition.**—The court may allow a petition of appeal to be amended to bring in additional parties (*Gilman* v. *Gilman*, 35 Barb. 591).

p. **Filing Petition.**—The court may extend the time to file the petition of

appeal (*Halsey* v. *Van Amringe*, 4 Paige, 279, *Suffern* v. *Lawrence*, 4 How. 129; 2 Code Rep. 69).

a. **Compelling surrogate to make a return.**—A surrogate will be compelled to make a return to an appeal within a reasonable time (no time being fixed by statute or rule), by an order of the court, on pain of attachment (*Gardner* v. *Brown*, 5 How. 351). An objection that his fees have not been paid, is of no avail where it appears they were offered to be paid when ascertained. (*Ib.*)

b. **Extending time to procure return.**—Where the appellant could not obtain the return, nor take any steps to procure it, nor compel the return, the court will allow him further time to procure the return (*Gilman* v. *Gilman*, 35 Barb. 591).

c. **Motion to dismiss appeal.**—Where an appeal is taken from an order of the surrogate, and the petition of appeal is filed within the time prescribed by the rules of court, an application to the court under the rule to dismiss the appeal, by a party whose interest is affected by the appeal, but who has not been made a party to the petition of appeal, must be made upon notice. That rule only authorizes an ex-parte application to be made to dismiss, where the petition of appeal has not been filed in time; not where any of the proper parties have been omitted in the petition (*Suffern* v. *Lawrence*, 4 How. 129; 2 Code Rep. 69).

d. **Appeal, where heard.**—An appeal from a surrogate's order admitting or refusing to admit a will to probate, should in the first instance be heard at general term (*Watts* v. *Aikin*, 4 How. 439; see *Brockway* v. *Jewett*, 16 Barb. 590). In *Wever* v. *Marvin* (7 How. 182; S. C. 14 Barb. 376), it was held that appeals from all decrees or sentences of surrogates should be first heard at general term. In that case, however, the court (Wright, J.), at the request of both parties, heard the appeal at special term.

e. **Papers to be furnished to the court.**—Upon an appeal from a surrogate's decree, the papers necessary to be furnished to the court are, the copy of the surrogate's return, copies of the petition of appeal and answer, and a copy of the points (*Halsey* v. *Van Amringe*, 6 Paige, 12).

f. **Proceedings on appeal.**—Upon an appeal from the decree of a surrogate on an application for letters of administration, the supreme court is to review the determination upon the proofs before the surrogate. It cannot receive further evidence nor award an issue to be tried by jury at circuit. The power of the supreme court to award an issue is confined, it seems, to appeals from decisions admitting or refusing to admit a will to record or probate (*Devin* v. *Patchin*, 26 N. Y. 441).

g. On the reversal of a surrogate's decree admitting an instrument to record and probate as a will, may the court adjudge the instrument void, or must the judgment be simply of reversal? (*Mead* v. *Mead*, 11 Barb. 661.)

h. On appeal from a final decree of a surrogate, the supreme court may receive newly discovered evidence in addition to the evidence which was before the surrogate (*Caujolle's appeal*, 9 Abb. 393).

i. Where an objection to the competency of a witness examined before a surrogate is not raised there, it will be deemed to have been waived, and cannot be raised on appeal (*McDonough* v. *Loughlin*, 20 Barb. 238).

j. Where there is a doubtful question of fact, the court will reverse the surrogate's decree, and order issues to be tried by a jury (*Patchen* v. *Devin*, 37 Barb. 430).

k. Where the decision of a surrogate admitting a will to probate, has on appeal been reversed on the ground that the evidence before him was insufficient, he may try the question as to the validity of the will a second time (*Mead* v. *Mead*, 18 Barb. 578).

l. Where on an appeal from the decision of a surrogate refusing to admit a will to probate, the decision was reversed (by the circuit judge), and a feigned issue ordered, upon which issue the appellant obtained a verdict by default,

held that a motion to set aside such verdict must be made before the surrogate (*Re Hicks*, 4 How. 316).

a. **Costs.**—The costs of an appeal from a surrogate's court are regulated by the code (see § 318).

b. Where several parties to a proceeding before a surrogate, appeal by different attorneys who are partners, they are entitled to only a single bill of costs; and the fact that the appellate court decides in each appeal that the order appealed from be reversed with costs, will not prevent the application of this rule (*Brockway* v. *Jewett*, 16 Barb. 590).

c. The compensation for the printed papers furnished the court, is limited to the disbursement for the printing. (*Ib.*)

d. Where on an appeal from a decision of a surrogate the decision is affirmed by the supreme court, and on appeal to the court of appeals both decisions are reversed "without costs," the appellant is not entitled to costs in either court (*Macgregor* v. *Buell*, 17 Abb. 32).

e. Costs in surrogates' courts are to be taxed according to the common pleas fee bill of 1837 (*Lee* v. *Lee*, 16 Abb. 127).

f. The surrogate, in proceedings before him, may award costs to be taxed, but he has no power to make an arbitrary allowance for counsel fees, and such counsel fees as may be taxable are to be allowed to the party and not to his counsel (*Devin* v. *Patchin*, 26 N. Y. 441; see *Lee* v. *Lee*, 39 Barb. 172; and Laws 1863, p. 608, § 8).

g. The decision of a surrogate awarding costs on the final settlement of the accounts of administrators, may be reviewed on appeal (*Wilcox* v. *Smith*, 26 Barb. 317).

h. **Appeal to court of appeals.**—A judgment of the supreme court affirming an order of a surrogate denying a motion for leave to discontinue proceedings for accounting by a guardian and directing the proofs to be closed, is not appealable to the court of appeals (*Tompkins* v. *Soulice*, 7 How. 194).

i. An order of the supreme court reversing a final decree of a surrogate in a proceeding for an account, and directing the proceedings to be remitted to the surrogate with instructions, &c., is appealable to the court of appeals (*Wagener* v. *Reiley*, 4 How. 195; so is an order reversing a surrogate's decree admitting a will to probate for error in law (*Talbot* v. *Talbot*, 23 N. Y. 17).

j. A judgment of the supreme court reversing an order of a surrogate *with costs*, is not appealable to the court of appeals until the amount of costs are entered in the judgment and the judgment roll is filed (*McMahon* v. *Harrison*, 5 How. 360).

See *ante*, p. 668, *g*.

See note to section 318 of the code.

RULE 45. *Points on motions. Discussion on facts.*

In all enumerated motions, each party shall briefly state upon his printed points, the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found; and the court will not hear an extended discussion on a mere question of fact.

RULE 46. *Cases, points, &c., how printed.*

The cases and points, and all other papers furnished to this court at a general term in calendar causes, shall be printed on white writing paper, with a margin on the outer edge of the leaf, not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide. The folio, numbering from the commencement to the end of the papers, shall be printed on the outer margin of the page.

a. The expense of printing is a disbursement (16 Barb. 590).

RULE 47. *Certiorari, when heard.*

Every case on certiorari to subordinate courts, tribunals, or magistrates, may be brought to a hearing by either party, upon the usual notice of argument; and shall be entitled to preference on the morning of any day during the first week of term.

RULE 48. *Non-enumerated motions, hearing of.*

Non-enumerated motions made in term time, at a general term, will be heard on the first day, and Thursday of the first week, and Friday of the second week, of the term, immediately after the opening of the court on that day. Except in the first judicial district, a party attending pursuant to notice, to oppose a non-enumerated motion, if the same shall not be made on the day for which it is noticed, may, at the close of that order of business, take a rule against the party giving the notice, for costs for attending to oppose.

Motions in criminal cases may be heard on any day in term.

b. A criminal case cannot be moved out of its order on the calendar by the defendant, unless the notice of argument states his intention of bringing it on out of its order (*Barron* v. *The People*, 1 Barb. 136). Does the rule give either party the right to move the case out of its order, or does it apply to the counsel for the people only? (*Ib.;* see Laws 1858, ch. 87).

c. Actions in which executors or administrators are sole plaintiffs or sole defendants, have a preference in the supreme court at general term, and appeals which prevent the issuing of letters testamentary or of general administration have a preference in the supreme court over all actions except criminal cases, and may be moved out of their order accordingly (Laws 1860, ch. 167).

RULE 49. *Non-enumerated motions, how noticed.*

Non-enumerated motions, except in the first district, shall be noticed for the first day of the term or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made; and the notice shall not be for a later day, unless sufficient cause be shown [and contained in the affidavits served] for not giving notice for the first day.

d. Rule 32 of supreme court rules, requires non-enumerated motions, except in the first district, to be noticed for the first day of the term or sitting, unless sufficient cause shall be shown for the omission; and then a motion may be noticed for a day in term special, other than the first, but sufficient excuse must appear upon the moving papers (*Whipple* v. *Williams*, 4 How. 28).

e. The first part of this rule does not apply to motions made on the regular notice of eight days (*Lakey* v. *Cogswell*, 3 Code Rep. 116). The last part of Rule 32 of the rules of the supreme court was held to be inconsistent with section 401 of the code. (*Ib.*)

f. By a rule of the court of common pleas for the city and county of New York, it is ordered, that orders to show cause on non-enumerated motions will not hereafter be granted, except upon affidavit showing the necessity of making the time of notice shorter than is required in the Code; and where such order is returnable on any other day than the first day of the special term, the reason therefor must be stated in the affidavits on which the motion is founded (see Appendix; and 2 Code Rep. 138).

RULE 50. *Motions to amend pleadings.*

Motions to strike out of any pleading matter alleged to be irrelevant or redundant, and motions to correct a pleading on the ground of its being "so indefinite or uncertain that the precise nature of the charge or defence is not apparent," must be noticed, before demurring or answering the pleading, and within twenty days from the service thereof.

a. A motion to strike out irrelevant or redundant matter, or to correct a pleading, must be noticed before demurring or answering the pleading, and within twenty days from the service of such pleading (*Roosa* v. *Saugerties Turnpike Road Co.* 8 How. 237; *Bowman* v. *Sheldon*, 5 Sand. 657; *N. Y. Ice Co.* v. *N. West. Ins. Co.* 21 How. 234).

b. An answer served pending a motion to correct the complaint is a waiver of the motion (*Goch* v. *Marsh*, 8 How. 439).

c. An extension of the time to answer is a waiver of all formal objections to the complaint, and a bar to a motion to strike out irrelevant matter, unless the right to make such motion is expressly reserved (*Bowman* v. *Sheldon*, 5 Sand. 657).

d. This rule, as plainly applicable, is binding upon the superior court. (*Ib.*)

e. The moving party need not show, in the first instance, that the motion is made within twenty days (*Barber* v. *Bennett*, 4 Sand. 705; *Roosa* v. *Saugerties Turnpike Road Co.* 8 How. 237; *contra*, see *Rogers* v. *Rathbone*, 6 Ib. 66).

RULE 51. *Proceedings on return to mandamus, &c.*

The return to a writ of mandamus, or of prohibition, having been filed, the party making such return may serve a notice upon the relator, requiring him to demur or plead thereto within twenty days after such service; and if no plea or demurrer to such return be interposed, within that time, either party may notice the matter for a hearing at the next or any subsequent special term at which the same may, according to the practice of the court, be heard as a non-enumerated motion, and the same shall be heard and disposed of on the said return.

f. There is no statutory limitation of the time within which writs of mandamus may be obtained (*The People* v. *Supervisors of Westchester*, 12 Barb. 446).

g. Service of notice of motion for a mandamus on a majority of the contracting board (a part of the canal board) of the State, including the chairman, held a sufficient service (*The People* v. *The Contracting Board*, 20 How. 206).

h. Costs in mandamus cases (*The People* v. *Flagg*, 5 Abb. 232).

i. As to mandamus generally, see 7 How. 81, 124, 290; 11 How. 89; 6 Abb. 30; 12 Abb. 385.

RULE 52. *Additional allowances.*

Applications for an additional allowance under the provisions of the 309th section of the Code of Procedure, can only be made to the court before which the trial is had, or the judgment rendered.

j. The rule in the second district, adopted May, 1858, is, "that no allowance will be made in actions for the foreclosure of mortgages (except where a defence has been interposed and a trial has been had), beyond that specified and allowed by the act of 1857, and that in all cases motions for an additional allowance, on the ground that the actions are difficult or extraordinary, must be made before the close of the trial, when made before the court and a jury, or before the court alone.

a. "When the trial has been had before a referee or referees, the application must be made on notice, upon a certificate of the referee or referees, of the facts which render the allowance proper."

RULE 53. *Justice's return on appeal, amendment of.*

On appeals from a justice's judgment, where the county court has not jurisdiction, by reason of relationship, &c., a notice of motion for an order to compel the justice to amend his return, may be given in twenty days after the date of the certificate of the county judge, and not after that time.

RULE 54. *Number of counsel, &c.*

At the hearing of causes at a general or special term, not more than one counsel shall be heard on each side, and then not more than one hour each, except when the court shall otherwise order.

RULE 55. *Counsel to endorse proof of notice.*

When a rule is obtained, either at a general or special term, by default, the counsel obtaining the same shall endorse his name, as counsel, on the paper containing the proof of notice; and the clerk in entering the rule, shall specify the name of such counsel.

RULE 56. *Orders on petitions.*

Orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed as other judgments.

RULE 57. *Time for complying with orders.*

In all cases where a motion shall be granted, on payment of costs, or on the performance of any condition, or where the order shall require such payment or performance, the party whose duty it shall be to comply therewith, shall have twenty days for that purpose, unless otherwise directed in the order. But, where costs to be adjusted are to be paid, the party shall have fifteen days to comply with the rule, after the costs shall have been adjusted by the clerk on notice, unless otherwise ordered.

b. This rule has no application to an order directing defendant to satisfy the part of plaintiff's claim by the answer admitted to be due (*Baker* v. *Nussbaum*, 1 Hilton, 549).

c. Where a new trial is granted on payment of the costs of the trial and subsequent thereto, the costs must be regularly adjusted before the time for their payment under this rule begins to run, and this notwithstanding the costs are fully stated in the judgment-roll and require merely to be separated from the earlier costs in the cause (*North* v. *Sergeant*, 14 Abb. 234).

See *ante*, p. 621, *i.*

RULE 58. *Order to stay, with view to change venue. Revoking stay. Notice of revocation.*

No order to stay proceedings for the purpose of moving to change the place of trial shall be granted unless it shall appear, from the papers, that the defendant has used due diligence in preparing the motion for the earliest practicable day after issue joined. Such order shall not stay the plaintiff from taking any step, except subpœnaing witnesses for the trial, without a special clause to that effect. On presenting to and filing with the officer granting the order, an affidavit, showing such facts as will entitle the plaintiff, according to the settled practice of the court, to retain the place of trial, the officer shall revoke the order to stay proceedings; and the plaintiff shall give immediate notice of such revocation to the defendant's attorney.

a. In *Schenck* v. *McKie* (3 Code Rep. 24; 4 How. 246), the plaintiff had given notice of motion before Willard, J., at chambers, on the 30th October, to change the place of trial. After the service of such notice, and on the 10th October, the defendant obtained an order of a county judge, staying all proceedings on the part of the plaintiff, until the decision of the said motion. This order was served on the plaintiff, but was disregarded by him. The court said, It is plain, by section 401, *et seq.*, of the code, that the judge has no jurisdiction of the motion at chambers, and, consequently, the order to stay proceedings for that purpose was void. It appeared on its face to be a nullity. An order was never a stay of proceedings unless accompanied with a notice of motion; but a notice of motion, to be of any efficacy to uphold the order, must be to a court having jurisdiction of the matter. Again, the (now 58th) rule allows the plaintiff to proceed to judgment, unless the order specially directs otherwise (*Peebles* v. *Rogers*, 5 How. 208).

RULE 59. *Affidavits to change venue.*

In addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and may also show where the cause of action or the defence, or both of them, arose; and those facts will be taken into consideration by the court, in fixing the place for trial.

RULE 60. *Guardians ad litem.*

No person shall be appointed guardian ad litem, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and who has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian, who is not of sufficient ability to answer to the infant, for any damage which may be sustained by his negligence or misconduct in the defence or prosecution of the suit.

This rule shall not apply to actions for the recovery of money only or of specific real or personal property, as specified in § 253 of the code.

b. The court will not appoint a guardian *ad litem* for an infant defendant, on the nomination of the plaintiff (2 Paige, 304; but see Code, § 116).

a. Where the court clearly discovers that the interests of infants are committed to a guardian who is not likely to protect them, he should be removed and a proper one appointed (*Litchfield* v. *Burwell*, 5 How. 341).

RULE 61. *Duty of guardian ad litem.*

It shall be the duty of every attorney or officer of this court, to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defence, when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services, as the court may deem reasonable.

RULE 62. *Guardian not to receive property unless security has been given.*

No guardian ad litem for an infant party, unless he has given security to the infant according to law, shall, as such guardian, receive any money or property belonging to such infant, or which may be awarded to him in the suit, except such costs and expenses as may be allowed by the court to the guardian out of the fund, or recovered by the infant in the suit. Neither shall the general guardian of an infant receive any part of the proceeds of a sale of real property belonging to such infant, sold under a decree, judgment, or order of the court, until the guardian has given such further security for the faithful discharge of his trust as the court may direct.

RULE 63. *General guardian, how appointed.*

For the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upwards, or some relative or friend if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which such person bears to the infant, and the nature, situation and value of the infant's estate.

RULE 64. *Age of infant, how ascertained*

Upon presenting the petition, the court shall, by inspection or otherwise, ascertain the age of the infant, and if of the age of fourteen years or upwards, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount or value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian.

RULE 65. *Security by general guardian.*

The security to be given by the general guardian of an infant shall

be a bond, in a penalty of double the amount of the personal estate of his ward, and of the gross amount or value of the rents and profits of the real estate, during his minority, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond, over and above all debts; or, instead of personal security, the guardian may give security by way of mortgage on unincumbered real property, of the value of the penalty of his own bond only. But the court, in its discretion, may vary the security, where, from special circumstances, it may be found for the interest of the infant; and may direct the principal of the estate, or any part thereof, to be invested in the stocks of the State of New York or of the United States, or with the New York Life Insurance and Trust Company, the United States Trust Company, or on bond and mortgage, for the benefit of the infant, and that the interest or income thereof, only be received by the guardian.

a. The New York Life Insurance and Trust Company, when appointed general guardian, is not required to give security (see Laws of 1830, p. 77).

b. Action on bond of guardian see *Clark* v. *Montgomery* (23 Barb. 464).

RULE 66. *Application to appoint special guardian.*

An infant, by his general guardian, if he has any, and if there is none, by his next friend, may present a petition, stating the age and residence of the infant, the situation and value of his real and personal estate, the situation, value and annual income of the real estate proposed to be sold, and the particular reasons which render a sale of the premises necessary or proper; and praying that a guardian may be appointed to sell the same. The petition shall also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given; and the petition shall be accompanied by affidavits of disinterested persons, or other proofs verifying the material facts and circumstances alleged in the petition. And if the infant is of the age of fourteen, he shall join in the application.

c. Proceedings cannot be entertained for the appointment of a guardian to sell infants' real estate, by a justice of the supreme court *at chambers.* Such proceedings must be had at a special term. The supreme court is not always open, as a court of equity, except to enable the justices thereof to make such orders as the chancellor formerly made out of term. Petitions in proceedings for the sale of infants' real estate should be addressed, "To the Supreme Court of the State of New York" (*In Re Bookhout*, 21 Barb. 348).

d. The mother of an infant is his "*next friend*" within the meaning of this rule and may present the petition (*Re Whitlock*, 32 Barb. 48; 10 Abb. 316).

RULE 67. *Order on petition to appoint guardian. Proceedings on such order.*

If it satisfactorily appears that there is reasonable ground for application, an order may be entered, appointing a guardian for the purposes of the application, on his executing and filing with the clerk the requisite security, approved of as to its form and manner of execution by a justice of this court or a county judge, signified by his approbation endorsed thereon, and directing a reference to ascertain

the truth of the facts stated in the petition, and whether a sale of the premises, or any and what part thereof, would be beneficial to the infant, and the particular reasons therefor; and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions upon which it should be sold; and whether the infant is in absolute need of any and what part of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions. And if there is any person entitled to dower in the premises, who is willing to join in the sale, also to ascertain the value of her life-estate in the premises on the principle of life annuities. But no proceedings shall be had upon such reference, until the guardian produces a certificate to the clerk, that the requisite security has been duly proved or acknowledged, and filed agreeably to the order of the court; and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report.

The said report shall contain in itself a statement of the particular reasons which, in the opinion of the referee, render a sale of the premises necessary or proper, and of all the facts required to be ascertained and reported, and shall not refer to the petition or affidavits for such statements.

RULE 68. *Security by special guardian.*

The security required on a sale of the real estate of an infant shall be a bond of the guardian, with two sufficient sureties, in a penalty of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond, over and above all debts; or a similar bond of the guardian only, secured by a mortgage on unincumbered real estate, of the value of the penalty of such bond.

a. A husband cannot be appointed guardian to sell the estate of his infant wife (4 Johns. Ch. Cas. 378; *Cook* v. *Rawdon*, 1 Code Rep. N. S. 382; and see 8 Paige, 265; 2 ib. 412).

b. Where a piece of real estate was ordered to be sold for the benefit of five infant children, and the guardian gave to each infant a separate bond, under the rules, with the same sureties, who justified in each case according to the penalty of each bond, the bonds differing in amount,—held, that such justification was not in accordance with the spirit of the rules of the court, although it might conform to the letter. The sureties being the same in each case, they should have justified in respect to their ability, as to the aggregate penalties of the several bonds (*Anon.* 4 How. 414).

RULE 69. *Proceeds to be brought into court.*

If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court. If the infant's in-

terest in the property does not exceed one thousand dollars, the whole costs, including disbursements, shall not exceed twenty five dollars. And where several infants are interested in the same premises as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

a. Where several infants join in the same application, or where several pieces of land are sold at different times, an allowance will be made in addition to the sum of $25 (*Re Morrell*, 4 Paige, 44; and Code, §§ 306, 308).

RULE 70. *When moneys may be paid to general guardian. Orders to pay money.*

No moneys arising from the sale of the real estate of an infant, on a mortgage or partition sale, or under any decree, judgment, or order of court, shall be paid over to his general guardian, except so much thereof, or of the interest or income, from time to time, as may be necessary for his support and maintenance; unless such guardian has previously given sufficient security on unincumbered real estate, to account to the infant for the same, in the usual form.

No order shall be made for the payment of any such moneys to any person claiming the same, except upon petition, accompanied by a certified copy of the order in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the funds, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee, to take proof and report thereon.

b. The *proceeds* of an infant's real estate is regarded as *real estate* (*Foreman* v. *Foreman*, 7 Barb. 215).

c. Powers of guardian (see *Swarthout* v. *Swarthout*, 7 Barb. 354).

RULE 71. *Reference to compute amount due on mortgage. When proof of facts to be also taken. Judgment at special term. Proof of filing notice of lis pendens.*

If in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff as stated in the complaint is admitted by the answer, the plaintiff may have an order referring it to the clerk, or to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior encumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference shall also direct the person to whom it is referred to take proof of the facts and circum-

stances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

Where no answer is put in by the defendant within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial as to all the defendants, may apply for judgment, at any special term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar. The plaintiff, in such case, when he moves for judgment, must show, by affidavit or otherwise, whether any of the defendants who have not appeared, are absentees; and, if so, he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made. And in all foreclosure cases the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, and at or after the time of filing the complaint, as required by § 132 of the Code of Procedure.

a. The taking of mortgaged premises by the city of New York for a public place cancels the mortgage (*Shephard* v. *Mayor of N. Y.* 13 How. 286).

b. Right of mortgagee to pay assessments and add amount paid to his mortgage (see *Brevoort* v. *Randolph*, 7 How. 398).

c. Priority of subsequent assignment of mortgage to an amended assignment (*Pickett* v. *Barron*, 29 Barb. 505).

d. Liability of an assignee of a mortgage (*Stebbins* v. *Hall*, 29 Barb. 524); liability of grantor of premises subject to a mortgage (*Trotter* v. *Hughes*, 12 N. Y. 74).

e. Foreclosure of mortgage by married woman (*Cramer* v. *Comstock*, 11 How. 486).

f. **Suit on bond.**—A mortgagor may sue upon the bond or foreclose the mortgage at his election, and in case of the death of the mortgagee, he may sue his heirs on the bond (*Roosevelt* v. *Carpenter*, 28 Barb. 426; and see *Bedell* v. *McClellan*, 11 How. 172).

g. **Complaint in foreclosure.**—(See *ante*, p. 218, *e*).

h. "Action to foreclose a mortgage. Infant defendants. Motion for judgment, for want of an answer. The complaint must state the facts which entitle the plaintiff to his judgment, and where they are not admitted—which as against infant defendants they never can be—they must be proved. In this case both these essentials are wanting. The complaint alleges that the infants have an interest, but does not, as it should, state what that interest is. If the complaint was sufficient in this respect, there is no proof of what the infants' interest is. Motion denied" (*Aldrich* v. *Lapham*, 6 How. 129).

i. Complaint to state what proceedings have been had at law (*Williamson* v. *Champlin*, 1 Clarke's Ch. R. 9).

j. **Order of reference to compute amount due.**—An affidavit to obtain a reference to compute the amount due on a mortgage, should, in addition to

the fact that the bill has been taken as confessed, state the further fact, whether the moneys secured by the mortgage have all become due and payable or not; and also whether any of the defendants are absentees or infants (*Anon.* 8 How. 158); and if any of the defendants are absentees or infants, the order of reference should direct the referee (among other things) to take proof of the facts and circumstances set forth in the bill, and also to report the proofs and examinations had before him. (*Id.*)

a. **Parties.**—One who has agreed with the mortgagor to purchase the mortgaged premises is a *proper* but not a necessary party to an action to foreclose the mortgage (*Crooke* v. *O'Higgins*, 14 How. 154).

b. As to joinder of a surety, see *Chauncey* v. *Lawrence* (15 Abb. 106); and see now subd. 7 of § 167, of the Code.

c. **Filing notice of lis pendens.**—It seems that filing the notice in a case in which it ought not to have been filed, does not render the party filing it liable to an action for slander of title (See *Gibbs* v. *Pike*, 9 Mees & W. 351; 1 Dowl. N. S. 409; 6 Jur. 465; *Kendall* v. *Stone*, 1 Selden, 14).

d. Where the notice of the pendency of the suit filed stated that the mortgage was "recorded on the 12th day of Nomenber, 1831," but did not state *where* it was recorded. The affidavit of filing the notice stated that the deponent "filed in the office of the clerk of Erie county a notice of the pendency of the suit, of which a copy *he believes*, is hereto subjoined." The copy referred to stated that the mortgage was "recorded *in the clerk's office of the county of Erie*, on the 12th day of November, 1831." Held, that the notice, although it omitted to state *where* the mortgage was filed, was, when taken with the affidavit, sufficient to render the decree of the court, effectual to cut off the equity of redemption of judgment creditors (*Potter* v. *Rowland*, 4 Selden, 448).

e. **Defences.**—In an action by an assignee of a mortgage, a judgment of dismissal for defect in the assignment is not a bar to a new action by the same plaintiff after perfecting the assignment (*Mitchell* v. *Cook*, 29 Barb. 243).

f. The fact that when an instalment of interest becomes due, the mortgagor was unable to find the mortgagee to pay same, until after the period for payment to prevent the principal becoming due, is not, no fraud being shown, a defence to an action to foreclose the mortgage (*Dwight* v. *Webster*, 10 Abb. 128).

g. Defence of usury by ante-dating mortgage, how set up (*Banks* v. *Van Antwerp*, 5 Abb. 411).

h. A suit to have a mortgage declared void does not prevent the mortgagee prosecuting a suit to foreclose the same mortgage (*Tarrant* v. *Quackenbos*, 10 How. 244).

i. In an action to foreclose a mortgage, when the defendant appears, but makes default in answering, and the plaintiff gives due notice of an application to the court for the relief demanded in the complaint or for judgment, the court when so applied to may, instead of itself computing the amount due on the plaintiff's mortgage, refer it to the clerk or to some other suitable person then in court, to make such computation. Such reference may be immediately proceeded with, and report being made to the court, judgment may be rendered thereon. The court does not lose control of the main application by such reference.

j. Such a reference is not such a new or independent proceeding as to require to be on a new notice to the defendant. Such a reference need not, under the rule, be executed in the county in which the action is triable (*Kelly* v. *Searing*, 4 Abb. 354).

k. **Reference to compute amount due.**—Powers and duties of referee on reference to compute the amount due (*Faure* v. *Winans*, Hopk. Rep. 283; *Harris* v. *Ely*, 7 Paige, 421; 3 How. 110, 159; 16 *id.* 417; 5 Selden, 42). In an action of foreclosure on a decree to compute the amount due, to examine the plaintiff as to payments and to take proof of the allegations of the complaint against an absent defendant, and directing a sale on the confirmation of the

report, the parties who have appeared and answered are concluded by such decree as to the issues, and the referee has no right to examine the plaintiff as to any facts except those relating to payments on the mortgage, nor to examine the absent defendant in behalf of his co-defendants as to a defence of fraud set up in the answer (*McCrackan* v. *Valentine's Ex's*, 5 Selden, 42).

a. Where some defendants answer and some do not, it is irregular to combine in one reference the inquiry as to the amount due with the trial of the issues raised (*Cram* v. *Bradford*, 4 Abb. 193).

b. The referee cannot accept an affidavit as proof of the amount due (*Sec'y Fire Ins Co.* v. *Martin*, 15 Abb. 479).

c. The referee must attach to his report an abstract of the documentary evidence produced before him (*Sec'y Fire Ins. Co.* v. *Martin*, 15 Abb. 479).

d. The report of the amount due must be confirmed at special term (5 How. 198).

e. **Decree in foreclosure.**—Decree on foreclosure of mortgage to a building association (*Franklin B'ld'g Asso.* v. *Mather*, 4 Abb. 274).

f. Where the complaint did not ask a judgment for the deficiency, there being no answer, held that a judgment for deficiency was erroneous and was vacated (*Simonson* v. *Blake*, 12 Abb. 331; 20 How. 484); as to adding deficiency clause see *Sprague* v. *Jones*, 9 Paige, 395.

g. Where after a mortgage the mortgagor lays out the land into lots with streets and avenues, the court refused to compel the sale to be made in lots as so laid out (*Grinwold* v. *Fowler*, 4 Abb. 238).

h. Order of sale of separate parcels of mortgaged premises sold to several purchasers, after the mortgage (*Ellison* v. *Pecare*, 29 Barb. 333), or where part only is sold (*Breese* v. *Busby*, 13 How. 485).

i. In an action in which some of the defendants answered and some did not, the issues raised by the answers were referred and decided against the defendants, but not deciding on the amount due. The plaintiff then applied on notice at special term for the relief demanded in the complaint, and no opposition being made, took an order of reference to compute the amount due, and after obtaining the report on notice brought the cause to a hearing and took a judgment of foreclosure and sale, held that he was regular (*Hill* v. *McReynolds*, 30 Barb. 488).

j. Where after trial of the issues a reference is ordered to ascertain the amount due, only the judge who tried the issues can order judgment on the referee's report (*Chamberlain* v. *Dempsey*, 15 Abb. 1).

k. Merger of decree for sale by contract of the parties (*Van Wagenen* v. *La Farge*, 13 How. 16).

l. **Charging defendant with costs.**—*Semble*, that a defendant putting in an answer denying the allegations of the complaint where his rights could have been protected by an appearance on the reference to compute the amount due, will be charged with costs (*Barnard* v. *Bruce*, 21 How. 360).

m. **Correcting decree.**—Where the plaintiff takes a decree, without giving credit for payments on account, the remedy of the defendant is by motion to open the decree to prove the payments (*Egleston* v. *Knickerbocker*, 6 Barb. 458).

n. An error in the judgment as to the distribution of the proceeds must be remedied by appeal (*Barnard* v. *Bruce*, 21 How. 360).

o. The remedy of any person whose rights are affected by a decree in a foreclosure suit is a motion to vacate it, not an action to vacate the sale (*Gould* v. *Mortimer*, 26 How. 167; 16 Abb. 448; *Whitbeck* v. *Rowe*, 25 How. 403; *Gould* v. *Libby*, 24 How. 440).

p. **Sale.**—Where the sale is by a referee he must be personally present at the sale (*Heyer* v. *Deaves*, 2 Johns. Ch. 154).

q. If the premises consist of several parcels they should be sold separately

(*Woolcots* v. *Schenck*, 28 How. 385). But omitting to do so does not make the sale void (1 Johns. Ch. R. 503; 7 Abb. 183; *Husted* v. *Dakin*, 17 Abb. 137).

a. Under a foreclosure of a mortgage of a lease, a renewal of such lease may be sold (*Holden* v. *Sackett*, 12 Abb. 473).

b. The sheriff or referee conducting a sale of leaseholds should pay or allow out of the purchase money all arrears of rent due at the time of sale (*Holden* v. *Sackett*, 12 Abb. 474).

c. After a sale a mortgagor has no right of redemption (*North River Ins. Co.* v. *Snediker*, 10 How. 310).

d. **Confirming report of sale.**—The confirmation of the report of sale is not necessary to pass the title to the purchaser. The title passes by the referee's deed. A subsequent confirmation of the report relates to the date of the deed (*Fort* v. *Burch*, 6 Barb. 60).

e. **Setting aside sale—Resale.**—The court will not set aside a sale for mere inadequacy of price, but it will where by fraud, accident or mistake, parties in interest were prevented from attending the sale (see *Gould* v. *Libby*, 24 How. 440; *Whitbeck* v. *Rowe*, 25 How. 403; *Lefevre* v. *Laraway*, 22 Barb. 167; *Manning* v. *Merritt*, 1 Clarke's Ch. R. 101).

f. Resale ordered (see *Colby* v. *Rowly*, 4 Abb. 361; *Lents* v. *Craig*, 2 Abb. 294; 13 How. 72; *King* v. *Morris*, 2 Abb. 296; *Merchants Ins. Co.* v. *Hinman*, 3 Abb. 455; *Stuhl* v. *Charles*, 5 Abb. 348; *Ames* v. *Lockwood*, 13 How. 555; *Murdock* v. *Empie*, 9 Abb. 283; *Banta* v. *Maxwell*, 12 How. 479).

g. Resale denied (see *Wake* v. *Hart*, 12 How. 444).

h. Form of bond on ordering a resale (*Murdock* v. *Empie*, 9 Abb. 285).

i. An order denying a motion to open a judgment and sale in foreclosure, on the ground that the sale was for a grossly inadequate price, and not for any irregularity, is not appealable to the general term (*Young* v. *Bloomer*, 22 How. 383; see *Kingsland* v. *Bartlett*, 28 Barb. 480; 8 Abb. 42; *Gould* v. *Libby*, 24 How. 440; see however, *Wolcott* v. *Schenck*, 28 How. 385).

j. Held that a purchaser, at foreclosure sale, was entitled to appeal from an order setting aside the sale, but that the court would not interfere except in a very strong case (*Mortimer* v. *Nash*, 17 Abb. 229, *note*; and see *Blakely* v. *Calder*, 13 How. 476).

k. Resale on sale under order by surrogate (2 R. S. 105, § 33; *Kain* v. *Masterton*, 16 N. Y. 176).

l. Resale in foreclosure on these terms: (1.) Purchaser to be indemnified by returning his deposit, auctioneer's fees, and expenses of examining title. (2.) Promovent to file a bond that $14,000 will be bid at resale. (3.) Promovent to pay costs of motion (*Murdock* v. *Empie*, 19 How. 79).

m. **Compelling purchaser to complete. Discharging purchaser.**—Mere irregularities in the proceedings may be corrected and will not excuse the purchaser from completing (*Alvord* v. *Beach*, 5 Abb. 451; *Oram* v. *Bradford*, 4 Abb. 193).

n. Where property is sold at a judicial sale without notice of any defect in the title, the purchaser will not be compelled to take a doubtful title (*Rogers* v. *McLean*, 10 Abb. 306).

o. One who falsely assumes to be agent of A. and buys it at a judicial sale in the name of A. cannot be made to complete the purchase (*Hegeman* v. *Johnson*, 35 Barb. 200).

p. A purchaser will not be discharged because there is an appeal from the judgment on which the sale was made. The reversal of the judgment would not affect the purchaser's title. Nor will he be discharged because of the pendency of an action to cancel the mortgage. Nor because the property being leasehold, the rent is in arrear and the lessors have given notice of re-entry (*Holden* v. *Sackett*, 12 Abb. 473), nor for formal defects which can be amended *nunc pro tunc* (*Rogers* v. *McLean*, 11 Abb. 440).

q. On an appeal from an order discharging a purchaser and directing a repayment of his deposit, the court refused a motion to stay proceedings on the

order pending the appeal, the purchaser not being shown to be irresponsible (*Rogers* v. *McLean*, 10 Abb. 458).

a. Vacating the sale and opening the judgment to allow a defendant to come in and defend, tolls the title of the purchaser and his grantee (*Freeman* v. *Munns*, 15 Abb. 468).

b. A purchaser on being discharged on account of a defect in the title should receive a return of his deposit, with interest from the time the sale was to be completed, and costs of examining title and of the motion to be discharged (*Rogers* v. *McLean*, 10 Abb. 306; *Re Cavanagh*, 14 Abb. 261, *note*).

c. Query—The nature and effect of the purchaser's contract (*Miller* v. *Collyer*, 36 Barb. 250; *Willets* v. *Van Alst*, 26 How. 325; *Bicknell* v. *Byrnes*, 23 How. 486; *Hegeman* v. *Johnson*, 35 Barb. 200).

d. The remedy against a purchaser who refuses to complete, is by an order that he complete or that a resale be had, and to hold him liable for the loss and expense (*Miller* v. *Collyer*, 36 Barb. 250).

e. A purchaser having deposited ten per cent. with the referee and failed to complete, a second sale was had for a much less sum than the first, the deposit may be applied towards making up the deficiency (*Willets* v. *Van Alst*, 26 How. 326).

f. **Writ of assistance.**—A writ of assistance may issue *ex parte* (*Lynde* v. *O'Donnell*, 12 Abb. 286, 291; 21 How. 34); and without any order (11 Abb. 223, *note*; *N. Y. Life Ins. Co.* v. *Rand*, 8 How. 35, 352; *N. Y. Life Ins. Co.* v. *Cutler*, 9 How. 407; see *ante*, p. 826, *g*).

g. A writ of assistance may issue against all persons parties to the suit, or who came into possession under either of them pending the suit, but no others (see *Betts* v. *Birdsall*, 19 How. 491; 11 Abb. 222, and *note*).

h. The purchaser is entitled to a writ of assistance, notwithstanding the death of the plaintiff after judgment and before the sale. A revival of the action in such a case is not necessary (*Lynde* v. *O'Donnell*, 12 Abb. 286; 21 How. 34).

i. Under a mortgage foreclosure and sale a tenant in possession who was made a party to the action, is bound to attorn to the purchaser or be removed by writ of assistance, although he claims under an unexpired lease executed previous to the mortgage (*Lovett* v. *German Ref'd Church*, 9 How. 220).

j. **Death of plaintiff.**—Death of plaintiff before judgment, no further proceedings can be had until action revived (*Gerry* v. *Post*, 13 How. 118). But the death of the plaintiff after judgment and before sale, does not prevent the sheriff or referee proceeding to sell and make a deed to the purchaser, the same as if the plaintiff continued in life (*Lynde* v. *O'Donnell*, 12 Abb. 286; 21 How. 34).

k. **Dower.**—The dower of the wife of the mortgagor is not barred by a foreclosure unless she is made a party (*Mills* v. *Van Voorhis*, 10 Abb. 152).

l. **Delivery of deed to purchaser.**—The court will not ordinarily direct the delivery of a deed to the purchaser without payment of the purchase money on the ground that he will be entitled to the *surplus* (*Battershall* v. *Davis*, 23 How. 383).

m. **Title.**—The purchaser does not acquire a title to the premises until the delivery of the deed to him (*Blanco* v. *Foote*, 32 Barb. 535).

n. **Receiver.**—Unless there is a special clause to that effect in the mortgage, the mortgagor acquires no lien on the rents and profits of the property mortgaged (*Syracuse City B'k* v. *Tallman*, 31 Barb. 201). But under certain circumstances the court will appoint a receiver of the rents pending the foreclosure. (*Id.*)

o. **Strict foreclosure.**—Proceedings in action for a strict foreclosure (*Kendall* v. *Treadwell*, 5 Abb. 16; 14 How. 165).

p. **Stay of proceedings.**—In an action to foreclose a mortgage containing an interest clause, for failure to pay an installment of interest, defendant obtained *ex parte* an order allowing him to pay the interest in arrear into court, and having paid it, he answered, setting up the payment as a defence; on

motion to vacate such order, it was held that the defendant had mistaken the practice. He should have offered to pay the interest accrued, and upon its refusal and a reasonable excuse for the seeming want of precise punctuality, have obtained, as he might, an order to stay all proceedings until further default, if any, should occur (*Thurston* v. *Marsh*, 5 Abb. 398; 14 How. 572; *Lynch* v. *Cunningham*, 6 Abb. 94; *Hunt* v. *Keech*, 8 *id.* 204; and see *Broderick* v. *Smith*, 15 How. 534; *Ferris* v. *Ferris*, 16 *id.* 102; 28 Barb. 29).

a. A tender of the amount due upon a mortgage, made after the day on which the mortgage money becomes payable, and after a foreclosure suit has been commenced, will discharge the lien of the mortgage, so as to bar a suit of foreclosure (*Kortright* v. *Cady*, 21 N. Y. 343; reversing, 23 Barb. 491; 5 Abb. 358; and see *Kortright* v. *Blunt*, 12 Barb. 424).

RULE 72. *Judgment for sale of mortgaged premises. Surplus moneys. Report of sale.*

In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far at least as the same can be ascertained from the mortgage; shall be inserted. And unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff, for principal, interest, and costs, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale, he pay to the plaintiff, or his attorney, the amount of his debt, interest, and costs, or so much as the purchase money will pay of the same, and that he take the receipt of the plaintiff, or his attorney for the amount so paid, and file the same with his report of sale; and that the purchaser at such sale be let into possession of the premises, on production of the deed.

All surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable, in the city of New York to the chamberlain of said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of sale shall be filed or confirmed, unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited, or disposed of in pursuance of the judgment. The referee to be appointed in foreclosure cases shall be selected by the court, and the court shall not appoint as such referee a person nominated by the party to the action, or his counsel.

b. Upon a reference to a master to ascertain the rights to the surplus moneys on a sale of mortgaged premises, under the provisions of the 13[illegible]h rule of the court of chancery, the party prosecuting the reference had to produce before the master a certificate of the register, or clerk, with whom the report was filed and the surplus money deposited, showing that no notice of claim to such surplus was annexed to the report of sale, and that no claim to the same has

been filed previous to the entry of the order of reference; or if claims have been filed, stating the names of the claimants, and of their solicitors, if any, and their places of residence (*Hulbert* v. *McKay*, 8 Paige, 651).

a. And before the master proceeded to make his report as to such surplus moneys, he had to ascertain, by the proper certificate and other evidence, that all claimants and other proper parties had been notified or summoned to attend before him on such reference. And the fact that such certificate and evidence was produced before him had to be stated in his report. (*Id.*)

b. An incumbrancer who had neglected to file a notice of his claim upon the surplus moneys, as prescribed by the 136th rule, might go before the master pending the reference as to such surplus and file his claim with him, duly verified; and he would then be entitled to be heard upon the reference, as to the validity of such claim, upon such equitable terms as to costs as the master should direct. (*Id.*)

c. Parties and other claimants, upon a reference to a master to ascertain the rights to the surplus moneys upon a mortgage sale, had to verify their claims in the same manner as creditors coming in under a decree were required to do; and the master might examine the claimants upon oath touching their respective claims. (*Id.*)

d. Where it appeared from the master's report that the proceedings upon the reference as to surplus moneys was entirely *ex parte*, so that no person had a right to except to the report, the entry of an order *nisi*, to confirm the report, might be dispensed with; and the special order of the court to confirm the report, and to pay over the surplus moneys according to the report, might be entered together. (*Id.*)

e. But in all other cases, an order *nisi* to confirm the report had to be first entered; and a certificate of the register, or clerk, that such order had become absolute, had to be produced upon the application to the court for an order to pay out such surplus moneys according to the report. (*Id.*)

f. In all cases of special applications for orders to pay out moneys brought into court, the party applying had to produce the certificate of the register, or clerk, with whom the money was deposited, showing the amount of the fund, and the way in which it is invested; and the claims, if any, which have been made thereon; so that the proper order may be entered to enable the applicant to obtain the fund. (*Id.*)

g. Widow of a deceased mortgagor has a right of dower in surplus (*Blydenburgh* v. *Northrop*, 13 How. 289; *Matthews* v. *Duryee*, 17 Abb. 256).

h. A creditor of the estate by a surrogate's decree has priority over legatees in the distribution of surplus on foreclosure against executors (*Clarke's case*, 15 Abb. 227).

i. On an order distributing surplus moneys the court may allow the parties a suitable compensation for costs and disbursements, to be paid out of the funds (*N. Y. Life Ins. Co.* v. *Vanderbilt*, 12 Abb. 458).

j. See as to proceedings on reference as to surplus (*Husted* v. *Dakin*, 17 Abb. 187).

RULE 73. *Sale of lands in the city of New York. Sale of lands out of the city.*

Where lands in the city of New York are sold under a decree, order, or judgment of any court, they shall be sold at public vendue, at the Merchant's Exchange, between twelve o'clock at noon and three o'clock in the afternoon, unless otherwise specially directed. The notice of the sale of lands, lying in any of the cities of this State in which a daily paper is printed, except where a different notice is required by law, or by the order of the court, shall be published in one or more of the daily papers of that city, for three weeks immediately pre-

vious to the time of sale, at least twice in each week. When lands in any other part of the State are directed to be sold at auction, notice of the sale shall be given for the same time and in the same manner as is required by law on sales of real estate by sheriffs on execution.

a. Though not necessary, it is proper to insert the title of the action in the notice of the sale (*Ray* v. *Oliver*, 6 Paige, 489).

b. On sales of lands in the city of New York, *on partition*, and by the sheriff, the notice must be for six weeks, the statutory time (2 R. S. 326, § 56; ib. 330, § 81; ib. 386, § 34). Rule 73 has no application to such sales. That rule applies only in cases where there is no time fixed by statute, as upon a sale by a bill filed to foreclose a mortgage, or sales of infants' or lunatics' lands, &c. (*Romaine* v. *McMillen*, 5 How. 318).

c. A notice of sale for 28th December published in a daily paper on the 9th, 12th, 16th, 19th, 23rd, and 26th of that month held to be a notice published "for three weeks immediately previous to the time of sale, at least twice in each week" (*Chamberlain* v. *Dempsey*, 22 How. 356; 13 Abb. 421).

d. Notices of foreclosure and of sale of land in Hamilton County and all other notices may be published in Fulton County with the same effect as if published in Hamilton County. (Laws 1860, ch. 297).

e. Where the day of sale has passed without any sale or postponement being had, to authorize a sale the officer having charge of the sale must advertise *de novo* or procure an order of the court directing his course of proceeding (*Bicknell* v. *Byrnes*, 23 How. 486).

f. The proper method of adjourning a sale would include the naming the adjournment day, but that is not indispensible (*La Farge* v. *Van Wagenen*, 14 How 54).

RULE 74. *How sheriff is to sell.*

Where mortgaged premises or other real estate directed to be sold, consist of several distinct lots or parcels, which can be sold separately without diminishing the value thereof on such sale, it shall be the duty of the sheriff, or other person conducting the sale, to sell the same in separate lots or parcels, unless otherwise specially directed by the court. But if the sheriff or other person is satisfied the property will produce a greater price if sold together than it will in separate lots or parcels, he may sell it together, unless otherwise directed in the order of sale.

g. Mortgaged premises which adjoin and are used together, may, in the discretion of the officer conducting the sale, be sold together or in parcels; and his discretion will not be interfered with by the court (*Whitbeck* v. *Rowe*, 25 How. 403); but a resale was ordered in *Wolcott* v. *Schenck* (23 How. 385; see 1 Johns. Ch. R. 503; 7 Abb. 183; 17 Abb. 137).

h. Stipulating as to the parcels in which premises are to be sold (*Woodruff* v. *Bush*, 8 How. 117).

RULE 75. *Mortgage must be filed or recorded.*

Whenever a sheriff or referee sells mortgaged premises, under a decree or order or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage in the office of the clerk, unless such mortgage has been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded, at full length, in the county

or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and if filed with the clerk, he shall enter in the minutes the filing of such mortgage, and the time of filing. But this rule shall not extend to any case where the mortgage appears, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

RULE 76. *Claims for surplus money.*

On filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed, a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference, to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. Every party who appeared in the cause, or who shall have filed such notice with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office, directed to the claimant at his place of residence, as stated in the notice of his claim.

a. On a reference in a foreclosure suit under rule 76, the liens referred to in the rule are those which subject the estate to be sold under execution, without any further intervention of the court. Claims, however equitable, which are not matured into liens under which the property can be charged in execution, and sold without further adjudication, cannot be taken into consideration by the referee (*King* v. *West*, 10 How. 333; see *Sleight* v. *Read*, 9 How. 278; *Beekman* v. *Gibbs*, 8 Paige, 511).

b. "As I understand the rule [Rule 76,] it was intended that the plaintiff should have the same right to present and establish a claim to the surplus moneys as a defendant in a foreclosure suit or any other person" (Harris, J. *Field* v. *Hawkhurst*, 9 How. 75). The complainant in a foreclosure suit, is not required to establish beforehand all the claims he may have upon the mortgaged premises. (*Ib.*)

c. Junior mortgage has priority over judgments (*Brewster* v. *Cropsy*, 4 How. 219; *Tallman* v. *Farley*, 1 Barb. 280; *Slosson* v. *Duff*, 1 Barb. 432).

d. Purchasers at a sale on execution have priority over junior judgments on which no sale has been had (*Shepard* v. *O'Neil*, 4 Barb. 125).

e. A subsequent incumbrancer has claim upon the surplus money, arising from a sale under a statute foreclosure of which he had no notice (*Winslow* v. *McCall*, 32 Barb. 241).

f. A prior judgment confessed by two of three partners has priority over a subsequent judgment against the three partners (*Stevens* v. *Bank of Cent. N. Y.* 31 Barb. 290).

g. Unregistered mortgage has priority over a subsequent judgment (*Thomas* v. *Kelsey*, 30 Barb. 269).

a. Under a general power an attorney in fact may receive surplus money (*Howland* v. *Ayres*, 4 How. 223).

b. An attorney who receives surplus money, and pays it over to his client is not liable to any person having claims on such surplus (*Costigan* v. *Newland*, 12 Barb. 456).

c. Unsuccessful claimants of surplus money may be charged with the costs occasioned by their claim (*Lawton* v. *Sager*, 11 Barb. 350).

d. Liens existing on the premises at the time of the sale are transferred to the surplus (*Averill* v. *Loucks*, 6 Barb. 471).

RULE 77. *Partition of lands held in common.*

Where several tracts or parcels of land lying within this State are owned by the same persons in common, no separate action for the partition of a part thereof only shall be brought, without the consent of all the parties interested therein; and if brought without such consent, the share of the plaintiff may be charged with the whole costs of the proceeding. And when infants are interested, the petition shall state whether or not the parties own any other lands in common.

RULE 78. *Reference as to title where no defence interposed.*

Where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a special term for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the bill or petition; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances by which the same are held.

RULE 79. *Order for reference. Sale in partiion.*

Where the whole premises of which partition is sought, are so circumstanced that a partition thereof cannot be made without great prejudice to the owners, due regard being had to the power of the court to decree compensation to be made for equality of partition, and to the ability of the respective parties to pay a reasonable compensation to produce such equality, or where any lot or separate parcel of the premises, which will exceed in value the share to which either of the tenants in common may be entitled, is so circumstanced, the plaintiff, upon stating the fact in the affidavit which is to be filed for the purpose of obtaining an order of reference under the next preceeding rule, may have a further provision inserted in such order of reference, directing the officer or person to whom it is referred, to inquire and report whether the whole premises, or any lot or separate parcel thereof, are so circumstanced that an actual partition cannot be made; and that if he arrives at the conclusion that the sale of the whole premises, or of any lot or separate parcel thereof, will be necessary, that he specify the same in his report, together with the reasons which render a sale necessary; and, in such a case, that he also as-

certain and report whether any creditor, not a party to the suit, has a specific lien, by mortgage, devise, or otherwise, upon the undivided share or interest of any of the parties, in that portion of the premises which it is necessary to sell; and if he finds that there is no such specific lien in favor of any person not a party to the suit, that he further inquire and report whether the undivided share or interest of any of the parties in the premises is subject to a general lien or incumbrance, by judgment or decree; and that he ascertain and report the amount due to any party to the suit who has either a general or specific lien on the premises to be sold, or any part thereof, and the amount due to any creditor, not a party, who has a general lien on any undivided share or interest therein, by judgment or decree, and who shall appear and establish his claim on such reference. He shall also, if requested by the parties who appear before him on such reference, ascertain and report the amount due to any creditor, not a party to the suit, which is either a specific or general lien or incumbrance upon all the shares or interests of the parties in the premises to be sold, and which would remain as an incumbrance thereon, in the hands of the purchaser; to the end that such directions may be given in relation to the same, in the decree for the sale of the premises, as shall be most beneficial to all the parties interested in the proceeds, thereof on such sale.

RULE 80. *Staying sale in foreclosure or partition.*

No order to stay a sale under a judgment in partition or for the foreclosure of a mortgage, shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney.

RULE 81. *Moneys brought into court to be paid to county treasurer. Where deposited.*

All moneys brought into court by order of this, or any other court, shall be paid to the county treasurer of the county in which the action is triable, unless the court shall otherwise direct. And all bonds, mortgages, and other securities upon real estate, heretofore required to be taken in the name of the clerk of the court of appeals, shall, except as otherwise provided by law, be taken to the treasurer of the county where such fund belongs, or such other county treasurer as this court shall direct. And all moneys received by the county treasurer, under and by virtue of any law vesting him with the funds or securities belonging to any of the suitors, in any court of this State, shall be deposited by the said county treasurer, in his name of office, in the New York Life Insurance and Trust Company, the United States Trust Company, or in such bank, or trust company, as the court for the district shall from time to time direct, as a deposit bank, unless the order or judgment under which such moneys are brought into court, shall direct such moneys to be deposited in some other bank or company.

a. As to the method of investing moneys in court on bond and mortgage, and of ascertaining the sufficiency of the security, see *Green* v. *Ward* (1 Barb. 21).

b. The chamberlain of the city of New York is the county treasurer thereof (1 R. S. 370, § 29).

RULE 82. *Accounts of county treasurer. County treasurer to report annually.*

The accounts of the county treasurers, with respect to moneys or securities received by them under the foregoing rule, or by virture of any order of any court of this State, with the banks and other companies, in which moneys are directed to be deposited, shall be kept in such manner, that in the cash books of the banks and other companies, and in the bank books of the said treasurers, it shall appear in what particular suit, or on what account, the several items of money credited, or charged, were deposited, or paid out. The said county treasurer shall, at the first general term of this court, for the district in which such treasurer resides, in each year, make a report to said court, containing a statement of his accounts, and of the funds and securities under his control, on the first day of January, which statement shall show the amount in his hands, uninvested, and the times when received, and the suit or matter in which the same was paid in, constituting the balance in deposit in banks, and other companies; and also all stocks, bonds, and mortgages, and other investments, for the benefit of suitors or otherwise. The court to which such report shall be made, shall cause the same to examined by some suitable and proper person, to be appointed by them. The person so appointed shall forthwith proceed to examine the account and statement, with the accounts in banks and in other companies, and with the accounts and securities in the office of such treasurer. He shall have the power to summon witnesses before him, if necessary, to be examined with respect to such accounts. He shall report whether such accounts have been correctly kept, and are truly stated; and shall, on or before the first day of the next ensuing general term in such district, deliver to the court of such district, by which he shall be appointed, or one of the justices thereof, his report upon the matters so referred.

RULE 83. *Orders for paying moneys out of court. Accounts with Trust Companies.*

Orders upon the banks or other companies for the payment of moneys out of court, shall be made payable to the order of the person entitled thereto, or of his attorney duly authorized, and shall specify in what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made. When moneys are deposited in the New York Life Insurance and Trust Company, or the United States Trust Company, to the credit of the county treasurer, the entry of such deposit, both in the books of the company and in the accounts of the county treasurer with the company, shall contain a short reference to the title of the cause or

matter in which such deposit is directed to be made; and specifying also the time from which the interest or accumulation on such deposit is to commence, where it does not commence from the date of such deposit. The secretary of the company shall transmit to the justices holding the first general term for the first district, in January in each year, a statement of the accounts of the said county treasurer; and to the justices holding the first general term in the other districts, a statement of the accounts of the county treasurer in each district; showing the amounts standing to his credit on the first day of January, including the interest, or accumulation, on the sums deposited to the credit of each cause or matter. In every draft upon the Trust Company by the county treasurer, for moneys deposited with the said company, or for the interest or accumulation on such moneys, the title of the cause or matter on account of which the draft is made, and the date of the order authorising such draft, shall be stated; and the draft shall be made payable to the order of the perfon or persons entitled to the money, or of his or their attorney, who is named in the order of the court authorising such draft. And to authorize the payee or indorsee of such draft to receive the money thereon from the Trust Company, the same shall be accompanied by a certified copy of the order of the court authorising such draft, countersigned by the justice by whom such order was made. But where periodical payments are directed to be made out of a fund deposited with such company, the delivery to the secretary of the company of one copy of the order authorising the seveal payments, shall be sufficient to authorize the payment of subsequent drafts in pursuance of such order.

RULE 84. *Gross sum, in payment of life-estates, how ascertained.*

Whenever a party, as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent. on the principal sum, during the probable life of such person, according to the Portsmouth or Northampton Tables.

RULE 85. *Fees on executing commission of lunacy. Committee may pay taxed costs.*

On the execution of a commission of lunacy, &c., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to the same allowance which is made by law to commissioners to make partition or admeasure dower. And for drawing the inquisition and process and serving notices, when no attorney is employed, they shall have the fees to which an attorney would be entitled for the same services.

The committee of a lunatic, idiot, or drunkard, may pay to the petitioner on whose application the commission was issued, or to his attorney, the costs and expenses of the application and of the subsequent proceedings thereon, including the appointment of the committee, and without an order of the court for the payment thereof, when the bill of such costs and expenses has been duly taxed and filed with the clerk in whose office the appointment of such committee is entered; provided the whole amount of such costs and expenses does not exceed fifty dollars. But where the costs and expenses exceed fifty dollars, the committee shall not be at liberty to pay the same out of the estate in his hands, without a special order of the court directing such payment.

a. If an action is brought against the committee of a lunatic, for a cause of action which might have been settled on a summary application, the plaintiff will not be allowed his costs (*Outrin* v. *Graves*, 1 Barb. Ch. R. 49; and Code, §§ 306, 308).

b. The court has no jurisdiction to appoint a committee of a lunatic, or order a sale of his property, upon petition of his friends and relatives, before a commission of lunacy has been issued and returned (*Re Payn*, 8 How. 220).

c. As to the form of the finding (*Re Mason*, 1 Barb. 436). The inquisition is only presumptive evidence of incapacity as respects transactions prior to the taking such inquisition (*Re Patterson*, 4 How. 34).

d. New trial on writ *de lunatico inquirendo*, *Tebout's case* (9 Abb. 211).

e. The inquisition will not be set aside for mere irregularity if there is no doubt of the lunacy (*Lamoree's case*, 32 Barb. 122; 11 Abb. 315). Who may be committee. (*Id.*)

f. Effect of finding a party a lunatic upon his acts and contracts (*Re Patterson*, 4 How. 34).

g. As to the costs and proceedings generally, see *Re Clapp* (20 How. 385).

RULE 86. *Action for divorce or separation. Complaint for divorce.*

When an action is brought to obtain a divorce or separation, or to declare a marriage contract void, if the defendant fail to answer the complaint, or if the facts charged in the complaint are not denied in the answer, the court to which application is made for judgment, shall order a reference, to take proof of all the material facts charged in the complaint.

The court shall in no case order the reference to a referee nominated by either party.

And, when the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff—that five years have not elasped since the discovery of the fact that such adultery had been committed—and that the plaintiff has not voluntarily cohabited with the defendant since such discovery—and also where, at the time of the offence charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed—that five years have not elasped since the commencement of such adulterous inter-

course was discovered by the plaintiff; and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the 157th section of the code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

a. The fact that a man represented himself as a widower, he being in fact a divorced husband, is not a ground for a divorce (*Clarke* v. *Clarke*, 11 Abb. 228).

b. As to proceedings in action for divorce, see opinion of Hon. Murray Hoffman, as referee, published 17 Abb. 48.

c. Domicile of wife—venue of action (see *Venes* v. *Venes*, 15 How. 497; *id.* 576, *note*).

d. Complaint.—Where the complaint in an action for divorce demands judgment for a separation from bed and board for ever, without asking any other relief, or for relief generally, and the allegations of the complaint are not such as entitle the plaintiff to the relief demanded, if the defendant demurs to the complaint for not stating facts sufficient to constitute a cause of action, the demurrer must be allowed, although the facts stated are such as would entitle the plaintiff on a proper prayer to a judgment declaring the marriage contract void (*Walton* v. *Walton*, 32 Barb. 203; 20 How. 347).

e. On a complaint demanding a separation from bed and board, there being no answer, a decree declaring the marriage contract void is unauthorized (*Anon.*, 11 Abb. 231).

f. In an action for a limited divorce for cruelty, the plaintiff could not also complain for adultery, and ask a decree dissolving the marriage contract, *if* the adultery should be proved, see *Smith* v. *Smith* (4 Paige, 92).

g. A complaint in an action for a separation from bed and board, which does not specify particularly the circumstances relied upon, with dates and places with reasonable certainty, is bad on demurrer (*Anon.*, 11 Abb. 231; and see *Hyde* v. *Hyde*, 4 Sand. 622).

h. In an action for an absolute divorce for adultery, the complaint should allege that the discovery of the plaintiff's criminality took place within a certain time before the commencement of the action (*Zorkowski* v. *Zorkowski*, 27 How. 37). An error in the date may be disregarded. (*Id.*)

i. In an action for a divorce on the ground of adultery, an order of reference on the default of the defendant to answer will not be made where the complaint contains no specification of the person with whom, or the place where, the offense was committed (*Hyde* v. *Hyde*, 4 Sand. 622).

j. An allegation that the defendant in November 1851, committed the offense in the city of New York, with a female whose name is unknown to the plaintiff, and the particular circumstances of which are unknown to the plaintiff, will not suffice. (*Ib.*)

k. If the person be unknown, the complaint should state particularly the place where the offense occurred, as at a house specified, or the like. (*Ib.*)

l. Alimony—Expenses of prosecuting or defending action.—Where the wife is the defendant in a bill filed by her husband, for a divorce on the ground of adultery, she is entitled to the means of defence as well as of support during the pendency of the suit. And unless she has means of her own, the husband may be ordered to furnish her the means of obtaining a fair and impartial trial, as well as providing for her subsistence. Before final decree, however, the court should interfere with the husband's property with great caution, and deal it out to the wife much more sparingly than it would be proper to do after the termination of the suit. And if the wife has sufficient property in her hands to defray the expenses of the suit, and to support herself pending the litigation, the husband should not be ordered personally to advance any thing more until that property shall be exhausted (*Morrell* v. *Morrell*, 2 Barb. 480).

a. A referee appointed to hear and determine an action for a limited divorce, may provide in his decision for the allowance to the wife for maintenance (*Bihin* v. *Bihin*, 17 Abb. 21).

b. A motion for alimony may be made on affidavits alone, and before a copy of the complaint has been served. But in such case the affidavits must allege in substance, all the facts necessary to make a good complaint (*Whitney* v. *Whitney*, 22 How. 175).

c. Upon a reference to inquire and ascertain the amount which should be allowed to a wife for maintaining a suit for divorce, and for support of herself and child meanwhile, it is not necessary that she prove her case upon the merits; and proof of her misconduct is admissible only to show, that it was so glaring that no aid should be given her to prosecute the suit. The delay of the wife in prosecuting her suit, will be a ground for discontinuing the allowance (*Fowler* v. *Fowler*, 4 Abb. 411).

d. If wife denies charge of adultery on oath, she is entitled to alimony *pendente lite* and to a counsel fee (*Hallock* v. *Hallock*, 4 How. 160).

e. Poverty of husband not an answer to the application. (*Id.*)

f. Where on the motion of a plaintiff's wife for alimony, the papers present a case of serious doubt of her ultimate succcess, the motion will be denied (*Carpenter* v. *Carpenter*, 19 How. 539).

g. Alimony and allowance for defence will not be granted to a wife who is shown to be living in open adultery, although she may by her answer, deny the adultery charged in the complaint (*Griffin* v. *Griffin*, 23 How. 189; 21 How. 364).

h. As to misconduct of wife after the decree see *Forest* v. *Forest*, 9 Abb. 289).

i. Where, pending an action in a foreign state by the husband for divorce, the wife commenced an action for divorce in this state, it not appearing that by the law of such foreign state a divorce could be granted to the defendant in the action in that state, held that the pendency of the suit in the foreign state, was not a reason for denying alimony to the plaintiff in her suit in this state (*Whitney* v. *Whitney*, 22 How. 175).

j. The rule as to payment of alimony is, that the same is to be paid up to the entry of the final judgment even if the decision on the trial is adverse to the wife (*Moncrief* v. *Moncrief*, 15 Abb. 187).

k. In case of an appeal by the wife from the judgment, the order for alimony does not continue, but a motion may be made to continue the alimony. (*Id.*)

l. An order denying or granting a motion for alimony or an allowance for expenses of the action, in an action for divorce for adultery, is discretionary and is not appealable (*Griffin* v. *Griffin*, 23 How. 189; and see *McDonough* v. *McDonough*, 26 How. 193; *Moncrief* v. *Moncrief*, 10 Abb. 315).

m. Where the wife has a judgment in her favor for a separation from bed and board for ever, and in which judgment she is allowed a sum in gross, declared to be in full satisfaction for her support and all alimony, such judgment is a bar to the wife's claim for alimony in an action by the husband for a divorce on the ground of adultery, but it is not a bar to her claim for an allowance to defend the action (*McDonough* v. *McDonough*, 26 How. 193).

n. Where the plaintiff's wife is defeated in her action the husband is not liable to her attorneys for the costs of prosecuting the action (*Shelton* v. *Pendleton*, 18 Conn. R. 417; *Wing* v. *Hurlbut*, 15 Verm. R. 607; *Dorsey* v. *Goodenow*. Wright's (Ohio) R. 120). And where pending a suit by a wife for divorce she and her husband become reconciled and settle the action, the husband is not liable to the attorneys of the wife for the costs (*Phillips* v. *Simmons*, 20 How. 342; 11 Abb. 287).

o. **Proof of marriage and residence.**—In actions for divorce, proof of marriage and the residence of the parties, is as material as proof of the adultery (9 Paige, 589; 7 *ib.* 589; 3 Edw. Ch. R. 377; 8 How. 298).

a. **Marriage in a foreign country how proved** (*Winslow* v. *Winslow*, 6 Abb. 294).

b. **Cruel and inhuman treatment.**—What amounts to cruel and inhuman treatment justifying a limited divorce (*Bihin* v. *Bihin*, 17 Abb. 20; *Conklin* v. *Conklin*, 17 Abb. 20, *note*; *P.* v. *P.* 24 How. 197).

c. **Judgment on referee's report.**—Judgment may be entered on the report of a referee in an action for a limited divorce, without any application to the court to confirm the report (*Bihin* v. *Bihin*, 17 Abb. 21).

d. **Vacating judgment.**—A judgment of divorce may be vacated for irregularity, affecting the jurisdiction of the person, even after the prevailing party has married again, but this will be done with caution (*Wortman* v. *Wortman*, 17 Abb. 66; and see *Singer* v. *Singer*, 17 Abb. 66, *note*).

e. An order of the New York common pleas denying a motion for leave to come in and answer after judgment taken for want of an answer, is appealable without any certificate (*McGuin* v. *Cace*, 9 Abb. 160).

RULE 87. *Reference in suit to annul marriage.*

To obtain an order of reference, if the complaint seeks to annul a marriage on the ground that the party was under the age of legal consent, an affidavit must be produced showing that the parties thereto have not freely cohabited for any time as husband and wife, after the plaintiff had attained the age of consent. If the complaint seeks to annul the marriage on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show by affidavit that there has been no voluntary cohabitation between the parties as man and wife; and, if it seeks to annul a marriage on the ground that the plaintiff was a lunatic, an affidavit must be produced showing that the lunacy still continues, or the plaintiff must show by his affidavit, that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

RULE 88. *Plaintiff may be examined on reference.*

On a reference to take proof of the facts charged in a complaint for separation, or limited divorce, the examination of the plaintiff on oath may be taken, as to any cruel or inhuman treatment, alleged in the complaint, which took place when no witnesses were present who were competent to testify to the facts on such reference.

f. **Examination of parties.**—When a reference is ordered in an action for a divorce for adultery, the defendant cannot be examined as a witness for the plaintiff; and in such a case proof must be made before a referee, not only of the fact of adultery, but of all the other material facts charged in the complaint; if the referee's report is found insufficient, the court may order the report to be recommitted to the referee to take further proof (*Arborgast* v. *Arborgast*, 8 How. 297).

g. When the wife may testify in an action for a limited divorce (*Bihin* v. *Bihin*, 17 Abb. 21; and see *P.* v. *P.*, 24 How. 197).

RULE 89. *Defence in action for divorce, &c.*

The defendant, in the answer, may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract; and if an issue is taken thereon, it shall be tried at the same time, and in the same manner, as other issues of fact in the cause.

a. Where the answer sets up the adultery of the plaintiff, the charge must be such, that the defendant, if innocent, would be entitled to a divorce if the charge was substantiated in an action by such defendant (*Morrell* v. *Morrell*, 8 Barb. 236; and 1 *ib.* 318). And in such a case the adultery of the plaintiff should be set up in the answer in the same manner and be accompanied with the same allegations as are required in a complaint. The answer should allege that the adulteries of the plaintiff were committed without the procurement, connivance, privity, or consent of the defendant. (*Ib.*)

b. In an action for a divorce, an answer setting up the adultery of the plaintiff as a defence need not allege either that the parties were inhabitants of this State at the time of the commission of the offence, nor that the defendant at that time, and at the commencement of the action, was an actual inhabitant of this State (*Lessner* v. *Lessner*, 31 Barb. 330).

c. In an action by a wife for a limited divorce, the defendant set up as a separate defence, that at the time of his alleged marriage with the plaintiff, she had a husband living, and that such husband was still living and demanded a divorce on that ground; the referee found that at the time of the alleged marriage of plaintiff and defendant, she had a husband living and refused to grant a divorce to either party, and directed a judgment dismissing the complaint without costs, on appeal this was held right (*Linden* v. *Linden*, 36 Barb. 61).

d. In an action for a limited divorce, the defence of adultery of the plaintiff cannot be interposed, *semble* (*McNamara* v. *McNamara*, 9 Abb. 18; see *McIntosh* v. *McIntosh*, 12 How. 289).

e. In an action for a limited divorce by a wife against her husband, held that although the defendant might show he was the party entitled to the divorce, it could not be granted to him in that action (*McNamara* v. *McNamara*, 9 Abb. 18).

f. In an action for a divorce on the ground of adultery. the defendant cannot interpose the defence of physical incapacity of plaintiff to contract the marriage relation, where more than two years have expired from the solemnization of the marriage contract, and within which time the defendant has brought no action against the plaintiff for a dissolution of the marriage contract on that ground (*Griffin* v. *Griffin*, 23 How. 183).

g. In an action for a limited divorce on the ground of cruelty, the defendant cannot set up as a defence or counter-claim the adultery of the plaintiff (*Henry* v. *Henry*, 27 How. 5).

See *ante*, p. 282, *c*, *d*, *e*, *f*, and p. 294, *b*.

h. Matter of defence coming to the knowledge of the defendant after answer, may be set up by supplemental answer (*Smith* v. *Smith*, 4 Paige, 432).

RULE 90. *Questioning legitimacy of children.*

On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If a reference is ordered, proofs shall be taken upon the question of legitimacy, as well as upon the other matters stated in the complaint; and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

RULE 91. *Sentence of nullity or decree for divorce by default. Pleadings or testimony not to be published. Judgment for divorce.*

No sentence or decree of nullity declaring void a marriage contract, or decree for a divorce, or for a separation or limited divorce,

shall be made of course by the default of the defendant, or in consequence of any neglect to appear at the hearing of the cause, or by consent. And every such cause shall be heard after the trial of the issue, or upon the coming in of the proofs, at a special term of the court; but where no person appears on the part of the defendants, the details of the evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of this court with whom the proceedings in an adultery cause are filed, or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of the suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party, or the attorney or counsel of a party, who has appeared in the cause, without a special order of the court.

No judgment in an action for divorce shall be entertained except upon the special direction of the court.

a. The court will not grant a decree for divorce, upon a complaint to which no answer has been interposed, until after an inspection of the complaint, proof, and the affidavit of service of the summons (*Robinson* v. *Robinson*, 1 Barb. 27).

RULE 92. *Receiver of debtor's estate. When allowed his costs. May sell doubtful claims at auction.*

Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands, and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor, without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs, unless such suit is brought by order of the court, or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

b. A receiver who prosecutes or defends an action as receiver, without leave of the court for that purpose first obtained, is personally liable for costs (*Phelps* v. *Cole*, 3 Code Rep. 157).

c. A motion in the supreme court to vacate a receiver's sale of real estate, where the sale was regular, is addressed to the discretion of the court, and the order thereon cannot be appealed to the general term (*Wakeman* v. *Price*, 3 Code Rep. 196; 3 Coms. 334).

RULE 93. *Suits pending. Cases not provided for. When rules take effect.*

All actions depending on the first day of July, 1848, may be conducted according to the rules of the Supreme Court adopted in July, 1847, so far as the same are applicable.

In cases where no provision is made by statute, or by these rules, the proceedings shall be according to the customary practice, as it has heretofore existed, in the Court of Chancery and Supreme Court in cases not provided for by statute or the written rules of the court.

These rules shall take effect on the first day of October, 1858.

ANNUITY TABLE.

A TABLE corresponding with the Northampton Tables referred to in the 84th Rule of the Supreme Court, showing the value of an annuity of one dollar, at six per cent., on a single life, at any age from one year to ninety-four, inclusive :—

Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.
1	10.107	25	12.063	49	9.563	73	4.781
2	11.724	26	11.992	50	9.417	74	4.565
3	12.348	27	11.917	51	9.273	75	4.354
4	12.769	28	11.841	52	9.129	76	4.154
5	12.962	29	11.763	53	8.980	77	3.952
6	13.156	30	11.682	54	8.827	78	3.742
7	13.275	31	11.598	55	8.670	79	3.514
8	13.337	32	11.512	56	8.509	80	3.281
9	13.335	33	11.423	57	8.343	81	3.156
10	13.285	34	11.331	58	8.173	82	2.926
11	13.212	35	11.236	59	7.999	83	2.713
12	13.130	36	11.137	60	7.820	84	2.551
13	13.044	37	11.035	61	7.637	85	2.402
14	12.953	38	10.929	62	7.449	86	2.266
15	12.857	39	10.819	63	7.253	87	2.138
16	12.755	40	10.705	64	7.052	88	2.031
17	12.655	41	10.589	65	6.841	89	1.882
18	12.562	42	10.473	66	6.625	90	1.689
19	12.477	43	10.356	67	6.405	91	1.422
20	12.398	44	10.235	68	6.179	92	1.136
21	12.329	45	10.110	69	5.949	93	0.806
22	12.265	46	9.980	70	5.716	94	0.518
23	12.200	47	9.846	71	5.479		
24	12.132	48	9.707	72	5.241		

RULE FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY.

Calculate the interest at six per cent. for one year, upon the sum to the income of which the person is entitled. Multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the gross value of the life-estate of such person in said sum.

EXAMPLES.

Suppose a widow's age is 37, and she is entitled to dower in real estate worth $350 75. One third of this is $116 91⅔. Interest on $116 91, one year at six per cent. (as fixed by the 84th rule), is $7 01. The number of years' purchase which an annuity of $1 00 is worth at the age of 37, as appears by the table, is 11 years and $\frac{025}{1000}$ parts of a year, which multiplied by 7.01, the income for one year, gives $77 35 and a fraction, as the gross value of her right of dower.

Suppose a man whose age is 50, is tenant by the curtesy in the whole of an estate worth $9,000. The annual interest on the sum at six per cent. is $540. The number of years' purchase which an annuity of one dollar is worth at the age of 50, as per table, is $9\frac{417}{1000}$ parts of a year, which multiplied by 540, the value of one year, gives $5,085 18 as the gross value of his life-estate is the premises or the proceeds thereof.

Note.—The values in this table are calculated on the supposition that the annuities are payable yearly; if payable half-yearly, one fifth of a year's purchase should be added to those values.

See *Jackson* v. *Edwards*, 7 Paige, 408, as to computation of dower right.

SUPREME COURT, GENERAL TERM.

NEW YORK, *April* 14*th*, 1856.

Rules in regard to Moneys awarded to Unknown Owners.

1. Whenever any person shall claim any money awarded to unknown owners on the opening, widening, altering, improving, or laying out of any street, avenue, square, or public place, he shall cause notice of his intention to apply to the court for such moneys, to be published in one of the daily newspapers in this city, at least once a week for four weeks; and shall serve notice of such intention on the Mayor of the city, and the Counsel to the Corporation of the city, at least fourteen days before such application. The court at special term, or the judge at chambers may hear the application, and may hear the proofs or refer the matter to a referee to hear and examine into the matter, and to report the substance of the proofs, with his opinion. The applicant shall furnish to the court or referee an abstract of title for at least twenty years prior to the award, and carried down to the time of

the examination; and also produce the originals or verified copies of all deeds and wills referred to in the abstract, unless the court or judge, on proof that the same cannot be furnished, shall authorize other proof to be received in place of such originals or copies; and shall also furnish a certificate of search for mortgages and conveyances against the persons named in the abstract of title, made by a searcher in the Register's office, or by some other person experienced in making such searches, and shall furnish his own affidavit, or that of his agent, or of some other person likely to be acquainted with the truth, to the effect that, according to his best knowledge, information, and belief, there were no mortgages, conveyances, judgments, or liens of any kind on the property to which the award was made, at the time of the award, and of the payment of the money to the officer then holding the money for the unknown owners except such liens (if any) as may be specially mentioned in such affidavit. The maps of awards and assessments, or extracts from them, so far as relates to the lots in question, shall also be produced to the court, or judge, or referee. Whenever any money shall be paid to the clerk or to the chamberlain or county treasurer, for unknown owners, such officer shall enter in his books of account a memorandum showing the title of the matter in which payment was made, and the number of the lot or lots on the map of awards or assessments to which the award is made.

2. No application will be heard in regard to the disposition of moneys awarded to unknown owners, until such moneys shall have been actually paid.

3. Every petition for the payment of such moneys shall be verified under oath; shall set forth a statement of the title and the grounds of the claim; and shall also state the names and residences of all persons, if any, whom the petitioner knows, or has been informed, or believes, to be claimants of such moneys or of any part thereof, or in any manner or in any degree interested or claiming to be interested therein.

4. Ten counsellors at law, to be named by the presiding justice, with the concurrence of one or more of the other judges, shall be appointed referees, to one of whom such application shall be referred; and no application shall be referred except to one of the persons so to be named.

5. The referee, before proceeding in the reference, shall require proof of the service of notice of the reference upon all persons named in the petition as interested, or as claimants, and if, upon the reference, the referee shall consider that other persons should be notified, he shall require notices to be served upon them. If any such persons are infants, guardians must be appointed as in ordinary actions; and if any are absent, non-resident, or cannot be found, special application must be made to the court for direction in the premises.

6. The referee shall require a full and complete abstract of the title to be furnished to him, and which he shall verify for such length of time as he may deem advisable, together with full, complete, and original returns of searches for mortgages, conveyances, and all other

liens whatever, affecting the title of the property, and such affidavits also as he may deem proper. And he shall annex to and return with his report, all such papers, together with the proofs of service of notices upon adverse claimants, and all testimony taken before him.

7. Notice of hearing, upon the report of the referee, shall be served upon all persons who appeared upon the reference, and proof shall be furnished to the court of the service of such notice.

[The foregoing rules as to "unknown owners" were not made at a convocation of the judges as provided in section 470 of the Code. They are not therefore "general rules" (*In the matter of the Bowery*, 19 Barb. 591). Nor were they published as required by Laws of 1847, ch. 470. Nor were they concurred in or recognized by all the judges of the first district.]

Supreme Court, First District.

Rules as to Terms and Calendars.

Special Terms are held every Saturday for special motions. The Saturday special-motion terms will be held, when the special terms are not in session, by the judge assigned to sit in chambers during the month.

The judge sitting at chambers will, at the same time, hold special term for any *ex-parte* business, and for such litigated business as he shall expressly permit.

All issues of fact already joined, and triable in the city of New York, will be noticed to the clerk, and be put on the calendar for the ensuing January circuit.

During the first week of that circuit, motions to correct the calendar may be made.

After that week, the calendar will remain unchanged, and continue the calendar for every successive circuit, until all the causes on it shall be tried—each circuit beginning on the calendar where the immediately preceding circuit left off.

Fifteen causes a day, and no more, will be called at general and special terms, and before each judge at circuit, unless otherwise specially ordered.

No cause will be set down for a particular day at a circuit, unless sworn off when called, on account of the absence of a witness, and on payment of costs.

If the trial of a cause shall not be moved by either party when called in its order on the circuit calendar, it will go to the foot of the calendar, and not be called again until it shall be reached in that place.

All new issues will be noticed for the first day of the next circuit; after the same shall be joined, and be put in their order at the foot of the permanent calendar.

After the first week of each circuit (during which motions to correct the calendar may be made), the calendar of the causes which may have gone down at the previous circuit, and the new issues, will be entered as part and in continuation of the permanent calendar; and so on, from court to court, until the end of the year.

These regulations do not affect the question of noticing the causes for trial to the opposite party, from court to court, as the statute may require.

Position on Calendar of Causes called and Passed in Courts in New York City.

When a cause placed upon a calendar of a court of record in the City of New York shall be regularly called and passed, without a postponement by the court for good cause shown, it shall thenceforth take its place on the same or any future calendar as if the date of the issue were the time when it was thus passed (Laws of 1849, p. 708, § 16).

In the case mentioned in the last section, it shall be the duty of the party placing a cause upon the calendar for a subsequent term, to state the date of the issue, as above prescribed; and if he omit to do so, by reason whereof the issue retains its priority on the calendar, the court, on the application of the adverse party, or of its own motion, may strike the cause from the calendar. (*Id.* § 17.)

SPECIAL CIRCUIT CALENDAR. FIRST DISTRICT.

At any Circuit, until further orders, any causes belonging to either of the following classes may be placed on a special Circuit Calendar, unless the trial is likely to occupy more than one hour:

1. Where the action is on a contract, and the answer merely denies the allegations in the complaint, without setting up any new matter.

2. Where the action is on contract, and new matter is set up in the answer, and there shall be reason to believe that the defence is made only for the purpose of delay; or, where it shall appear, by affidavit, that the cause can be tried in an hour.

To entitle the cause to be placed on such calendar, the plaintiff's attorney must give a notice of four days, to be heard before a judge at chambers, that he will move to have the cause placed on such calendar; and if the motion be granted, the cause may be heard on any subsequent Friday.

If the motion be founded on the belief that the defence is for delay, or that the cause can be tried in an hour, affidavits must be served at the time of notice.

The plaintiff's attorney must deliver to the clerk of the circuit a

like notice, one day before such Friday, containing also the number of the cause on the general circuit calendar.

If the cause shall actually occupy more than one hour on the trial, the trial may be suspended, at the discretion of the court, and the cause be put down at the foot of the calendar.

Preferred Causes.

Causes which, under existing laws, are preferred, take their preference in the following order on the calendar:

1. Criminal actions.
2. Cases in probate in which the appeal prevents the issue of letters testamentary or of administration.
3. Appeals in which the sole plaintiffs or defendants are executors or administrators.
4. All other preferred causes.

Any party claiming a preference must so state in his notice of argument to the opposite party and to the clerk, and must also state the ground of such preference, so to show as to which of the above classes the case belongs.

The clerk will place the preferred causes at the head of the calendar, in the order above prescribed.

A preferred cause being once passed without reservation, will take its place on subsequent calendars, without preference.

Mortgage or Sale by Religious Corporation.

MARCH 4, 1862.—*Ordered*, That in all future applications made to this court by religious corporations for leave to mortgage or sell their real estate, it shall be necessary to submit, with the petition to the court, a statement specifying what property had been sold by the corporation under any order of the court at any time within five years next preceding such application, and also showing the object for which sales, if any were ordered, and the disposition actually made of the proceeds of any sale. Such statement shall be verified by one of the officers of the corporation.

a. An application for leave to sell the real estate of a religious corporation must be made to the supreme court (*Wyatt* v. *Benson*, 23 Barb. 337; 4 Abb. 182).

b. The vestry or trustees of a religious corporation may apply for an order to mortgage or sell the real estate of such corporation, without any express vote of the corporation, and where the good faith and propriety of the application are unquestioned (*Re St. Ann's Church*, 14 Abb. 424; 23 How. 285).

c. See 1 Kernan, 243; 20 How. 324).

Sales by Order of the Court.

MARCH 25, 1862.—*Ordered*, That all sales to be made by virtue of or under any order, judgment, or other proceedings of this court,

after the first day of May, 1862, may be noticed for and made at the Merchant's Exchange Sales-room, No. 111 Broadway, and that any order heretofore made, so far as it conflicts with this order, is vacated.

But nothing in this order shall apply to any notice of sale heretofore published; and where any notice of sale has been given for a day subsequent to the first day of May, 1862, at the Merchant's Exchange, the same may be adjourned to the room above designated.

April 21, 1863.—*Hon. G. G. Barnard, J.* It is hereby ordered that from and after this date all sales of real estate, made under the order of the Supreme Court, shall be conducted by and under the direction and control of of a Referee to be apppointed by this court.

Trial Fees.

May 5, 1862.—Trial fees for causes heard at general term will hereafter be collected on the argument, to be paid in all cases by the moving party.

Substitution of Attorney

Ordered, Whenever a consent is filed with the clerk of this court for the substitution of an attorney or the discontinuance of an action, the clerk may enter in the minutes of the court the substitution of the attorney or the discontinuance of the action, without any order of the judge therefor

Special Term and Motions.

After the October term of 1859, all motions at special term at chambers must be noticed for the first and third Mondays in each term, and for no other time. Such motions will be heard in order on those and the succeeding days, unless otherwise ordered by the judge holding the term, until disposed of. Motions must be noticed for twelve o'clock, noon. *Ex-parte* business will be attended to between ten and twelve o'clock each day.

Ordered, That the following classes of motions shall have preference at chambers, in the order herein mentioned, and that all orders heretofore made in relation thereto be and are hereby vacated.

1. Motions to place causes on special calendars
2. Motions for extra allowance.
3. Motions for judgments in foreclosure cases where no answer is put in.
4. Motions for reference and for commissions to take testimony.
5. Motions to discharge from imprisonment.*

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* *a.* A motion to vacate an order of arrest after a defendant has been bailed is not a motion to discharge from imprisonment (*Cummings* v. *Woolley*, 16 Abb. 291. *note*).

6. Motions to punish for contempt.

7. All other motions to which preference is given by the statute.

8. The general call of the calendar.

Gen'l Term, Jan'y 1860.—In all motions noticed for hearing at chambers and Special Term, the moving party may file with the clerk at chambers a note of the title of the cause and the object of the motion, which shall be entered by the clerk on a calendar to be prepared by him in the order in which the same are received. Such motions will be heard in the order in which they are placed on the calendar.

Admission of Attorneys.

MAY 12, 1862.—*Ordered*, That a committee be appointed at each of the May and November terms, to whom the matters shall be referred for such examination and inquiry. The commttee are to report on or before the third Monday of the term. Where a certificate of good character is submitted, the same should state that the party signing the same is acquainted with the character of the applicant, and knows it to be good.

Entry of Orders.

Special Term, 27 MARCH, 1857.—No order will be entered upon a litigated motion, except on consent, or at least one day's notice to the opposite party.

ADDITIONAL RULES.

1. Hereafter no causes will be reserved generally, after they are placed on the day calendar.

2. No cause on the day calendar will be passed, except where the counsel is actually engaged in the trial of a cause in another court in the city, or in the court of appeals; and then only until such an engagement is discharged, or upon proof of the absence of a witness duly subpœnaed.

3. The calendar will only be called regularly in its order.

4. Causes will only be put off for the term on applicant showing a good excuse for not proceeding to trial, when reached on the day calendar.

5. Set-down causes to be placed at foot of the day calendar.

6. Parties by consent may apply to the clerk and have any cause reserved generally before it is placed on the day calendar, and may, on filing with the clerk a like consent, have the same placed on the day calendar.

7. Hereafter no note of issue for the general term will be received

or filed by the clerk, unless it shall appear distinctly on the face thereof, whether the same belongs to the class of enumerated or non-enumerated motions.

Supreme Court, Second District

Rules adopted Jan. 13, 1852.

The following rules, to be observed in the Second Judicial District, are adopted, in regard to the order of business and allowances to be made under section 308 of the Code of Procedure:

1. Issues of law shall be first tried and decided at a special term.

2. At the general terms of the court, ten causes only will be called in each successive day during the term. They will be called and heard in the order in which they stand upon the calendar, and no cause will be reserved, or set down for hearing out of the order herein prescibed.

3. Two hours and no more is given to the counsel on each side for the argument of causes at the general and special terms, unless the court, upon special application at the commencement of the argument, shall otherwise direct.

4. In actions tried at the circuit or the special term, applications for additional allowances, under section 308 of the code, must be made to the justice who heard the the cause, unless he is out of the State, or unable to attend to business from ill health, or out of office. And in actions heard before referees, the application must be made in the judicial district where the action is pending. Such allowances will be made whenever there has been a trial, and the parties have appeared and litigated the questions in controversy.

5. No allowance shall exceed the sum of $100, unless due notice of the time and place of making application therefor be first given to the adverse party, nor unless it shall appear to the justice who shall hear such application, that the litigation in respect to which the allowance is claimed, has been unreasonably or unfairly conducted by the party to to be charged with such allowance.

6. In actions for the foreclosure of mortgages, where the defendants do not exceed five in number, the allowance shall not, when added to the costs given to the plaintiff under section 307 of the code, exceed the sum of $40. And in cases where there are more than five defendants, such allowance shall not, when added to the costs given to the plaintiff under section 307 of the code, exceed in amount the costs heretofore given to the solicitor for the complainant under the first section of the act of the 25th of May, 1841, to amend the act to reduce the expenses of foreclosing mortgages in the court of chancery.

7. A printed copy of these rules shall be annexed to every calendar of causes hereafter made up for trial at the circuit, and for hearing and argument at the general and special terms of the court, by the clerks who furnish such calendars.

These rules are modified by the amendment to the code in 1857; and see note to rule 9, *ante*.

RULE.—ADOPTED 20TH FEB'Y, 1857.

ORDERED. That orders to show cause on non-enumerated motions will not hereafter be granted, except upon affidavit, showing the necessity of making the time of notice shorter than is required by the code.

The attention of the profession is particularly directed to this rule. It will be strictly enforced throughout the district.

ORDER OF BUSINESS FOR HEARING NON-ENUMERATED MOTIONS AT SPECIAL TERM, KINGS COUNTY.

1. Ex-parte motions.
2. Motions to modify, and discharge provisional remedies.
3. Applications for judgment, and other motions on notice in foreclosure and partition cases.
4. Applications for judgment, on notice in other cases for want of an answer, or on account of frivolousness of demurrer, answer, or reply.
5. Motions in proceedings against persons brought up by attachment.
6. Motions for commissions and discovery of books and papers, and for the examination of parties.
7. Motions to change the place of trials.
8. Motions to open defaults.
9. Motions to strike out sham and irrelevant pleadings, to strike out irrelevant or redundant matters, and to make a pleading definite and certain by amendment.
10. Motions for allowance of injunction.
11. Other motions.

NEW YORK SUPERIOR COURT RULES.

ADOPTED JANUARY 18, 1851.

RULE 1. (*See Rule* 1 *of Rules of Dec.* 1863, *post.*)

RULE 2. *Business at general term; time of opening.*
At the general terms, the court will hear appeals and enumerated motions. The general term will open at eleven o'clock, A. M.

RULE 3. *Trial term.*
The special term will consist of two or more trial terms, held by two or more justices, severally, and a term held by one justice, which will be designated the special (or equity) term. For the trial terms the clerk will prepare a calendar for each branch of the court, containing the issues of fact to be tried by a jury. Such calendars will be called and regulated by the justice presiding in each court. The trial terms will open at eleven o'clock, A. M.

RULE 4. *Special term.*
For the special term the clerk will prepare a calendar, containing, first, the issues of law noticed for argument at such term, and, second, all issues of fact noticed for trial, which are designated on the notes of issues as causes not requiring to be tried by a jury by § 253 of the Code of Procedure, or in which a jury trial is waived. The special term will open at ten o'clock, A.M., and the first hour will be devoted to the giving of judgment in undefended causes, and the hearing of litigated non-enumerated motions. The calendar will be taken up each day at eleven o'clock A. M.

RULE 5. (*As amended January*, 1862.) *Non-enumerated motions.*
At ten o'clock in the morning, daily, except Sundays, New-Year's day, Good Friday, Thanksgiving and Christmas days, the Fourth of July, and the days of annual election, special terms shall be held at chambers to hear non-enumerated motions and applications required to be made in open court; also for the trial of causes which the par-

ties and the justice sitting in such term may consent to have tried before him without a jury, and giving judgment therein; and also for giving judgment in actions under chapter one, title eight, second part of the Code. And as many special terms for such purposes may be held simultaneously as there may be justices attending to hold the same.

Where the notice of a motion or application states that it will be made at chambers, or at a special term at chambers, it shall be heard there only, unless the parties otherwise agree; and either party may there take the other's default therein.

RULE 6. *Attendance of justices at chambers.*

The justices designated to hold the general terms will attend at chambers daily, during their respective terms, from ten to eleven A. M., to dispose of *ex-parte* applications and of non-enumerated motions. All applications for *ex-parte* orders, and for judgments upon failure to answer, during the general terms, must be made before eleven o'clock, A. M.

RULE 7. (*As amended October*, 1858.) *Appeals from orders on non-enumerated motions.*

Appeals from all orders made on non-enumerated motions will be heard on each Monday during the general terms, at eleven o'clock, A. M. Such appeals may be noticed for that time. Appeals from orders sustaining or overruling demurrers will also be then heard, and will be heard in their order on the general term calendar. Six copies of the appeal papers must be furnished to the court.

RULE 8. *Motion to set aside verdict as against evidence.*

A party intending to move to set aside a verdict as against the evidence, must obtain from the justice who tried the cause an order staying the proceedings for that purpose. Such a motion will not be entertained unless the stay of proceedings be obtained and served within four days after the entry of the judgment by the clerk, or before the insertion of the costs by the clerk in the entry of the judgment. The court, by order, may permit the judgment to be entered and collected, without prejudice to a motion to set aside the verdict; and may impose such terms on each party in respect thereof as to the court may seem meet.

RULE 9. *Case and exceptions on motion to set aside verdict as against evidence.*

The party moving to set aside a verdict as against evidence, must prepare a case, and procure the same to be settled in the usual manner. If the party making the case intends to appeal from the judgment, when entered on the verdict, because of errors of law alleged to have occurred at the trial, or in the direction for judgment, he must present such alleged errors in the case made for setting aside the verdict. If the errors complained of were excepted to in due sea-

son, when they occurred, the case may be turned into exceptions, as of course, in the event of the application to set aside the verdict being denied.

RULE 10. *Hearing on motion to set aside verdict.*

The motion to set aside the verdict on the case when settled, must be brought on, on the usual notice, at the special term. No alleged errors of law presented by such case will be considered at the special term, unless by the express directions of the justice before whom the cause was tried.

RULE 11. *Appeal from order granting or refusing a new trial.*

If either party appeal from an order of a justice granting or refusing a new trial on such case, the appeal may be brought on before the general term, on the usual notice. If the order refuse a new trial, and there be alleged errors of law contained in the case on which the motion was made, the appeal from the judgment in respect to such errors of law must be brought on and argued at the same time with the appeal from the order refusing a new trial, at the special term.

RULE 12. *Costs on appeal.*

The costs, on an appeal to the general term from a judgment, as well as from an order granting or refusing a motion to set aside a verdict as against evidence, when allowed by the court, shall be the costs prescribed in subdivision six of section three hundred and seven of the amended code, together with the expenses specified in section three hundred and eleven. But where an appeal from such order is heard at the same time with an appeal from the judgment in the cause, the court may, in its discretion, give costs on the former appeal, as if it were a motion at special term.

RULE 13. *Motion for re-hearing, before referees.*

The party who moves for a re-hearing or review of a cause or matter decided by a referee or referees, shall procure and furnish to the court a special report of the referee or referees, setting forth distinctly the facts found on the reference, and his or their decision upon the points of law arising in the cause.

RULE 14. (*Adopted December*, 1851.) *Notes of issue.*

That all notes of issue hereinafter filed with the clerk, in causes which have once been on the calendar for trial or argument, shall specify the number of the cause on the last preceding calendar on which it was entered, and the date of such calendar. And every note of issue shall state whether the cause is to be placed on the calendar of the general term, the special term, or the trial term. No cause shall be entered by the clerk on either calendar, unless the note of issue conforms to this rule

RULE 15. (*Adopted March* 6, 1852.) *Notes of issue.*

That all notes of issue hereinafter filed with the clerk, in causes which have once been on the calendar for trial or argument, shall specify the number of the cause on the last preceding calendar on which it was entered, and the date on such calendar. And every note of issue shall state whether the cause is to be placed on the calendar of the general term, the special term, or the trial term. No cause shall be entered by the clerk on either calendar, unless the note of issue conforms to this rule.

RULE 16. (*Adopted March* 19, 1853.) *Note of issue.*

That all notes of issue hereafter, for the general, special, and trial terms of this court, must be filed with the clerk eight days before the commencement of the first day of the succeeding term.

RULE 17. (*Adopted March* 10, 1855.) *Inquests.*

That when a cause is placed on the day calendar for trial, the plaintiff may, at the opening of the court each day, take an inquest therein, in any case the court will consent to try without the intervention of a jury, though an affidavit of merits may have been filed, unless the defendant shall appear and state that a defence is intended to be made.

RULE 18. (*Adopted April* 11, 1857.) *Filing papers. Entering orders. Motions for judgment.*

The attorneys of the parties must file immediately every paper read by them on a motion.

Every order hereafter entered must specify the papers on which it was granted or opposed; and the clerk is directed not to enter any order unless such papers are exhibited to him and filed, or unless they have been previously filed.

Either party, at the time of giving notice of trial for the special or trial term, may also give notice that he will move, on the first day of term, for judgment upon the pleadings, or upon the pleadings with such admission on his part as he may specify; and may thereupon bring on the action to be tried, and move for such judgment as he may be entitled to upon the pleadings, with or without such admission.

RULE 19. (*See Rule* 10 *of Rules of December*, 1863, *post.*)

RULE 20. *Regulations as to the calendars.*

Causes may be *generally reserved* by a written consent of the attorneys, filed at any time before the case is on the day calendar. Cases so reserved may afterwards be placed upon the day calendar, on the application of either party to the judge at chambers, provided two days' previous notice of such application be given to the adverse party.

All causes marked "Off for the Term," shall have priority at the

succeeding term, and will be placed in their order at the head of the calendar therefor.

Causes passed, or run down, will be placed upon the calendar for the succeeding term, as of the date of issue when thus passed or run down.

RULES ADOPTED DECEMBER 16, 1863.

RULE 1.—The general, special and trial terms of the court will be held on the first Monday in January, February, March, April, May, June, October, November and December, in each year, and will continue until the last Saturday of such months respectively.

RULE 2.—There will be two trial terms for the trial of causes by a jury, which will be denominated Parts I. and II.

RULE 3.—There will be a special term, for the trial of issues of law and of issues of fact, without a jury. The calendar will be called through at 11 o'clock on the first day of the term, for the purpose of setting down causes for trial.

RULE 4.—*Ex parte* orders must be applied for and non-enumerated motions heard at special term only. For such purpose the special term will be opened at 10 o'clock, A. M., and continue in session until 3 o'clock, P. M., of each day, except New Year's day, Good Friday, the Fourth of July, the days of the annual and charter elections, Thanksgiving day and Christmas.

Ex parte orders must be applied for between the hours of 10 and 11 o'clock, A. M. of each day, or at any other times when the justices, while holding the special term, may be disengaged.

The first Monday and each of the Saturdays in the special term, shall be set apart for the hearing of non-enumerated motions. All motions must be noticed for, and orders to show cause returnable on, one of those days, unless otherwise directed by the justice holding the special term.

RULE 5.—The general, trial and special terms, for the trial of causes, will open at 11 o'clock, A. M., respectively.

RULE 6.—Appeals from orders shall be heard in the general term, on each Saturday in term, and on the days appointed in vacation, at 11 o'clock, A. M. The appeal papers must be printed in like manner as upon appeals from judgments.

In appeals from orders, and in calendar causes, the parties shall deliver eight copies of the printed papers and points to the clerk at the commencement of the argument.

RULE 7.—The day calendar in the trial terms will be called through each morning, at the opening of the court. The plaintiff, on failure of the defendant to appear, may take an inquest; and the defendant, on failure of the plaintiff to appear, may have a dismissal of the complaint.

RULE 8.—Causes on the trial calendar may be *reserved generally* at any time before the cause is on the day calendar, be filing with the clerk the written consent of the attorneys.

Motions to put such causes on the day calendar may be made to the justice holding the special term on two days' notice.

RULE 9.—It is ordered that from, and after the first day of July, 1864, no *ex-parte* order for the substitution of attorney for either party to any action pending in this court, will be granted unless upon the consent in writing signed by the party and his attorney duly acknowledged or proven by affidavit.

RULE 10.—In actions on contract where there is reason to believe that the defense is interposed for the purpose of delay, and that the trial will not occupy more than one hour, the plaintiff may apply by motion at special term, on a notice of four days, to have the issue placed upon a special calendar for trial, (serving with such notice any affidavits or papers he may wish to use on the motion, which have not already been served;) and the same be so ordered in the discretion of the justice before whom the motion shall be made.

If such motion be granted, the cause will be entered on a special calendar to be made by the clerk, on receiving a note of the issue specifying the number of the cause on the general trial calendar, and the date of the order directing it to be placed on such special calendar. Such note of issue to be filed with the clerk four days before the day on which the cause shall be so entered.

The special calendar will be called on the second and last Friday of each trial term in part No. 1. for trials, by the justice there presiding, and the causes may be tried in either part, as may be directed by such justice.

If the trial of the cause shall occupy more than one hour, the trial may be suspended at the discretion of the court, and the cause be placed at the foot of the general trial calendar.

COURT OF COMMON PLEAS

FOR THE CITY AND COUNTY OF NEW YORK.

RULES ADOPTED DECEMBER 2, 1863.

Regulation of calendar—Short causes.

1. The general calendars for the trial of jury cases, and cases to be tried by *the court without a jury*, for the year 1863, having been called through, will be re-numbered for 1864, and those cases only in which the law relative to stenographers shall have been complied with, on or before the 24th instant, will be continued on the calendars. Notes of issue in new cases not on the present general calendar, must be filed on or before the 24th inst.

2. Causes may be *generally reserved* by a written consent of the attorneys, filed at any time before the case is on the day calendar. Cases so reserved may afterwards be placed upon the day calendar, on the application of either party to the judge *at chambers*, provided two days' previous notice of such application be given to the adverse party.

3. All causes marked "*Off for the Term*," shall have priority at the succeeding term, and will be placed at the head of the calendar therefor.

4. The calendar of causes to be tried *by the court, without a jury*, will be called at the trial terms on the fourth Mondays of January, March, May, and November.

5. Fifteen causes will be placed on each day calendar, and no calendar will be made for Saturdays.

6. At the general terms, in appeal cases arising in *this court*, the parties may, by consent, reserve the argument until the second week in term, when all so reserved will be called in their order on the calendar. But in appeals from the marine and justices' courts no such

reservation will be allowed, and counsel therein must be prepared for the argument when the case is reached in its order.

7. In any action on contract, where there is reason to believe that the defence is interposed for delay, and that the trial will not occupy more than one hour, the plaintiff may, upon a notice of four days, apply *at chambers* to have the cause placed upon the special calendar for short cases, and which will be made up for the last Friday in each trial term.

The notice must be accompanied by the affidavits (if any) upon which the motion will be founded.

If the motion be granted, the order to that effect shall forthwith be delivered to the clerk, with a written notice specifying the number of the cause on the general calendar.

Should the trial occupy more than one hour, it may be suspended, in the discretion of the judge holding the court, and the cause will thereupon be placed at the foot of the general calendar, unless otherwise specially ordered.

RULE ADOPTED MARCH 22, 1851.

Review of questions of practice, &c.

For the purpose of regulating the review of questions of practice decided by a single judge, the court adopt the following rule:

Upon the decision of motions made before a single judge at chambers or at special term, in cases in which no appeal is allowed by section 349 of the code, the judge may, if he deem the question of such importance and doubt as to render a review by the general term proper, give a certificate thereof; and the party desiring such review shall within six days after the decision of such motion, procure such certificate, and serve a copy thereof, with a notice of hearing for the next general term for which the same can be noticed; and thereupon such motion shall be brought on and submitted for review, on written points, to be shown to the opposite counsel and then handed to the court.

Such certificate shall not operate a as stay of proceedings, unless such stay of proceedings be expressly ordered.

a. An order made at special term on the application of the comptroller of the city of New York to open a judgment pursuant to law of 1859 may be appealed to the general term without a certificate under this rule (*Joyce* v. *Mayor of N. Y.* 20 How. 439).

b. An order denying a motion to set aside a report of referees, is not within this rule (*Matthews* v. *Jones*, 1 E. D. Smith, 429).

c. An order giving ten days' time to a party to make a motion, and staying proceedings in the meantime, is within the above rule (*Hunt* v. *Bennett*, 2

E. D. Smith, 53). So is an order opening a default and permitting the defendant to answer the complaint (*Mead* v. *Mead*, id. 223).

a. The decision of a judge at special term, granting costs to the defendant from the time of answer, as a condition of permission to the plaintiff to amend the complaint, is not appealable. In order to review, at a a general term, the propriety of imposing such costs as a condition, the appellant must obtain a certificate of the judge, in pursuance of the Rule of March 22, 1851 (*Smith* v. *Dodd*, 4 E. D. Smith, 643).

RULE ADOPTED MAY 2, 1857.

Appeals from orders to be submitted on certified copies of the papers.

Ordered, That apppeals to the general term from orders made in motions at special terms and chambers be submitted upon certified copies of the papers used on the motion, instead of the original papers

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RULE ADOPTED SEPTEMBER 28, 1857

Argument of appeals from Marine and District Courts.

Appeals from the marine and district courts shall hereafter, and until further order of this court, be heard orally at the general term appointed for the submission thereof.

The parties will be confined on the argument to a brief statement of the facts and points involved, and the authorities relied on, unless the court shall otherwise direct.

1. If the appellant does not procure the return to be made to this court, within the time prescribed in section 360 of the Code of Procedure, the respondent may serve a notice in writing, requiring the same to be done within ten days thereafter, and that, in default thereof, he will apply to the general term, on the first day thereof, for an order dismissing the appeal; and upon proof of the service of such notice, and of a non-compliance therewith, such order will be granted, unless the court grant further time therefor.

2. If the court below shall not make the return to this court as prescribed by the code, the appellant may apply by motion to a judge at chambers, to compel such return by attachment.

b. On moving to dismiss an appeal because the return has not been filed, the moving party has only to show the proper service on the opposite party of the notice of ten days required by this rule. That is, he need not show *affirmatively* that the return has not been filed within thirty days as required by section 360 of the code (*Coudert* v. *Lias*, 11 How. 264)

Assignee's bond for benefit of creditors

Ordered, That the bond required to be given by an assignee, under the act of April 13th, 1860, respecting voluntary assignments for the benefit of creditors, must specify the place of residence of each surety named therein.

At the time of presenting it for approval, it must be accompanied by an affidavit showing the nominal value, and also the actual value, of the property assigned; and no bond will be hereafter approved until these requirements are complied with.

RULE ADOPTED JUNE, 1868.

Bonds to be legibly written.

Ordered, That the clerk of this court be directed to place no bond or undertaking on file in his office unless the same is legibly written, and all interlineations, alterations or erasures therein are duly noted as having been made before execution thereof.

Removal of Actions from District Courts into New York Common Pleas.

In any action commenced in a district court of the city of New York, where the claim or demand exceeds $100, upon the application of the defendant, the justice may make an order removing the same, at any time after issue joined and before the trial, into the New York common pleas, upon the defendant executing to the plaintiff an undertaking with one or more sufficient sureties, to be approved by the justice in whose court the action is commenced, to pay to the plaintiff the amount of any judgment that may be awarded against the defendant by the said court of common pleas (Laws 1857, ch. 344, § 3). Query, subsequent proceeding? See id. § 48.

INDEX.

[The reference is to the page. The letters following the figures refer to corresponding letters on the pages indicated by the figures.]

Abate, when action not to, 133.
Abatement, answer of matter in, 297.
Absconding debtors, attachment against property of, 46 *b*.
provisions of Revised Statutes as to, not repealed, 835.
Absence from State, effect of, on time of limitation, 90 *b*, 101.
Absence *of Judge*, 782.
Absent debtors, see *Non-resident*.
Abuse of process, action for, 111 *l*, *m*.
Account, defendants in action for, 127 *h*, 128 *a*.
how stated in pleadings, 315.
verified copy of to be delivered, 315.
further, may be ordered, 315.
stated, complaint on, 205 *e*.
in justices' courts, either party may be required to exhibit, 72.
pleading founded on, 72.
action on, in justices' courts, 54, 56.
reference to take, after judgment on issue of law, 489.
for information of court, or to carry a judgment into effect, 489, 493 *a*, 495 *e*.
by county treasurer, 894.
by guardians, 793.
by agent, 745 *a*.
books, as evidence, 750 *a*.
See *Bill of particulars*, *Current account*, *Long account*.
Accountability of guardian, 793.
Acknowledgment of debt, when it must be in writing, 104.
effect of, 75, 76.
Act (*Code*), division of, 19.
when to take effect, 837.
to what to relate, 19.
construction of, 832.
extended to suits on forfeited recognizances, 20 *a*.
rules and practice consistent with, retained, 833.
all statutes inconsistent with, repealed, 832.
cases not provided for in, 832.
not to apply to certain statutory proceedings, nor to mandamus, 834.
Action, defined, 18.
what is, and what is not, 18 *a*, *b*.
jurisdiction of courts, 22 *n*.
against Mayor, &c. of N. Y. 23 *b*.
by grantee of land in name of his grantor, when allowed, 106.
authority to commence, when to be produced, 106 *c*.
provisions of Revised Statutes applicable to proceedings in, not repealed, 836.
abatement of, 133.
consolidating, 835 *c*.
discontinuing in justice's court, on answer of title, 67.
after discontinuance, on answer of title, 68.

Action—*continued.*
on judgment, 85, 86, 80 *b*, *c*, 96.
on judgment against joint-stock companies, 86 *f*.
on undertaking, 242 *k*, 409 *f*, 419 *i*, 660 *j*, 673.
when deemed commenced, 100, 161, 153 *c*, 177 *a*, *b*.
how commenced, 153.
proof of commencement of, 100 *a*.
should not be commenced until cause of action has accrued, 153, *a*.
title of, not changed on appeal, 639.
for discovery abolished, 744.
form of, 85.
kinds of, 19.
criminal action defined, 19.
and suit, distinction between, abolished, 85.
limitation of, time for commencing, 88.
cause of, when it accrues, 88, *note*, 89, *note*.
continuance of, 138 *d*.
dismissal of, 138 *h*.
parties to, 85, 105, 746 *a*.
place of trial of, 143.
severance of, 345, 462 *b*, 506, 509.
transfer of. See, *Transfer*.
permission to bring, 191 *b*.
pending defence of, 279 *b*, 818, *f*.
submitting controversy without, 717.
by attorney-general, 460 *a*.
confession of judgment without, 722.
See, *Cause of action*, *Civil action*, *Existing suits*, *Thing in action*.
Actual determination, judgment by consent is not, 649, *c*, *d*.
Additional allowance. See *Allowance*.
Additional time, how computed, 787. See, *Enlarging time*.
Address of plaintiff, when it may be required, 106, *d*
Adjoining towns, what are, 55.
Adjournment of court of appeals, 28.
general and special terms of supreme court, circuits, and oyer and terminer, 35.
of hearing before referees, 497 *d*.
of examination in supplementary proceedings, 562 *a*.
in justices' courts, 62.
of mortgage sale, 891
costs on, 619.
Adjustment of costs, by the clerk, 613.
notice of, 613, 614 *a*.
what a sufficient notice, 614 *d*.

Adjustment of costs—*continued.*
effect of omitting notice, 614 *f*.
power of clerk as to, 614 *i*.
disbursements, how stated and verified, 615 *d*.
what are allowed as disbursements, 615 *f*.
review of, 617 *h*.
in court of appeals, 660 *a*.
by judge at chambers, 618 *e*.
See, *Interlocutory costs*.
Admeasurement of dower, in county court, 39.
complaint for, 827 *g*.
Revised Statutes as to, not repealed, 835, 836, *a*.
See, *Ejectment for dower*.
Administrator, action on bond of, 55. See *Executor*.
Admiralty *causes*, superior court claims jurisdiction of, 45 *a*.
Admission of counsel and attorneys regulated, 849, 911.
of service of summons, 175, 176 *a*.
of genuineness of paper, when may be required, &c., 735.
by assignor of thing in action, 116 *d*.
by wife, 745 *e*, *f*, *g*.
in answer of *part* of plaintiff's claim, 432, 439 *k*.
in pleading, 304 *f*, 336 *b*.
by demurring, 257 *d*.
by not answering or replying, 338 *a*, 339 *b*.
Adultery, issues on question of, how settled, 862.
Adverse claims to real estate, costs in proceedings on, 608, 609 *a*.
actions to determine, 205 *g*, 817.
party, examination of, as a witness, 688 *e*, 746, 747.
examination of, to same matter, when assignor of thing in action is examined, 959.
possession, what is, 93, 94.
Advertisement, publication of, how proved, 795 *a*, 175, 176 *b*.
of sale of real estate on execution, 540 *m*.
execution creditor not liable for cost of, 540 *n*.
foreclosure by, not affected by the Code, 836.
See, *Publication*.
Advice *of counsel*, how sworn to, 857, 461 *e*.
Affidavit, title of, 785.
to be filed, 783, 774 *a*, *c*, 851.
to be used on a motion, 774 *a*.
used on a motion to be filed, 687 *a*, 774 *a*.

Affidavit—*continued.*
copy to be served with orders enlarging time, 783, 783 *l.*
of advice of counsel, 461 *e*, 857.
of merits, 461. See *Merits.*
of service of summons, 175, 176 *b*, 856.
concerning venue, 879, 149 *b.*
of disbursements, 618.
on motion to vacate order of arrest, 886.
for order for publication, 171.
for order of arrest, 874.
amendment of, 339 *d*, 350 *d.*
using pleadings as, 409 *i.*
folios of, to be numbered and marked, 857.
copy of, to include jurat and signature, 784 *a.*
proof of service, where party serving is dead or insane, 787 *f.*
made out of the State, 310 *h.*
Affirmance, *judgment of*, 644 *g*, 708.
what is not, 661 *h.*
in part, 644.
in court of appeals, 27.
on equal division of court, effect of, 28 *b.*
by default in court of appeals, 844.
notice of, when to be given, 844.
meaning of, 660 *j.*
on appeal from justice's court, 700 *d*, 711, 708.
Affirmative relief, to defendant, 476, 506, 509 *d.*
on motion, 774 *d.*
answer need not contain a prayer for, 278 *c.*
Agent, acts of, how alleged, 201 *d.*
when he may sue in his own name, 107 *i*, 108, 119 *b.*
complaint by, 190 *d.*
when liable to arrest, 363, 368 *c.*
when he may verify a pleading, 309 *a.*
form of verification by, 311 *a.*
accounting as, 745 *a.*
See *Managing agent.*
Aggravation, matter in, how pleaded, 204 *e.*
Agreements, as to proceedings in a cause, to be in writing or entered on minutes, 854.
Albany, general terms at, 33 *a.*
penitentiary, action against superintendent of, 144 *b.*
Alien, naturalization of in county court, 40 *b.*
may claim by adverse possession, 94 *b.*
Alien enemy, time of limitation does not run against, 102.
Alien enemy—*continued.*
answer of, 286 *f.*
Alimony, appeal from order granting, 680 *k*, *l*, 681 *n*, 864
amount of, 864 *c*, *f.*
Allegations *in pleading*, when deemed true, 337.
material, what are, 337 *c.*
how to be made, 201.
when deemed to be controverted, 337.
Allowance, *under 308th section*, 607.
no motion necessary, 608 *a.*
in what cases granted, 608 *b.*
in what cases refused, 608 *c.*
under 309th section, 609.
when has "a trial been had," 610 *a.*
what are difficult and extraordinary cases, 610 *d.*
when, where, and to whom the application for, should be made, 611 *a*, 877.
costs on motion for, 612 *d.*
after trial before a referee, 612 *a.*
review of order for, 612 *g*, 680 *o*, 681 *i*, 683 *l.*
of bail, 383.
Alternative, *judgment in the*, when allowable, 514.
relief, cannot be demanded, 258.
Amended pleading, what is, 345 *h.*
takes the place of the pleading amended, 340 *d.*
Amendment of complaint, time to answer after, 263.
Amendments, the provisions of the revised statutes as to, are not repealed, 339 *e.*
the whole matter of, is in the discretion of the court, 355 *f.*
of summons, 155 *a*, 350 *c.*
of affidavits, 350 *d.*
of attachments, 350 *e.*
of undertaking, 351 *a.*
of referee's report, 500 *f.*
of variances, 340. See *Variance.*
of complaint, 263.
of course, 344.
in what cases, 344, 346 *a.*
within what time, 347 *b.*
extent of, 348 *g.*
after decision on demurrer, 348 *b.*
right to amend of course is not a stay of proceedings, 345 *b.*
by order, 349.
what court may order, 349 *b.*
generally before trial, 349 *c.*
on motion, 351 *c*, 392 *b.*
at the trial, 351 *e.*
after the trial, 352 *d.*

Amendments—*by order—continued.*
from tort to contract or the reverse, 349 *c*, 352 *h*.
of the demand of relief in the complaint, 349 *c*.
of verdict, 352 *e*, *f*.
of judgment, 353 *a*.
judgment roll, 353 *g*. *h*.
after judgment, 353 *i*.
on appeal, 354 *b*, 640, 641 *a*.
to admit defence of usury, 350 *b*.
terms on which amendments are ordered, 354 *f*.
by dividing one action into several, 345.
by adding counter-claim, 293 *a*.
unauthorized, 351 *d*.
of attachment, 420 *b*.
effect of, on order of reference, 355 *a*, *b*, *c*, *d*, *e*.
of judgment of affirmance, 712 *a*.
motion for, when to be on notice, 772 *b*, 791 *a*.
is a waiver of a default previously taken, 340 *c*.
of affidavits, 339 *d*.
on application for judgment on the ground of the frivolousness of the answer, 452 *c*.
on payment of costs, 606 *d*.
of motion papers, 774 *g*.
on a motion, of a proceeding objected to, 351 *c*.
after notice of appeal of any omission in perfecting appeal or staying proceedings, 640, 641 *a*.
in justice's court, 74 *l*.
appeal from order granting or denying, 355 *f*, 681 *j*, *k*, 682 *g*, *o*, *w*.
in action for partition, 816 *c*.
in cases of mandamus, 834.
referee may allow, 498 *i*.
Amount admitted to be due by answer, when order for payment of, will be made, 432, 439 *k*.
order for payment of, how enforced, 440 *f*.
order for payment of, is appealable to the general term, 440 *h*.
Amount claimed, may be increased by amendment, 352 *j*.
judgment by default not to exceed, 512.
relief not to exceed, 512.
complaint to agree with summons as to, 193 *c*.
Animals, injury by, 224 *h*.
Answer, the only pleading by defendant is a demurrer or answer, 255.

Answer—*continued.*
statute of limitation must be set up by, 90.
time to answer, 255.
cannot be treated as a nullity, 256 *f*.
by married women, 257 *a*, 123 *a*, 281 *h*.
extending time to answer, 255.
defects in complaint, when waived by obtaining extension of time to answer, 255 *b*.
service of, after time to answer has expired, 256 *a*.
and demurrer, 256 *e*, 298.
separate answers, 256 *d*.
where to be served, 256 *b*.
what to contain, 266, 267.
need not be entitled, 267 *a*.
requirement of, 266.
need not be a defence to all complaint, 267 *b*.
general denial, 268 *a*.
denial of any knowledge or information, &c., when allowed, 268 *d*.
form of, 269 *c*.
denial on information and belief, 270 *a*.
should be in the disjunctive, 270 *c*.
should not be in the alternative, 270 *e*.
of part of a cause of action 271 *a*.
of one of several causes of action, 271 *a*.
what may be denied, 271 *b*.
what may be given in evidence under a general denial, 273 *b*.
what may *not* be given in evidence under a general denial, 274 *d*.
new matter, definition of, 275 *d*.
must be pleaded, 276 *b*.
in confession and avoidance, 276 *c*.
partial defence, 277 *e*.
mitigating circumstances, 278 *b*.
prayer for relief in, 278 *c*.
denying notice of non-acceptance or non-payment of bill or note, 278 *e*.
of action pending, 279 *a*.
of discharge under insolvent or bankrupt act, 280 *h*.
of leave and license, 281 *f*.
of justification under justice's warrant, 281, *e*.
of matter occurring pending the action, 281 *g*.
of non-joinder of party defendant, 282 *a*.

Answer—*continued.*
of judgment recovered, 281 *b*.
that plaintiff not the real party in interest, 109 *e*, 282 *b*.
in action for a divorce, 282 *c*.
foreclosure, 283 *a*.
an escape, 282 *g*.
an assault, 280 *e*.
on a judgment, 283 *j*.
goods sold, 280 *i*.
for libel or slander, 329.
to recover property distrained, doing damage, 331.
eviction, 283 *g*.
equitable defence, 283 *h*, 323 *h*.
of fraud, 284 *a*.
of payment, 284 *b*.
of performance, 284 *g*.
of a statutable defence, 285 *a*.
of statute of limitations, 285 *b*, 90.
of tender, 285 *b*.
of usury, 285 *h*.
in action on undertaking, 286, *e*.
of alien enemy, 286 *f*.
by carrier, 287 *a*.
in covenant, 287 *b*.
in action for rent, 287 *c*.
in action for specific performance, 287 *e*.
that instrument unstamped, 287 *f*.
demand of subrogation, 287 *g*.
and demurrer, 298, 256 *e*.
constituting a counter-claim, 287.
of several defences, 287, 296.
in abatement and in bar, 297.
sham and irrelevant may be stricken out, 298.
defined, 298 *c*.
demurrer to, 302, 303 *c*.
frivolous, 450. See, *Frivolous demurrer, answer, &c.*
new matter in, when deemed controverted, 337.
judgment on failure of, 441, 675 *h*.
is different from a demurrer, 256 *e*.
defendant may be let in to answer after time to answer has expired, 256 *c*, 448 *e*.
served after time to answer has expired, and without leave of the court, is irregular, 256 *c*.
of statute of limitations, when defendant restrained from interposing, 448 *e*.
of usury, when the defendant will not be restrained from interposing, 448 *e*.
objections to complaint not appearing on the face thereof, are to be taken by answer, 264.

Answer—*continued.*
objection not taken by answer or demurrer, when waived, 265.
time to answer if complaint be amended, 268.
time to answer may be extended, 255.
order for extending time to answer, how obtained, 858.
time to answer where summons served without any copy of the complaint, 159, 159 *f*.
time to answer after order of arrest, 376.
cannot be put in before service of complaint, 255 *a*.
time to answer after service by publication, 175 *a*.
after order for discovery of books, &c., 856.
not extended by order for bill of particulars, 316 *d*.
copy of, need not be served on a co-defendant, 256 *d*.
of one defendant not evidence against his co-defendant, 338 *a*.
admitting part of claim, 432, 439 *k*.
on demurrer to, sufficiency of complaint may be considered, 303 *h*.
amended, what is not, 345 *h*.
once, of course, 344.
of course, in what cases, 345 *g*.
of several defences, to be separately stated, 287, 296 *e*.
to be numbered, 856.
of counter-claim, 287, 267.
to part, and demurrer to residue of complaint, 256 *e*, 298, 298 *a*.
sham and irrelevant, may be stricken out, 298.
when it may be replied or demurred to, 302.
motion for judgment on, 304.
to supplemental complaint, 358 *e*.
supplemental, when proper, 358 *h*, 683 *g*.
of infant, 123 *c*, 338 *d*.
frivolous, motion for judgment on, 450.
discovery of documents to enable defendant to prepare, 855.
after discontinuance of action in justice's court by reason of title coming in question, 68 *a*.
in justices' courts, 74.
of title in justice's court, 64.
to be accompanied with undertaking, 66.
proceedings after, 66
as to one of several causes of action, 69.

Appeal *in general*, substitute for writ of error, 636.
is a new action, 637 *g*.
waiver of right to, 637 *f*.
motion in lieu of, 637 *h*, 651 *f*.
effect of, 638 *d*.
in existing suits, 636 *a*.
in *forma pauperis* not allowed, 637 *b*.
by the people, 637 *c*.
by State officers and board of State officers, 637 *d*.
from decision on demurrer, 777 *c*, 778 *a*.
by municipal corporations, 637 *e*.
second, in same action, when permitted, 638 *g*.
second, place of, on calendar, 27.
may be after payment of judgment, 656 *f*.
who may appeal, 639.
parties to, how designated, 639.
title of action not changed by, 639.
death of party to, 639 *f*.
how made, 639.
entry on docket that judgment secured on, 518.
mistake in proceedings *after* notice of, may be rectified, 640.
amendment on, 354 *b*, 641 *a*, 642 *a*.
not made until notice of, is served on clerk, 640 *c*.
service of notice of, 640 *c*.
clerk to transmit papers to appellate court, 641.
papers transmitted by clerk may be amended, 642 *a*.
intermediate orders reviewed on, 642.
judgment on, 642.
restitution on reversal of judgment, 642, 443, 447 *g*, 643 *e*, 713.
new trial may be ordered on, 642, 644 *b*.
discontinuance of, 634 *l*, 638 *h*.
appellant parting with his interest in subject of, 638 *c*.
stipulating not to, 659 *c*.
payment pending, 713 *a*.
time for, 645.
cannot be enlarged, 645 *i*.
when it commences to run, 645, 646 *e*.
cannot be until after entry of the judgment appealed from, 645 *a*.
entry of judgment may be compelled to enable appeal to be brought, 645 *b*.
when order is *entered* so as to permit an appeal, 646 *c*.
amendment after, 354 *b*, 640, 642 *a*, *b*, 641 *a*.

Appeal *in general—continued.*
costs on, 598, 600.
double costs on, 585.
guardian for infant on, 123 *g*.
death of party pending, 137 *c*, 644 *h*, *i*.
in proceedings to determine conflicting claims to real property, 817 *d*.
from orders allowing provisional remedies to have a preference, 778.
in special proceedings, 582 *d*, 628.
to superior court, New York, no longer exists, 20 *b*.
to court of appeals, in what cases, 25, 648.
what decision the court of appeals may review, 649 *c*.
cases in which it does not lie, 651 *g*.
cases in which it does lie, 656 *d*.
papers on, 657 *d*, 648.
power of court on, 27, 658 *a*.
remittitur after, 27.
when to be reheard, 27.
proceedings after decision of, 659 *d*.
costs on, 660 *a*, 658 *j*.
judgment on, 27, 642, 659 *d*.
security or deposit on, 660.
security or deposit may be waived, 660.
stay of execution on, from judgment directing the payment of money, 662.
sureties becoming insolvent, 662.
deposit in lieu of undertaking, 662.
from judgment directing the assignment or delivery of documents or personal property, 664.
from judgment to execute conveyance or other instrument, 664.
from judgment directing sale or delivery of real property, or for the sale of mortgaged premises, 665.
effect of stay of proceedings on, 645 *c*.
on appeal being perfected, proceedings stayed, 665.
security may be dispensed with or limited in certain cases, 665.
by executors, administrators, trustees, or persons acting in another's right, 665.

Appeal *to court of appeals—continued.*
undertaking on, and service thereof, 666.
security on, to be approved and justify, 667.
secured on appeal, may be entered on docket, 518.
case of perishable property, 668.
undertakings on, to be filed, 669, 851.
time for, 645.
statement of facts for, 648, 843.
death of party pending, 639 *f*, 644 *h*, *i*, 137 *c*.
what papers clerk is to return, 641, 839.
appellant to cause the return to be made, 641, 840.
how respondent may have it dismissed for want of a return, 840.
if the return filed be defective, a further return may be ordered, 841.
attorneys and guardians in court below to be deemed attorneys and guardians for the same parties on appeal, 841.
in calendar causes, a case is to be made, 841.
what such case is to contain, 841.
cases and points to be printed, 841.
copies of case to be served on adverse party, 841.
dismissal of, for want of a return, or for not serving copies of the case, 842.
form of order of judgment in court below after dismissal, 842.
proceedings on argument, 843.
copies of cases and points to be furnished the judges, clerk, and opposing counsel, 843.
one counsel only on each side, 843.
statements of facts on points, 843.
index to case, 841.
resettlement of case, 840 *f*.
extended discussion on question of fact not allowed, 843.
judgment of affirmance or reversal may be taken by default, 843.
notice of such judgment to be given, 844.
criminal cases to have a preference, 844.
may be submitted on printed arguments, 844.

Appeal *to court of appeals—continued.*
remittitur, 844.
time prescribed by rule may be enlarged, 844.
revoking or modifying orders 845.
rules when to take effect, 845.
call of calendar, 845, 847.
calendar to continue one year, 846.
to be noticed for January term each year, 846.
notice of argument, 847.
no defaults allowed, 846.
proof of service of notice, to be filed with the clerk, 847.
cases ordered to be re-argued, how placed on calendar, 847.
exchange of causes on calendar, 846.
ten causes called each day, 845.
date of issue of passed causes, 845.
striking cause from calendar, 845.
clerk to keep memorandum of the exchanged causes, 846.
certain rules and notice to be printed on calendar, 846.
not more than two hours to be occupied by argument of each counsel, 846.
calendar practice, 848.
miscellaneous rules, 848.
to the supreme court from an inferior court, in what cases, 670.
security upon, 671.
where heard, 671.
judgment on, where entered and docketed, 671.
time for, 645.
costs on, 672 *a*, 598, 600.
in the supreme court, superior court, and New York common pleas, from a single judge to the general term, from certain judgments, 673, 675 *b*.
does not stay proceedings, except, &c., 673, 674 *c*.
how heard, 673, 869, 876.
security on, 674 *c*.
amount of security to stay proceedings on, 675 *a*.
notice, of security may be entered on docket, 518.
in the case of certain orders, 678, 777 *g*.
when not allowed, 680, *e*.
allowed, 682 *h*.
from order on motion to vacate order of arrest, 368, *e*.

Appeal *in the supreme and other courts, &c., in certain orders—continued.*
from order sustaining or overruling a demurrer, 684 *a*, *b*, 685 *f*.
order involving the merits, 684 *d*.
order involving a substantial right, 685 *a*.
from an order granting or refusing a new trial, 685 *b*.
from two orders in one appeal, 777 *g*.
security on appeal from order, 685 *h*.
stay of proceeding on appeal from order, 685 *i*.
hearing of, 686 *c*.
in N.Y. common pleas, 687 *b*, 921
costs on appeal from order, 686 *l*
from order at chambers on notice, 678, 687.
judgment for want of an answer, 675 *h*.
noticing for argument, 675 *i*.
motion to dismiss, 675 *k*.
appeal book, 676 *a*.
failing to settle and serve case, 676 *b*.
order of, on the calendar, 675, 870.
papers on, to be printed, 871.
copy papers for the court on, 870.
what papers to be furnished on, 870, 871.
within what time, 645.
in superior court. See *Superior court.*
what questions may be raised on, 676 *e*.
when the judgment will be reversed, 677 *i*.
judgment on, 677 *l*.
costs on, 678 *b*, 600, 598.
death of party pending, 678 *c*.
re-argument, 678 *g*.
opening judgment by default in, 678 *h*.
in special procedings, 679 *a*.
from chamber order, made ex parte, 687.
in New York common pleas, 921.
from judgment on report of referee, 503 *a*.
in justices' courts of Buffalo, 689, 689 *a*.
from decisions of justices' courts in summary proceeding to recover possession of lands, 40 *b*, 689 *d*.

Appeal—*continued.*
on mechanic's lien, 689 *b*.
to the court of common pleas for the city and county of New York, or to a county court from an inferior court, existing laws as to, repealed, 688.
in what court appeal to be had, 47, 689.
time for, 690.
when process not personally served, 690.
notice of appeal to be served and costs paid, 690.
notice of appeal, what to state, 690, 693 *a*.
from justices of marine and justices' court, security to be given, or deposit made, 691.
by Mayor, &c., of N. Y., 692 *a*.
who may appeal, 692 *d*.
what judgments are appealable, 692 *e*.
when notices of appeal may be served, 692 *k*.
notice of appeal, 693 *a*.
effect of notice not stating grounds of, 693 *c*.
service of the notice, 694 *b*.
filing in lieu of service of notice of, 697.
payment of fee for return, 694 *g*.
when perfected, 694 *h*.
objections to regularity of notice of, when to be taken, 695 *h*.
motion to dismiss, 695 *j*.
security to stay execution, 695 *a*, 691.
form of undertaking, 691, 696.
execution, how stayed, 695, 696.
effect of stay on previous levy, 696, *c*, *h*.
where justice dead or removed, 697, 699.
return, how made and compelled, 697.
cannot be compelled till fees paid, 699 *a*.
form of, defects in, how remedied, 698.
where justice is out of office, 699, 700 *a*.
amended, 699.
noticing for hearing, 700.
on error in fact, 701, 705 *d*, 711 *a*.
hearing of, 700, 701, 711 *b*, 922.
to be on original papers, 701.
dismissal of, for want of prosecution, 700, 715.
on the argument, 711 *c*.

Appeal *to New York common pleas, &c.* —*continued.*
respondent need not notice for hearing, 700 *d.*
judgment on appeal, 701, 711 *d.*
new trial on, 700, 702, 712 *c.*
exceptions not necessary to, 702 *a.*
only the defects pointed out by the notice of appeal are reviewed, 702 *b.*
what questions are not reviewable, 703 *j.*
what objections cannot be taken for the first time on, 703 *k.*
that judgment against weight of evidence, 704 *b.*
what defence will be deemed to have been waived, 704 *c.*
what objections are waived by pleading to the merits, 704 *d.*
what may be waived, 704 *e.*
reversal of judgment for want of evidence to support it, 704 *f.*
for admitting illegal testimony, 705 *a.*
in other cases, 705 *c*, 707 *d.*
for errors of fact not appearing on record, 701, 705 *d*, 711 *a.*
for respondent not appearing at the hearing, 700 *c.*
in part, 711 *f.*
by default, 700 *c.*
reversal, mistakes can only be rectified by, 708.
power of court on, to order the proper judgment, 708.
conditions on, 711 *g.*
effect of, 711 *o.*
when the court will not reverse, 706 *a.*
affirmance on, 711 *d*, 700 *d*, 708 *b.*
when the court can only affirm the judgment, 708 *c.*
reducing amount of judgment on, 708 *e.*
new trial, where defendant appeared in the court below, 708 *g.*
where defendant did not appear in the court below, and manifest injustice has been done, 709 *a.*
rehearing of, 712 *b.*
amendment of judgment of appellate court, 712 *a.*
judgment roll, 712.
costs on, how awarded, 712.
on partial affirmance, 712 *d.*
when court must award, 712 *e.*
of court below, 712 *f.*

Appeal *to New York Common Pleas, &c* —*continued.*
payment of judgment pending the appeal, 713 *a.*
judgment on, how set aside, 713 *a.*
restitution may be awarded, 713.
set-off of costs and recovery, 713, 716 *d.*
set-off of costs, 714.
offer by respondent to have judgment corrected, 714.
amount of costs on, 714.
amount of costs on new trial in county court, 716.
in discretion of court, 716.
amount of costs when appeal is heard in the supreme court, 716 *f.*
when no costs allowed to either party, 715.
fee to justice for his return, 715.
from justices' courts in the city of Buffalo, 689 *a.*
from judgment of justices' courts in proceedings under mechanics' lien law, 689 *b.*
from clerk's adjustment of costs, 617 *h.*
in summary proceedings to recover possession of land, 689 *d.*
from surrogates' courts, not affected by the second part of the code, 834.
rules regulating, 871.

Appeal book, what to contain, 676 *a.*
See, *Case.*

Appearance, gives jurisdiction, 46 *c*, 45 *a*, 177.
against foreign corporations, 55.
what to be deemed, 853.
when notice of may be served, 446 *h.*
waives all defects in process, 61.
entitles defendant to notice of assessment, 442, 444 *e.*
trial, 459 *d.*
motion to amend, 772 *b*, 791 *a.*
does not entitle defendant to notice of application for provisional remedy, 790 *e.*
voluntary, equivalent to personal service of summons, 45 *a*, 46 *c*, 177.
may a defendant not served appear? 177 *d.*

Appellant, the party appealing is, 639.

Appointment *of terms, &c.*, 34, 35.

Apprentice, assignment of services of, 109 *k.*

Arbitration, proceedings on, not affected by the code, 836.

Argument. See, *Trial.*
Arrest, no person to be arrested in a civil action, except as prescribed by the code, 361.
code not to affect the act to abolish imprisonment for debt, &c., or amendments thereto, 361.
provisions of code as to, not to apply to proceedings for contempts, 361.
in what cases, 363, 805.
persons privileged from, 361 *a.*
when cause of arrest must exist at the time of the commencement of the suit, 373 *c.*
when defendant may be discharged from arrest on the ground of insanity or lunacy, 373 *d.*
on proceeding supplementary to execution, 556.
in action by partner against his co-partner, 373 *a.*
sheriff may be arrested, 361 *a*, 362.
defendant cannot be twice arrested for the same cause, 373 *i.*
order staying proceedings does not stay application for, 374 *b.*
in action for tort committed by a married woman, 372 *f.*
of female, 362, 372, 373.
order for, by whom made, 374.
granting is discretionary, 373 *e.*
affidavit to obtain, 374.
security on issuing of, 375.
when made, 376.
form of, 376.
undertaking and affidavit to be filed, 851.
and affidavit to be delivered to sheriff, 377.
copy of, and affidavit to be delivered to defendant, 377.
motion to vacate, 385, 376.
condition upon vacating, 388 *b.*
appeal from, 388 *c.*
time to answer after, 376.
how made, 377.
defendant not entitled to notice of application for, 790 *e.*
defendant may be discharged from, on bail or deposit, 377.
by bail, 379.
in action for usurping an office, 805.
of judgment, motion for, 37, 483 *d.*
on justices' warrant, justification of, how pleaded, 281 *e.*
See, *Bail.*
Assault, *action for*, must be brought within two years, 98.
Assault, *action for—continued.*
justices of the peace have no jurisdiction of, 54, 56.
complaint in, 206 *a.*
answer in, 280 *e.*
arrest in action for, 364 *f.*
against husband and wife, judgment for, 508 *a.*
assessment of damages in, 446 *i.*
costs in, 581 *j*, 591.
Assessment *of damages*, defendant entitled to notice of, 444 *e.*
in actions on contract, 445 *a.*
in actions to recover specific personal property, 446 *g.*
in actions against common carrier, 446 *e.*
in actions for assault, 446 *i.*
contingently, 475 *f.*
separate, 475 *b.*
after judgment on issue of law, 488.
to defendant, 476.
defendant may appear on, to mitigate damages, 447 *c.*
under general road law, 772 *d.*
See, *Damages.*
Assignee *of thing in action*, may sue in his own name, 108 *m.*
takes subject to right of set-off, 115
courts will protect, 116 *b.*
counter-claim in action by, 293 *g.*
is liable for costs, 116 *c*, 623 *b*, 629.
may be attached for costs, 629 *b.*
admissions by assignor, evidence against, 116 *a.*
may issue attachment, 417 *a.*
pending an action may be substituted as plaintiff, in lieu of assignor, 680 *v*, 133.
complaint by, 187 *a*, 203 *h.*
of lease, complaint against, 242 *g*, *i.*
of a demand in trust may sue in his own name, 119 *b.*
of judgment, may institute supplementary proceedings, 558 *g.*
may have an action in nature of a *sci. fa.* to recover, 802 *d.*
for benefit of creditors, assignment by, 109 *a.*
parties to action, 132.
Assignment *of thing in action*, in what cases, 109.
how made, 112.
consideration for, 113 *d.*
effect of, on character of claim, 113 *e.*

Assignment *of thing in action—continued.*
proof of, 118 *f.*
parol proof, to explain, 114 *a.*
implied warrantee in, 114 *a.*
reassignment, 114 *b.*
carries with it all collaterals, 114 *d.*
effect of, on set-off, 115.
not to abate the action, 183.
how alleged in pleading, 118 *d*, 114 *d.*
Assignor *of thing in action*, implied warranty by, 114 *a.*
who is, 755 *e.*
need not be made a party defendant, 128 *a.*
examination of, as a witness, 759.
admissions of, evidence against his assignee, 116 *d.*
wife of, may be a witness, 746 *g.*
Assistance. See, *Writ of assistance.*
Association. See, *Banking association.*
Attachment, provisions of Revised Statutes not abrogated, 835.
justices of the peace have jurisdiction of certain actions commenced by, 51.
authorized by the code, is a new and important remedy, 414 *b.*
is for the benefit of the individual creditor at whose instance it is issued, 414 *b.*
in what cases it may issue, 414, 417, 417 *a.*
against great Western Railroad of Canada, 415 *e.*
by whom granted, 416.
by foreign creditors, 415 *e.*
at instance of one foreign corporation against another, 415 *b*, *c*, *d.*
when it may be executed, 415 *a.*
lien of, 422 *g.*
requisites to the issuance of, 417 *a.*
superior court can issue, against property of non-residents, 46 *b.*
in what cases it may issue, 417, 417 *a.*
at what stage of the action it may issue. 415 *a.*
is it process? 416 *d.*
issuance of, is commencement of action, 177 *d*, 416 *a.*
may issue against one or more of several defendants, 416 *b.*
may issue at suit of a non-resident, 417 *c*, 415 *c.*
assignee of a cause of action, may issue, 417 *e.*
Attachment—*continued.*
affidavit to obtain, 416, 418 *a.*
to be filed, 417, 851.
amendment of, 350 *e.*
motion to set aside, 418 *e.*
security on issuance of, 419.
to whom directed, and what to require, 420.
several may issue at the same time to different counties, 420.
how executed, 420.
liability for wrong execution of, 421, *f.*
proceedings on, in case of perishable property or vessels, 423.
what property may be attached, 422 *c.*
plaintiff in, may prosecute action on notes, &c., attached, 427.
how executed on property incapable of manual delivery, 423.
certificate of the defendant's interest in stock of corporation to be furnished to sheriff, 424.
defendant may procure discharge of, and return of property, on giving undertaking, 429.
sale of evidence of debt, 426.
undertaking of the defendant on such discharge of attachment, 429.
return of, and proceedings thereon, 430.
sheriff's fees on, 430.
amending, 420 *b.*
allowance in addition to costs in actions commenced by, 607.
issuing is not a stay or waiver of supplementary proceedings, 557 *c.*
how satisfied, on judgment for the plaintiff in the action, 425.
on judgment for the defendant, the bond given to the sheriff on the attachment to be delivered to the defendant, 428.
to enforce payment of costs, against guardian of an infant plaintiff, 622.
against assignee of cause of action, 629.
for disobeying order for discovery, 856.
for contempt, for disobedience to orders in supplementary proceedings, 578.
bond, action on, 207 *d.*
appeal from order allowing, 682, *h.*
Attendance *of parties*, as witnesses, how enforced, 749.

Attendants *for courts*, supervisors to provide, 37.
Attesting witness, to prove execution of document, 744 *b*.
Attorney, regulation as to admission of, to practice, 849, 911.
means attorney at law, 788 *c*.
does not include clerk, 787.
clerk cannot practice as, 849 *a*.
form of summons against, for money collected, 157 *i*.
complaint by, for services, 188 *a*.
reference in action by, to recover fees, 493 *a*.
agreement as to compensation to, 581 *h*, *f*.
lien of for costs, 553 *i*, 816 *g*, 582 *f*.
when liable to arrest, 363, 367 *b*.
for defendant's costs, 590 *e*.
to sheriff for his fees on execution, 535 *k*.
no authority to control levy on execution, 537 *f*.
may subscribe execution, 531.
return of execution to, 533 *e*.
substitution of, 581 *i*.
married woman cannot appoint, 123 *e*.
cannot be bail, 378 *b*.
not liable for referees' fees, 501 *b*, *c*.
service of papers in cause upon, 791, 788, 256 *b*.
may be security for costs, 589 *i*.
may be surety on appeal? 668 *a*.
appearance by, 853.
to continue on appeal, 841.
to endorse name and place of residence on papers, 853
agreement by, as to proceeding in action to be in writing, or entered on minutes, 853.
privilege of, from arrest, 361 *a*.
non-resident, 850 *c*. 792.
certain rights and duties, of, 850 *d*.
duty of, to act as guardian *ad litem*, 880.
reference on motion against, for not paying moneys, 493 *c*.
is not a public officer, 368 *d*.
stipulation of client is binding on. 855 *e*.
to produce authority, 106 *c*, 820 *d*.
to disclose his client's address, 106 *d*.
substitution of, 854, 910, 919.
may issue execution on justice's judgment, after transcript filed, 81 *d*.
when he may verify pleading, 309 *e*.
form of verification by, 311 *c*.
may subscribe pleadings, 305.
Attorney—*continued*.
may make affidavit to prevent inquest, 461 *c*.
must produce client's papers, 747 *d*.
what he may testify to, as a witness, 755 *c*.
See, *Counsel*.
Attorney-general, actions by, 802.
have a preference on calendar, 460 *c*.
Auctioneer, when liable to be arrested, 367 *e*.
may sue without joining party in interest, 119 *b*.
is trustee of an express trust, 119 *b*.
Authority, to sue, when to be produced, 106 *c*, 820 *d*.
Award, complaint to set aside, 206 *d*.
action on, 29 *c*, 206 *c*, 800 *a*.
action to set aside, 128 *c*, 206 *d*.
review of judgment on, 637 *a*, 656 *b*.

B.

Bail, defendant may be discharged from arrest on, 377.
how given, 378.
who cannot be, 378 *b*.
surrender of defendant in exoneration of, 379.
may arrest defendant, 379.
how proceeded against, 379.
how exonerated, 380.
notice of, to plaintiff, 381.
notice of non-acceptance of, or exception, by plaintiff, 381.
when plaintiff deemed to have accepted, 381.
notice of justification of, 381.
new, notice of justification of, 381.
notice of justification is a waiver of all irregularity in the notice of exception, 382 *a*.
qualifications of, 382.
justification of, 382.
where to justify, 382 *b*, 852.
allowance of, 383.
deposit in lieu of, 383.
sheriff, when liable as, 384.
substituting for deposit, 383.
liable to sheriff, 385.
motion to reduce amount of, 385.
summons in action against, 157 *m*.
review of order, on motion to extend time to surrender principal, 681 *p*, 682 *a*.
review of order reducing amount of, 681 *i*.

Bail—*continued.*
action against, 379.
See, *Sureties.*
Bailee, interest of, may be sold on execution, 536 *f.*
Bank, accounts with, how kept, 895.
orders upon, in what form, 895.
president, complaint by, 190 *c.*
Banker, complaint against for dishonoring note, 212 *a.*
Bankrupt act, answer of discharge under, 280 *h.*
Banking associations, time of limitation not applicable to actions against, 103.
agent of, when liable to arrest, 364 *b*
parties to actions by and against, 118 *a.*
complaint in action by or against, 206 *a.*
supplementary proceedings against stockholders in, 555 *a.*
Bank notes, time of limitation not applicable to actions upon, 75.
Battery. See, *Assault.*
Begin, right to, on trial, 465 *d.*
on a motion, 776 *h.*
Benevolent societies, sale of real property of, 29 *c.*
Bill of exceptions. See, *Exceptions.*
Bill of exchange. See, *Bills and Notes.*
Bill of particulars, court may order either party to deliver, 315.
when it will be ordered, 315, 316.
order for delivery of, with a stay of proceedings, does not extend the time to answer, 255 *a*, 316 *d.*
delivery of, how enforced, 316 *e*, *i.*
not a part of the pleading, 315 *a.*
of the record, 316 *k.*
refusal of not reviewable, 316 *j*, 682 *f.*
See, *Account.*
Bills and notes, complaint in action on, 208 *f.*
answer in action on, 278 *e.*
affidavit of merits in action against the several parties to, 349 *c*, 352 *d.*
costs of several actions on, 591.
parties to actions upon, 133.
the several parties to, though sued in one action, are not thereby made jointly liable, 133 *e.*
put in circulation as money by moneyed corporations, 103.
plaintiff in action on, need not have *actual* possession of, 107 *c.*
possession is evidence of title to, 107 *g.*
Bills and Notes—*continued.*
provisions as to assignment not to apply to transfer of, 115.
action or defence upon, how pleaded, 327.
is endorser of, an assignor of thing in action? 755 *e.*
Board of Education, action by, 118 *c.*
Board of Excise, action by, 120 *b.*
Board *of State officers*, may appeal without giving security, 637 *d.*
actions and appeals by have preference on calendar, 27.
Board of Health, party to action by, 120 *c.*
Boats. See, *Owners.*
Bond, *actions on*, justice of the peace has jurisdiction in certain, 51, 55.
costs of several actions on same bond, 591.
complaint on, 207 *a.*
executed before July 1, 1848, judgment on, 795.
for security for costs, 589 *i.*
of constable, party to action on, 117 *c.*
of town superintendent, party to action on, 121 *b.*
of indemnity to sheriff, 538 *g* 539 *d*, *f.*
of administrator, action on, 55, 208 *b.*
taken in the name of the people, parties to action on, 116.
for duties to United States, action on, 22 *c.*
of assignee for benefit of creditors, &c., 923.
to be filed in New York common pleas, 923.
See, *Official Bond, Surety Bond, Undertaking, Replevin Bond, Lost Bond, Attachment Bond, Constable's Bond.*
Books, clerk to keep certain, 516, 853.
belonging to public office, compelling delivery of, 46 *d.*
of corporation, how proved, 747 *c*, *d.*
See, *Discovery, Inspection, Judgment Book, Production, Account Book.*
Broker, when liable to arrest, 368.
Brooklyn city court. See, *City Court of Brooklyn.*
City Judge, transfer of causes from, 30 *e.*
Brooklyn Fire Department, action by, 120 *b.*
Buffalo *& Lake Huron Railway Co.*, proceedings against, 800 *h.*

Buffalo, appeal from justices' courts in, 689.
appeal from superior court of, 25, 657 *l*.
See, *Superior Court of Buffalo*.
Building Society, shares in, exempt from execution, 549 *e*.
action against stockholder in, 294 *a*.
decree in foreclosure by, 886 *e*.
Burial ground, exempt from execution, 549 *a*.
Business *out of court*, judges may transact, 36.
of corporation, injunction to suspend, 410.
See, *Judge at chambers*.
By-law, *of city corporation*, action upon, may be brought in justice's court of a city, 88.

C.

Calendar, *supreme court*, when clerk to enter cause on, 457.
order for printing, 849 *e*.
order of disposing of issues on, 460.
action by attorney-general to have preference on, 460 *c*.
certain actions against corporations to have preference on, 460 *c*.
cases on certiorari have preference on, 460 *c*, 876.
issues of law to have preference on, 460 *c*.
criminal cases to have preference on, 876.
when cause is necessarily on, 604.
when cause may be struck from, 871.
in New York common pleas, 920.
in the superior court, 917.
in the first district, 907, 908, 911.
passed causes on, 908.
reserved causes on, 911.
in Kings county, 913.
in the second district, 912.
taking dismissal of complaint without putting cause on, 459 *g*.
of court of appeals, to continue one year, 846.
rules 6, 10, 12 and 20, with notice that 14 copies of cases and points are required to be printed on, 846.
Calendar *of court of appeals—continued*.
preferred cases on, 846, 844, 27.
how regulated, 27.
exchange of causes on, 846, 845.
call of, 845, 847.
calendar practice, 848.
for general term of supreme court, clerk to prepare and print, 870.
appeals, how placed on, 870.
other cases, how placed on, 870.
order of appeal on, 675 *j*.
certiorari to remove proceeding to have preference on, 876.
putting cause on, is a waiver of order for security for costs, 590 *d*.
See, *Preference*.
Canada, records in courts of, how proved, 796 *e*.
Carrier. See, *Common carrier*.
Case, on trial of question of fact by the court, 486.
after trial by court or referee, or to set aside non-suit, dismissal of complaint, or verdict, 503 *e*, 864.
settlement of, 504 *b*, 864.
failure to settle or serve, 676 *b*.
to be filed, 867.
order declaring it abandoned, 867.
statement of, for appeal to court of appeals, 867.
to be printed, 875.
time to make, 783.
order for time to make, not a stay of proceedings, 781 *a*.
may judge at chambers extend time to make, 783 *c*.
agreed on by the parties, 717.
not provided for by the code or the rules, 832, 903.
See, *Appeal book*.
Cattle distrained doing damage, provisions of revised statutes as to, not repealed, 836.
Cause of action, where does it arise? 164 *f*.
what it is, 165 *b*.
should be complete before action commenced, 153 *c*.
each should be perfect in itself, 219 *c*.
when it accrues on a current account, 98, 99.
on new promise, 104 *f*.
what may be joined, 332.
when only one exists, it should not be made the subject of several statements or counts in the complaint, 252 *b*.
when to be numbered, 856.

Cause of action—*continued.*
election of, 179 *b*.
splitting or dividing of, 55, 182 *b*. 111 *d*.
Causes of demurrer, 257.
Certain, effect of allegation of, 324 *a*.
See, *Indefinite and Uncertain, and Uncertainty.*
Certainty, what amount of required, 324 *h*.
See, *Uncertainty.*
Certificate *of service of summons by the sheriff*, 175, 175 *b*.
of service of notice of no personal claim, 160 *b*.
to enable parties to appeal from order on a point of practice, 921.
of good moral character of applicants for admission to practice as attorneys, 849.
of defendants' interest in rights and shares of corporations, 328.
that title came in question on trial, 69, 591.
that no return filed in court of appeals, 840.
of sheriff on sale of real estate, 542 *e*.
of deposit in lieu of bail, 383.
fraudulent, defendants in action to cancel 128 *b*.
Certiorari, return to, by judge out of office, 700 *a*.
necessary to review summary proceedings to recover possession of land, 689 *d*.
in certain cases, not affected by the code, 836.
review of decision on, 656 *a*.
to remove proceedings, hearing of, to be preferred on calendar, 460 *c*, 876.
to arrest special proceedings, 30 *c*, 47 *e*.
common law, cannot be granted at chambers, 37 *a*.
where heard, 876.
costs on, 628 *d*.
costs on, to have preference on calendar, 460 *c*, 876.
Chamberlain, is an officer of the court, 567 *g*.
Chambers, orders at, how vacated or modified, 638.
order at, after order of the court, is irregular, 775 *c*.
appeal from order at, in common pleas, 921.
See, *Judge at Chambers.*
Change *of name*, 349 *c*.
of attorney, 854, 910, 919.
of referee, 495 *g*, 680 *t*.
of ground of action or defence on trial, 468 *m*.
of place of trial, 145.
when the county designated is not the proper county, 146.
because an impartial trial cannot be had, 148.
for convenience of witnesses, and to promote justice, 148.
motion for, when to be made, 148 *e*.
staying proceeding for purposes of motion, 149 *a*, 879.
revoking order to stay proceedings, 879, 149.
motion for, 149 *b*.
affidavits on motion for, 879.
opposing motion for, 150 *e*.
not inferred from reference out of county, 152 *b*.
transfer of papers on, order for, 851.
See, *Exchange, Transfer of cause.*
Charging in execution, 530 *i*.
jury, 469 *d*.
Charitable societies, sale, &c., of real property of, 29 *c*.
Charter *of city corporation, action on*, in justices' courts, 83.
of New York city, how proved, 795 *c*.
of corporation, action to annul, 802.
Chattels. See, *Goods and Chattels.*
Check, complaint in action on, 208 *j*.
Children, questioning legitimacy of, 901.
See, *Infant.*
Chose in action. See, *Thing in Action.*
Circuit, issues of fact in the supreme court, when the trial is by jury, to be tried at, in other cases at the circuit or special term, 456, 860.
issues of law to be tried at circuit or special term, 456.
number of counsel to examine witnesses and sum up at, limited, 860.
what steps may be taken at, 30 *f*.
costs of, 601 *e*.
appeals from, 678.
irregularities at, how corrected, 471 *a*.
courts, statutes as to, repealed, 29.
times and places, &c., of holding, 34.

Circuit *courts—continued.*
jurisdiction of, 30 *f.*
extraordinary terms of, 34.
may be adjourned by entry on the minutes, 35.
jury may be drawn for an adjourned circuit, 35.
notice of trial may be given for adjourned, 35.
inability of judge to hold, 36.
rooms for holding, 37.
City authorities, costs in suits by, 595 *h.* See, *Mayor of New York.*
City court, *of Brooklyn*, power of supreme court on appeal from, 670 *g.*
appeal from, 670 *f.*
City Judge, *of Brooklyn*, transfer of causes from, 30 *e.*
postponement at, 466 *b.*
Civil action, 19. See *Action.*
Civil death, effect of, 134 *d.*
Claim, against deceased persons, costs of proceedings on, 622.
personal, notice of having none, 160.
See, *Amount, Bill of Particulars, Demand.*
Claim and delivery *of personal property*, provisions of code as to, a substitute for the action of replevin, 390 *e.*
discontinuance of action for, when and on what terms, 390 *g.*
an action for an injury by force to personal property, and an action to recover possession of personal property, are substantially different actions, 391 *f.*
delivery of personal property, when it may be claimed, 390, 391.
requisites of affidavit to obtain delivery, 391.
requisition to sheriff to take and deliver the property, 392.
security by plaintiff for return of the property, 393.
undertaking cannot be dispensed with, 393 *a.*
defendant to be served with copy of affidavit, &c., 393.
undertaking to be delivered to parties, 794.
what property may be taken, 394 *a.*
defendant may except to plaintiff's sureties, 394.
when defendant deemed to have waived exception to plaintiff's sureties, 394.
Claim and delivery—*continued.*
plaintiff's sureties, when and how to justify, 394.
when sheriff responsible for sufficiency of plaintiff's sureties, 394.
when defendant cannot reclaim the property taken, 394.
when defendant entitled to a redelivery of the property taken, 394.
defendant to give undertaking with sureties, 394.
when property taken is to be delivered to plaintiff, 394.
defendant's sureties, when and how to justify, 395.
when sheriff responsible for defendant's sureties, 395.
qualification and justification of sureties, same as on arrest, 396.
property, how taken when concealed in any building or inclosure, 396.
duty of sheriff as to keeping and delivering property taken, 396, 396 *a.*
claim of property by third party 396.
notice and affidavit, and proceedings thereon, to be filed, 397.
verdict on, 472.
Claim *to real property*, allowance in addition to costs in proceedings to determine, 607.
when it arises, 592.
within what time to be made, 91.
See, *Adverse Claim, Conflicting Claim, Ejectment.*
Clergy, confessions to, not to be revealed, 755 *a.*
Clerk, is an officer of the court, 567 *g.*
or deputy, cannot practice as attorney, 849 *a.*
the word defined, 832.
the words party or attorney do not include, 787 *c.*
to adjust costs in court of appeals, 660 *a.*
duty of, on receipt of note of issue, 457.
to keep a judgment book, 516.
other books, 853.
to insert costs in entry of judgment, 613.
to make up judgment-roll, 516.
to compute interest on verdict or report of referee, 612.
to enter judgment in conformity with verdict, 473.

Clerk—*continued.*
not bound to pay postage on letter containing process, &c., 389 *e.*
to transmit papers to appellate court, 641.
may refuse to receive his fee for entering judgment, 619 *a.*
service on, for the party, 791.
provisions as to service by mail do not apply to service on, 789 *f.*
to enter name of counsel taking order, &c., by default, 878.
his duty on entry of judgment by confession, 000.
party not to suffer for errors or omission of, 840 *b.*
of King's county, to record *lis pendens*, 853 *a.*
fees of, 618.
Cloud *on title*, complaint in action to remove, 215 *f.*
Code. See, *Act.*
Co-defendant, when he may be examined as a witness, 752.
answer of one, not binding on the other, 338 *a.*
See, *Defendant.*
Collateral security, action on instrument held as, 108 *l.*
Collector of customs, records in office of, how proved, 796 *e.*
Commencing action, manner of, 153.
when deemed commenced, 100, 153 *c*, 161, 177 *a*, *b.*
time for, 88.
See, *Limitation of actions*, *Time for commencing actions.*
Commission of lunacy, superior court will not issue, 46.
fees on executing, 896.
Commission, examination of witnesses and parties on, 46, 756 *k.*
in what cases, 757 *a.*
review of order for, 680 *q*, 683 *h.*
on assessment of damages, 757 *b.*
on supplementary proceedings, 757 *c.*
within the State, 757 *d.*
in discretion of court, 757 *e.*
to take oral testimony, 757 *f.*
on motion, 757 *g.*
to examine co-defendant, 758 *a.*
adverse party, 758 *c.*
motion for, when and how made, 758 *f.*
who may issue, 758 *b.*
stay of proceedings on, 759 *d.*
commissioners, 760 *a.*
interrogatories and directions for return of, 760 *c.*
form of, 760 *l.*

Commission—*continued.*
execution and return of, 761 *g.*
second, when may issue, 766 *b.*
to take testimony on an assessment of damages, 447 *a.*
in supplementary proceedings not allowed, 563 *j.*
amending commissioners' return, 766 *e.*
costs of, 766 *f.*
examination of witness at the trial after, 766 *a.*
costs of, in justice's court, 81 *b.*
Commissioners of highways, actions by, 127, *a.*
complaint against, 215 *g.*
appeals from determination of to county court, 89.
of excise, action by, 120 *b.*
Committee *of lunatic and habitual drunkard*, action by and against, 118 *f.*
complaint against, what to state, 191 *a.*
not to be sued except by leave of the court, 191 *b.*
Common carriers, form of summons in action against, 158 *e.*
parties to action by and against, 118 *a.*
complaint in action against, 212 *b.*
judgment on failure to answer in action against, how entered, 446 *e.*
as to actions by, 108 *a*, *g.*
assignment of claim against, 100 *h.*
answer in action against, 287 *a.*
Common informer. See, *Informer.*
Common law, a rule of construction of, not to apply to code, 832.
of other States and countries, how proved, 795, 796.
Common pleas costs, 585.
Common pleas, *for the city and county of New York*, jurisdiction of, 44, 45.
power of, to order production of documents, 46 *b.*
removal of causes from, to supreme court, 44.
removal of actions from district court into, 923.
may review judgments of marine and justices' courts, 47.
terms of, 47.
general terms of, by whom held, 48.
special terms, by whom held, 48.
judgment on appeal, where given, 48.
at general term, how pronounced, 48.

Common pleas *for the city and county of New York—continued.*
rehearing of appeal, 48.
judges of, to receive no fees, 48.
has jurisdiction of judgments on recognizances, 46 *a*.
voluntary appearance gives jurisdiction, 46 *c*.
when justice's judgment to be deemed a judgment of, 84.
may appoint a crier, 48.
require certain bonds to be filed, 852 *a*.
appeal from special to general term of, 673, 687 *b*.
appeal from judgment of, in actions commenced in justice's or marine court, 26.
rules of, 920.
regulation of calendar, 920.
short causes, 920.
review of questions of practice, 921.
appeal from marine and district courts, 922.
removal of actions from district courts into, 923.
Company, officers and directors of, may be arrested, 363.
Compensation to attorneys, 581 *h*.
Complaint, is the first pleading on the part of the plaintiff, 184.
defect in, supplied by allegations in answer, 250 *a*.
cured by verdict, 251 *c*.
waived, 255.
discovery to enable plaintiff to prepare, 855, 740 *f*, 741 *h*.
requisites of, ordinarily, 185.
title of the cause, as to the name of the court, 185 *a*.
as to the name of the county in which the plaintiff desires the trial to be had, 185.
as to the names of the parties, 186 *c*.
as to stating the character in which the plaintiff sues, 186 *e*.
plaintiff suing as assignee, 114 *d*, 187 *a*.
plaintiff suing as executor or administrator, 188 *a*.
plaintiff suing by guardian, 189 *b*.
plaintiff suing as a public officer, 189 *c*.
plaintiff suing as receiver, 190 *e*.
plaintiff suing as officer of joint stock company, 190 *b*.
plaintiff suing as bank president, 190 *c*.
Complaint—*continued.*
plaintiff suing as trustee or agent, 190 *d*.
as to the character in which the defendant is sought to be charged, 191 *a*.
permission to sue, when to be alleged, 191 *b*.
modification of rule that declaration must agree with writ, 192 *a*.
must agree with the summons as to the nature of the cause of action, 192 *c*.
must agree with the summons as to the description of the parties, 192 *b*.
must agree with the summons as to the amount claimed, 193 *c*.
date to, 193 *d*.
statement of the facts constituting a cause of action, 193.
what are facts, 193 *e*.
questions of fact, 194 *a*.
mixed of law and fact, 195 *m*.
of law, 195 *e*.
conclusions of law, 195 *v*.
a statement of the partial evidence of a fact is not an averment of the fact, 197 *a*.
duty, allegation of, 197 *b*.
unlawful, allegation that an act is, 197 *c*.
duly, effect of the allegation, 198 *a*.
what are the facts to be stated, 198 *b*.
what is necessarily implied need not be alleged, 199 *a*.
it is not necessary to anticipate and avoid a defence, 199 *b*.
matters of which the court take judicial notice need not be alleged, 201 *a*.
evidence of facts not to be stated, 201 *b*.
how the facts are to be stated, 201.
should the facts be stated according to their *legal effect?* 201 *c*.
allegations to be *positively* made, 201 *e*.
statement of facts valid at common law, but regulated as to mode of performance by statute, 204 *d*.
pleading a written instrument, 202 *b*, 327.
delivery, 202 *e*.
consideration, 202 *c*.
holder and owner, 203 *a*.
plaintiff must show title, 203 *f*.
matter in aggravation, 204 *a*.

Complaint—*continued.*
special damage, 204 *f*.
facts necessary in the following actions:—
account stated. 205 *e*.
adverse claim, to real property, 205 *g*.
assault and battery, 206 *a*.
attachment bond, 207 *d*.
award, 206 *e*.
banking associations, 206 *e*.
bills of exchange, 208 *f*.
bonds, 207 *a*.
of a railroad, 208 *a*.
of executor, 208 *b*.
in replevin, 208 *c*.
of constable, 208 *d*.
lost bond, 208 *e*.
carriers—for non-delivery of goods, 212 *b*.
for injury to passenger, 212 *f*.
for loss of goods, 212 *d*, *e*.
for refusing to carry goods, 212 *g*.
checks, 208 *j*.
commissioners of highways, 215 *g*.
cloud on title, 215 *f*.
compromise, 215 *h*.
against constable for not returning execution, 212 *h*.
on bond of, 208 *d*.
for surplus money, 212 *i*.
for refusing to deliver goods taken on an attachment, 212 *j*.
for divorce or separation, 897.
pursuant to section 238 of the code, 428 *a*.
contract of indemnity, 207.
by or against corporations, 212 *k*.
covenant, 214 *e*.
creditors' bill, 215 *i*.
dower, 827 *g*.
ejectment, 821 *c*.
false representation to induce credit, 218 *a*.
false imprisonment, 217 *d*.
false warranty, 218 *b*.
foreclosure of mortgage, 218 *c*.
of mechanics' lien, 219 *c*.
by foreign corporation, 218 *a*.
against executors, 217 *c*.
heirs, 222 *g*.
against foreign factor, 238 *a*.
fraud, 219 *f*.
goods sold, 220 *e*.
injury causing death, 222 *h*.
by defendant's negligence, 224 *e*.
by non-repair of premises, 224 *f*.
by leaving hatchways open, 224 *g*
by one animal to another, 224 *h*.
insurance policy, 224 *i*.

Complaint—*continued.*
judgment, 225 *d*, 827.
libel and slander, 225 *e*.
slander of title, 228 *b*.
to charge separate estate of married woman, 229 *f*.
malicious prosecution, 228 *c*.
by married woman, 231 *e*.
money had and received, 232 *a*.
money lent, 233 *d*.
money paid, 234 *b*.
money lost by gaming, 234 *f*.
by or against partners, 235 *a*.
limited partnerships, 235 *d*.
against Mayor, &c., of N Y., 235 *e*.
for partition of personal property, 235 *f*.
for a cause of action given by statute, 236 *g*.
for penalties, 235 *g*.
promise to marry, 229 *a*.
promissory notes, 209 *a*.
to recover personal property, 237 *a*.
public officer, 240 *a*.
on a recognizance, 240 *g*.
to try right to an office, 240 *h*.
on railroad act, 240 *c*.
on railway mortgage, 240 *f*.
for rent, 242 *f*.
by Seneca nation of Indians, 240 *h*.
to set aside fraudulent deed, 240 *i*.
an award, 206 *d*.
a judgment, 241 *c*.
against shareholders, 241 *d*.
specific performance, 241 *f*.
against stockholders, 241 *m*.
against sheriff, 241 *f*.
stakeholder, 241 *k*.
stockbroker, 241 *l*.
in ejectment, 821, 822.
for admeasurement of dower, 827 *g*.
on undertaking, 242 *k*.
use and occupation 243 *f*.
work and services, 244 *d*.
when to allege knowledge in defendant, 245 *k*.
consideration, how alleged, 246 *d*, 202 *c*, *d*.
negligence, how alleged, 246 *f*.
request or demand, when to be alleged, 246 *g*.
performance of conditions precedent, 248 *c*.
profert and oyer, 250 *e*.
reasonable time, 250 *f*.
defects in, cured by answer, 250 *a*.
verdict, 251 *c*.
for a single cause of action only one statement allowed, 252 *b*.

Complaint—*continued.*
demand of relief, 253 *a*, *b*, *c*, 254.
defect in, waived by obtaining time to answer, 255 *b*.
sufficiency of, may be considered on demurrer to answer, 303 *h*.
time to answer, 255.
service of, need not be served with summons, 158.
demand of copy of, 158, 159 *a*.
only one copy need be served on the same attorney, 159.
when copy to be served after demand, 159, 159 *d*.
when to be served after order for discovery of books, &c., 856.
order for further time to serve copy of, may be obtained, 159 *e*.
when such order cannot be made *ex parte*, 159 *e*.
motion for judgment for not serving copy, 508, 510 *d*.
after notice of no personal claim, copy need not be served, unless demanded, 158.
after amendment, 263.
filing of, before publication of summons, 169.
in all cases, 791.
dismissal of, for not serving summons on all defendants, 506, 510 *d*.
for not filing security for costs, 590 *c*.
for not proceeding, 506, 510 *d*, 511 *c*, 859, 860, *c*, *d*.
after notice of trial without putting cause on calendar is irregular, 459 *g*.
by referees, 497 *f*.
is equivalent to a nonsuit, 468 *e*.
is a judgment, 512 *e*.
publication of, not required when service by publication, 172 *f*.
amendment of, of course, 346.
after demurrer, 348 *b*, 345.
by order, 349.
answer after, 263.
supplemental, when allowed, 138 *f*, 358 *b*, 133.
verification of, 307.
in justice's courts, 70, 72 *a*.
waiver of objections to, 704 *d*.
See, *Pleading*.
Compound interest, verdict for, 474 *c*.
Compromise, offer of, 731.
complaint on a, 215 *h*.
See, *Offer*.
Computation *of time*, 88 *note*, 786.
See, *Time*, *Legal notices*.
Concealed Debtors, jurisdiction of county court as to, 39.
attachment against, 46 *b*, 414, 835.
Concealed defendant, attachment against the property of, 414.
service of process on, by publication, 168, 169.
See, *Attachment*.
Conclusions *of law*, 195 *v*.
Condition in order, vacating order of arrest, 388 *b*.
on reversing judgments, 711 *g*.
Conditions damages, 475 *f*.
See, *Damages*.
Conditional examination, of parties and witnesses, 747, 748 *c*.
in what cases, 766 *h*.
at what stage of the action to be applied for, 767 *b*.
time for, 767 *c*.
attendance at, how compelled, 767 *d*.
order to show cause why it should not be had, 767 *e*.
proceedings on, 767 *h*.
punishment of witness for failing to attend, 768 *d*.
deposition taken on, may be read in evidence, 768 *e*.
deposition on, how excluded, 769 *a*.
effect of death of party to action after, 770 *c*.
reading or producing documents proved on, at the trial, 770 *e*. *f*, *g*.
Conditional order, what is, 775 *b*.
time for compliance with, 878, 775 *b*.
Condition precedent, performance of, how pleaded, 327, 284 *g*, 248 *c*.
Confession in pleading, 338 *b*, 276 *c*.
to clergy, 755 *a*.
of judgment without action, judgment may be confessed for debt due or contingent liability, 722.
statement in writing and form thereof, 723.
statements for, held sufficient, 724 *a*.
insufficient, 725 *f*.
good in part, and bad in part, 727 *j*.
sufficient as to debtor, insufficient as to creditor, 727 *k*.
amendment of, 728 *a*.
verification of, 728 *b*.
signature to, 728 *c*.
authority to enter judgment, 728 *f*.
time to enter judgment on, 728 *d*.

Confession, *statements for—continued.*
construction of, 728 *e*.
at whose instance set aside, 728 *g*.
what confessions are not within this provision, 722 *a*.
are within this provision, 723 *i*.
for future advances, 722 *b*.
by joint debtors and partners, 722 *c*.
by public officer, 723.
by person of unsound mind, 723.
by married woman, 723.
by trustee, 723.
by partners, 723.
not a disposing of property, 723.
to be filed and judgment entered thereon, with $5 costs, 729.
judgment-roll, how constituted, 729.
execution on such judgment, 729.
execution for installment of such judgment, 729.
in justices' courts, 51, 55.
judgment, when perfected, 730 *b*.
amending entry of judgment, 730 *a*.
setting aside judgment for irregularity, 729 *e*, 723 *e*.
compelling debtor to give a new confession, 729 *f*.
Conflicting claims *to real property*, actions to determine, 205 *g*, 817.
place of trial of, 143.
allowance in addition to costs in proceedings to determine, 608.
to personal property, when interpleader allowed on, 139, 140 *d*.
Consent, examination of witness on interrogatories by, 770 *h*.
judgment in action for divorce, cannot be taken by, 901.
to refer, 491 *c*.
See, *Agreement*.
Consideration, when and how alleged, 246 *d*, 202 *c*.
Consolidating actions, 335 *c*.
Constable, action against, to be within two years, 98.
amendment of return of, 61.
party to action on bond of, 117 *c*.
complaint against, 212 *h*.
bond, action on, 208 *d*.
Construction *of will, &c.*, allowance in action for, 608.
of pleadings, 316.
of code, 832.
of order of reference, 496 *f*.
Constructive notice, when notice of *lis pendens* is, 160.
Consul, when he must plead his privilege, 266 *b*.
action against, 28.
Contempt, provisions of revised statutes as to, not repealed, 836.
provisions of code, do not apply to service to bring into, 792.
in disobeying order in supplementary proceedings generally, 578, 571 *a*.
for not attending as a witness, 749.
provisions as to arrest and bail, do not apply to proceedings for, 861.
referee can punish for, 497 *a*, *f*.
judge at chambers cannot discharge from a commitment for, 37.
judge at chambers, may punish for, 36.
in justice's court, 82.
Contested motions where to be heard, 868.
Contingent damages, 475 *f*. See, *Damages*.
Continuanc of action, by assignee or representative, &c., 133.
order for, 138.
Contract, *actions on*, within what time to be commenced, 96.
evidence of new, or continuing, must be in writing, 104.
and tort, distinction between, still exists, 179 *b*.
See, *Performance*.
Contradicting party called as a witness, 749 *f*.
Controversy, court may determine, 139.
submitting without action, 717.
Conversion of property, assignment of right of action for, 110 *q*, 109 *c*.
Conveyance, appeal from judgment to execute, 664.
Convict, cannot assign a thing in action, 112 *m*.
Convict labor, contract for, not assignable, 112 *k*.
Co-Plaintiff, examination of, as a witness, 752.
Copy of paper or pleading may be substituted for a lost original, 794.
served may be treated by the party on whom served as a true copy, 267 *c*, 776 *g*.
when court may give leave for copy to be taken of documents in possession of opposite party, 735.

Copy—*continued.*
clerk's fee for, 618.
of pleadings, &c., to be furnished to court, 471.
on jury trial, 471.
on enumerated motions, 870.
on argument on special verdict, 870.
on appeal to general term, 870.
from surrogate, 871.
when not required in mortgage and partition cases, 870.
on case agreed on, 870.
Corning, *village of*, appeal from police justice, 41 *b*.
Coroner, when, to act in place of sheriff, 792.
provisions relating to sheriffs to apply to, 792.
when execution to issue to, 531.
action against, to be taken within two years, 98.
Corporation, clerk or chamberlain is not, 567 *g*.
individual suing as a, 356 *d*.
president of, not required to produce books, 747 *c*.
may examine adverse party as a witness 755 *d*.
complaint in action by or against, 212 *k*.
complaint by or against stockholders of, 241 *d*, *m*.
service of process on, provisions of the code applied to justices' courts, 72.
service of summons on, 164 *c*, 168.
who is a managing agent of, 164 *c*.
cannot set up defence of usury, 286 *c*, 214 *d*.
injunction to suspend business of, 410.
superior court, New York common pleas, mayors' courts of cities, and recorders' courts of cities, have jurisdiction of, 45, 45 *a*.
provisions of revised statutes as to, not affected by code, 835.
time of limitation on bills, &c. of, 108.
actions against, in the name of the attorney-general, 802, 803.
interest in, may be sold under attachment, 424.
judgment of forfeiture against, 808.
parties to actions by creditors of, 126 *d*.
rule applicable to pleadings by, 179 *, laws 1864, ch. 422.
verification of pleadings by, 807.

Corporation—*continued.*
proceedings supplementary to execution cannot be instituted against, 555 *a*.
sequestration of property of, 555 *b*.
books of, how proved, 747 *c*, *d*.
may be examined as to property of a judgment debtor, 566 *i*.
how examined, as to property of a judgment debtor, 566 *i*.
proceedings to dissolve, superior court has no jurisdiction of, 46.
action to annul, 803.
receiver of, 808.
actions against, when to have a preference on calendar, 460 *a*.
See, *Attachment*, *Foreign Corporations*, *Joint-stock companies*, *Municipal Corporation*, *Quo Warranto*, *Religious Corporations*, *Scire facias*.
Costs, all statutes, rules, &c., as to costs or fees of attorneys, solicitors, or counsel, repealed, 580, 581 *a*.
amount of, to be regulated by agreement between the parties, 580.
certain allowances to prevailing party, called costs, 580.
in suits pending on the 1st of July, 1848, 584 *g*, 594 *a*.
in special proceedings, 582 *c*, 628.
against municipal corporations, 591 *b*.
in certain actions where damages claimed do not exceed $500, 581 *j*.
when they become a debt, 581 *b*.
in actions against the Mayor, &c. of New York, 581 *c*.
in surrogates' courts, 581 *d*.
in Federal courts, 581 *e*.
as between attorney and client, 581 *f*.
on substitution of attorney, 581 *i*.
staying proceedings till costs or previous action paid, 584 *c*, 824 *k*.
in action by married woman, 585 *d*.
of closing up insolvent and dissolved insurance companies, 585.
the liability of guardian *ad litem* for, 125 *h*.
the powers of referees as to, 499 *a*.
where the court has not jurisdiction of the action, 585, 597 *d*.
common pleas, 585.
malicious trespass, 585.

Costs—*continued.*
in proceedings for forcible entry, 585.
of opening streets, &c., 582 *a*.
where verdict part for plaintiff and part for defendant, 582 *b*.
on proceedings on forfeited recognizances, 582 *e*.
agreement with attorney as to, 581 *h*.
double, allowed, 585 *a*, *e*.
treble, allowed, 585.
include disbursements, 596 *a*.
security for, 585, 622, 627 *j*.
See, *Security for costs*.
to plaintiff of course, 591.
not to exceed amount of damages, 591.
in several actions on one instrument, 591.
in foreclosure suits, 596 *j*.
to defendant, 596.
to either party in discretion of the court, 596, 598 *a*.
amount of, 600.
allowance in addition to, 607, 609.
See, *Allowance*.
how inserted in judgment, 613.
disbursements, how stated, 613.
adjustment of, 613.
in action in name of the people, 628.
against an infant plaintiff, 622.
on a settlement, 630.
where favors granted on payment of costs, 606 *d*.
where the defence is infancy, 597 *c*, 634 *f*.
on a discontinuance, 630 *h*, 631.
against an assignee of a cause of action, 630.
after discontinuance in justice's court by reason of answer of title, 69, 593 *f*, 591.
in an action by or against an executor, an administrator, a trustee of an express trust, or a person expressly authorized by statute to sue, 622.
in proceedings against joint debtors, heirs, devisees, &c. (§§ 375—381), 600.
on claim against a deceased person, referred pursuant to the statute, 622.
in action to recover dower, 600.
on sale of real property of infant, 882.
on confession of judgment without action, 729.
on submitting controversy without action, 718.

Costs—*continued.*
in actions for partition, 816 *f*.
set-off of, 714, 509 *b*, 554 *d*.
after offer of defendant to compromise, or to liquidate damages, 782, 783 *d*.
after notice of no personal claim, 160.
on appeal, 589, 600.
from surrogate, 581 *d*.
to general term, 678 *b*, 686 *l*.
in a special proceeding, 582 *d*, 628.
how adjusted, 660 *a*.
against assignee, 116 *c*.
attorney, when liable for, 590 *a*.
party in interest liable for, 629.
lien of attorney for, 553 *i*, 582 *f*, 816 *f*.
on postponement of trial, 619.
on motion, 620, 686 *l*, 776 *k*.
of inspection, 742 *g*.
in ejectment, 629 *f*.
of previous appeal must be paid before second appeal, 638 *g*.
interlocutory. See, *Interlocutory costs*.
in supplementary proceedings, 577.
in justice's court, 80 *i*.
on motion for new trial, 480 *i*.
on appeal from order granting or refusing a new trial, 481 *g*, 686 *l*.
against corporation, how collected, 808.

Counsel, when liable to arrest, 363, 367 *b*.
cannot be bail, 378 *b*.
to endorse papers on taking a default, 878.
agreements as to compensation, 581 *h*.
right to address jury, 465 *e*.
only one on each side to be heard in court of appeals, 843.
admission and examination of, 849.
number of, on trial of issues of fact, 860.
on hearing at general or special term, 878.
advice of, how sworn to, 857, 461 *e*.
to stand to examine witness, 860.
witness not entitled to, 503 *i*.
See, *Attorney*.

Counter-claim, defendant may set up in answer, 267.
what may be set up as, 287.
when allowed, 287 *h*.
is broader than set-off, 288 *b*.

Counter-claim—*continued.*
when disallowed may be the subject of a new action, 289 *a.*
election between, and cross-action, 289 *h.*
in an action on contract, 292 *c.*
in an action of tort, 293 *a.*
in action by assignee, 293 *g.*
for divorce, 294 *b.*
for dower. 294 *c.*
by executor, 294.
between landlord and tenant, 294 *e.*
of lien, 294 *i.*
in foreclosure, 295 *a.*
in action on premium note, 295 *c.*
between principal and surety, 295 *d.*
vendor and purchaser, 295 *e.*
sufficiency of answer setting up a counter-claim, how determined, 290 *b.*
insufficient allegation of counter-claim, 290 *b.*
answer setting up matter as a counter-claim should state expressly it is intended as a counter-claim, 290 *c.*
requisites of counter-claim, 287 *h.*
when the statute of limitations is a bar to, 293 *c.*
judgment on, 293 *d.*
for excess over, 441.
amendment by adding, 293 *e.*
several may be set up, 287.
defendant is not obliged to set it up, 289 *g.*
where several set up they are to be separately stated, 287.
may it be met by a counter-claim in the reply?, 303 *b.*
reply or demurrer to, 302.
in reply, 303 *b.*
allowance of, on the trial, 464 *a*, 466 *a.*
discontinuance after, 632 *k.*
recovery on in justices' courts, 74 *i.*
Countermand of notice of motion, 773 *h.*
County, form of summons in action against, 156 *d.*
County courts, existing provisions of law as to, repealed, 38.
pending suits not affected by repeal of existing law, 38.
jurisdiction of, 38, 40 *b.*
as to jail liberties, 39, 40 *b.*
exclusive power to review justice's judgment on appeal, 38, 689.
County courts—*continued.*
certain provisions conferring jurisdiction on, are unconstitutional, 40 *a.*
when open, 41.
terms of, 41.
jurors in, 42.
supreme court rules apply to, 833.
new trial in, of cases arising in justice's court, 689, 690.
costs on, 716.
of Kings and Erie counties, exception as to, 40.
suits pending in mayors' and recorders' courts may be transferred to, 41 *f.*
suits in, may be transferred to supreme court, in case judge interested, &c, 40, 41 *e.*
have jurisdiction of appeals in summary proceedings to recover possession of land, 40 *a*, 689 *d.*
appellate jurisdiction of judgment under mechanics' lien law, 40 *a*, 689 *b.*
appeal from, to supreme court, 670.
of Steuben, appeal to, 41 *b.*
County judge, has power of a judge at chambers, 782.
power of, 778, 779 *d*, 781 *a*, 782, 783.
fees of, 38 *a.*
orders of, how reviewed, 670, 783, 678, 679 *i.*
may enlarge time for taking proceedings in the action, 783.
See, *Special county judge.*
County treasurer, moneys to be paid to, 894.
accounts of, how to be kept, 895.
to make an annual report, 895.
reference to examine his accounts, 895.
Court, meaning of the term, *the court* 779 *d.*
and chamber business, distinction between, retained, 36.
below, what is, on appeal, 668 *g.*
attorneys and guardians in, to be deemed such in court of appeals, 841.
verdict subject to opinion of, 648, 477, 481 *g.*
moneys brought into, 894.
order for paying moneys out of 895.
delay of, not to prejudice, 340 *b.*
trial by, 456, 484. See, *Trial by the Court.*

Court—*continued.*
of appeals, jurisdiction of, 25, 648.
additional jurisdiction of, 26 *a*.
appeals to, 25, 648.
appeals to from justices' courts, 26, 26 *b*, 651 *d*.
second appeal to, 27, 638 *g*.
papers on, 657 *d*.
either party may bring on cause for argument, 847.
cases where no appeal lies to, 649 *g*.
an appeal lies to, 649 *c*, 656 *d*.
power of, 27, 658 *a*.
after remittitur court has no jurisdiction, 666 *d*.
terms of, 27.
additional terms of, 27.
preference of causes on calendar of, 27.
judgment of, how pronounced, 27.
sheriff to provide rooms for, 28.
where to be held, 28.
how adjourned, 28.
rehearing in, 27, 28.
judgment of affirmance in, 28.
proceedings after decision of, 659 *d*.
rules of, 339.
of oyer and terminer, statutes as to, repealed, 29.
of justices of the peace, 50.
See, *Payment into court.*
Courts, enumeration of, 21.
jurisdiction of, generally, 22.
Covenant parties to action on, 119 *a*.
summons in action for breach of, 157 *m*.
answer in action on, 287 *b*.
complaint for breach of, 214 *e*.
Creditor's bill is an action, 18 *a*.
where a proper remedy before the code, relief may now be had by action, 215 *i*.
defendants in, 128.
what complaint, in nature of, should state, 215 *i*.
receiver in, 439 *j*.
supplementary proceedings substituted for, 557 *a*.
Criminal *action*, defined, 19.
cases, have preference on calendar, 876, 844.
review of, 637 *a*.
conversation, actions for, cannot be brought in justice's court, 54.
to be brought within six years, 97.
costs in, 591.
is an injury to the person, 364 *a*.
See, *Debtor confined for crime.*
Current account, time of limitation in actions to recover balance of, 98.
Curtesy, tenant by, interest of, how calculated, 816 *e*.
Customs. See, *Collector of Customs.*

D.

Damages, double and treble, 475 *a*.
severance of, 475 *b*.
contingent or conditional, 475 *f*.
rate of, where recoverable, 514.
in libel, 331 *g*.
pleading in action to recover property distrained for, 331.
admission as to, 339 *c*.
defendant's, jury may assess, 476.
defendant may offer to liquidate, 734.
by reason of injunction, 406, 408 *g*.
not to exceed amount claimed, 473 *f*
assessment of, 442, 446.
See, *Special damage, Unliquidated damages.*
Date *of issue*, 888 *j*, 850 *f*, 870, 504 *d*, 460 *b*.
of complaint, 193 *d*.
Death *of party to action*, effect of, 133, 136, 144 *c*, 802, 816 *e*, *f*, *g*, 824 *m*, 825 *b*, 860 *e*.
effect on time of limitation, 102.
after report of referee, 500 *k*.
pending a reference, 500 *j*.
pending supplementary proceedings, 567 *e*.
pending an appeal, 644 *h*, *i*, 137 *c*, 639 *f*, 678 *c*.
pending a motion, 773 *i*.
after verdict, 134.
after arrest on execution against the person, 529 *g*.
after return filed in court of appeals, 639 *f*
of referee, 496 *c*.
of attorney, 850.
of judgment debtor, execution after, 522 *e*.
proceedings after, 720.
creditor, execution after, 522 *f*.
of persons on whose life any particular estate depends, proceedings to ascertain, not affected by code, 835.
by wrongful act, parties to action for, 118 *d*.
summons in actions for, 157 *f*.
complaint in action for, 222 *h*.
assignment of claim for, 112 *b*.
of justice, whose judgment is appealed, effect of, 697, 699.
or removal of sheriff, 535 *a*.
of judge, 782.
See, *Scire facias.*

De bene esse. See, *Conditional Examination.*
Debtor to judgment debtor, *may* pay amount of his indebtedness to sheriff in certain cases, 564.
examination of in supplementary proceedings, 565.
confined for crime, code does not apply to attachments against, 835.
petition for discharge of, from imprisonment, cannot be heard by judge at chambers, 37.
See, *Absent debtors, Concealed debtors, Imprisoned debtors, Insolvent debtors, Joint debtors.*
Deceased person, costs on reference of claim against, 622, 624.
judgment debtor, proceedings against heirs and devisees of, 719.
judgment debtor, execution against property of, 522, *e.*
judgment creditor, execution in favor of, 522 *e.*
representative of, who is, 756 *e.*
Deceit, assignment of right of action for, 111, *k.*
See, *Fraud.*
Decree, time for commencing action on, 96.
of surrogate, appeals from, regulated, 871.
See, *Judgment.*
Deed, assignment of right of action to set aside, 112 *c.*
See, *Fraudulent deed.*
Default *of answer,* when judgment may be taken for, 441, 858.
when plaintiff may be required to give security before taking judgment for, 442.
is waived by amending the complaint, 340 *c.*
in court of appeals, for not serving copies of case, or neglecting to appear, 843.
notice of judgment by, to be given, 844.
order or judgment by, for not appearing to oppose motion, 773 *m.*
counsel taking, to endorse paper containing proof of service, 878.
in proceedings to obtain mandamus or prohibition, 877.
notice of retainer after, 854 *d.*
judgment by, not allowed in action for divorce, 868.
Default—*continued.*
entering order for, not necessary, 813 *g.*
opening judgment by, 168, 173 *e*, 448 *e*, 678 *k.*
appeal from judgment by, 675 *k.*
review of order on motion to open, 681 *f*, *g.*
See, *Inquest.*
Defect *of parties,* demurrer for, 260 *e*
See, *Errors and defects, Mistake.*
Defence, meaning of, 277 *e.*
occurring after commencement of action, 281 *g.*
mitigating circumstances are not, 278 *b.*
after judgment, 443.
in bar and in abatement, 297.
sham and irrelevant, may be struck out, 298.
See *Answer, Equitable defences, Irrelevant defences, Partial defences, Sham defences, Several defences.*
Defendant, party adverse to plaintiff, is, 85.
who to be, 127.
who is not a, 106 *a.*
death of, 136, 444 *c*, 133, 802, 816 *g*, 825 *b.*
pleadings on part of, 255.
character in which sued, to be alleged in complaint, 191 *a.*
appearance by, 177.
See, *Appearance.*
entitles to notice of all ordinary proceedings in the action, 442, 444 *e.*
does not entitle him to notice of application for provisional remedy, 790 *e.*
notice of application for judgment to, 442.
may treat copy complaint served as a true copy, 267 *c*, 776 *g.*
rights of, where served by publication, 168, 173 *e*, 442.
when he may demur, 257.
cannot move for injunction, 399 *d.*
order on, to satisfy amount admitted due, 431, 439 *k.*
affirmative relief to, 506, 509 *d.*
judgment against one of several, 506, 507 *a.*
damages of, jury to assess, 476.
when papers need not be served on, 790.
charging in execution, 530 *i.*
costs to, of course, 596.
where several defendants, 597.
offer of, to compromise, 781.

Defendant—*continued.*
in person, to endorse residence, &c., on papers, 853.
when to furnish copy pleadings to court, 471.
See, *Absent Defendant, Co-defendant, Parties, Several Defendants, Arrest, Offer, Confession of judgment.*
Deficiency *on mortgage*, county court has jurisdiction for collection of, 39.
Definite. See, *Indefinite.*
Definitions *and divisions*, 17.
Delivery *of personal property.* See, *Claim and delivery of personal property.*
Demand that trial be had in proper county, 145, 146 *a.*
of copy complaint, when and how made, 158, 159 *c.*
of relief, 253. See, *Relief.*
of admission of documents, &c. 735.
of particulars, 315.
against ships and vessels, not affected by the code, 835.
when to be alleged, 246 *g.*
Demised Premises, proceedings for recovery of, not affected by the code, 835.
Demurrer, or answer, only pleading on part of defendant, 255.
within what time to be served, 255.
differs from an answer, 256 *a.*
regularly served, cannot be treated as a nullity, 256 *f.*
decision on, how appealed from, 777 *i*, 778 *a.*
to complaint, in what cases, 257.
when proper, 257 *a.*
several causes of, 258 *i.*
appropriate cause of, to be stated, 259 *a*, 262.
bad in part bad altogether, 259 *e.*
may be to all complaint or to any one alleged cause of action, 262.
may assign several grounds of, 258 *i.*
can only be for cause mentioned in the code, 258 *b.*
that court has no jurisdiction of the person, 260 *a.*
that plaintiff has not legal capacity to sue, 260 *b.*
that another suit pending for same cause, 260 *d.*
for defect of parties, 260 *e*, 261 *a*, *b*, *c.*
for improper joinder of cause of action, 261 *d.*
Demurrer—*continued.*
for not stating facts sufficient to constitute a cause of action, 261 *g.*
must specify the grounds of objection, 262.
objections not appearing on face of complaint to be taken by answer, 264.
grounds for, when deemed waived, 265.
and answer, 256 *e*, 298.
for improper joinder of causes of action, proceedings after, 263.
amendment after, 263.
to answer, in what cases, 302, 303 *a.*
will be allowed after denial of motion to strike out answer as sham and irrelevant, 301 *g.*
to insufficient answer, omitting, consequences of, 304 *d.*
to supplemental pleading, 358 *b.*
to counter-claim, 302
to reply, 304, 305 *b.*
judgment on, 305 *d.*
section 160 not applicable to, 320 *b.*
frivolous, judgment on, 450. See, *Frivolous Demurrer.*
judgment for want of an answer, after overruling, 443 *c.*
costs on amendment after, 602 *b*, 606 *d.*
to one of several defences, judgment on, 515 *d.*
decision on, is it a judgment or order, 684 *b*, 685 *f*, 777 *i.*
appeals to general term from order overruling, &c., 679, 684 *b*, 685 *f.*
amendments after, 344, 345.
in justices' courts, 70, 73 *a.*
See, *Frivolous demurrer.*
Denial, how made, 266, 267 *g.*
of knowledge, 268 *d*, 269 *a.*
on information, 270 *a.*
in disjunctive, 270 *c.*
alternative, 270 *e.*
of part of cause of action, 271 *a.*
See, *General denial.*
Departure, what is, 305 *c.*
Deposit, *in lieu of bail*, defendant may be discharged from arrest on, 377.
sheriff to give defendant certificate of, 383.
to be paid into court, 383.
substituting bail for, 383.
disposition of, 384.
of moneys, &c., in court, 894.
order for payments of, out of court, 895.

Deposit—*continued.*
with trust company of New York, account of, how kept, &c., 895.
in lieu of security, on appeal, 660, 662, 664.
Deposition to be used on motion, 44 *note*, 746 *c*, 757 *g*, 779.
See, *Commission*, *Conditional examination.*
Descent cast, effect of, 95.
Destroyed note, complaint in action upon, 211 *h*.
Determination, *complete*, ordering parties to be brought in to effect, 139.
of ultimate right of the parties, power of the court to make, 506.
of conflicting claims to real property, 817.
to personal property, 390.
by interpleading, 139, 140 *d*.
See, *Final determination*, *Judgment.*
Devise, contesting validity of, in action for partition, 814 *b*.
Devisees, proceedings by and against, not affected by the code, 835.
of deceased judgment debtor, proceedings against, 519.
costs in proceedings against, 600.
See, *Joint debtors*, *&c.*
Director *of moneyed corporations*, provisions as to limitations of actions, not to apply to actions against, 103.
arrest of, 363.
Disabilities, what are, 95, 101, 102.
effect of, 95, 101, 133.
defendant out of State, 90 *b*, 95, 101.
of aliens, 94 *b*.
by death of party entitled to sue, 102.
several, effect of, 103.
not applicable to certain actions, 103
of judge, &c., 782 *f*.
See, *Inability.*
Disbursement. See, *Costs.*
Discharge, under bankrupt or insolvent act, defence of, 280 *h*.
from arrest on execution, effect of, 529 *h*.
Discontinuance *of action*, of course, on payment of costs, 630 *h*.
before notice of retainer, 631 *d*.
without costs, 631 *e*.
not a bar to a new action, 632 *h*.
is a step in the cause, 632 *i*.
Discontinuance—*continued.*
effect of, 632 *j*.
after counter-claim, interposed, 632 *k*.
in action to dissolve partnership, 633 *a*.
in foreclosure, 633 *d*.
after answer of action pending, 634 *c*, *e*.
after defence of infancy, 634 *f*, 597 *a*.
action on promise to enter, 55.
in justices' court, 62, 68.
after order for new trial, 633 *f*.
of action for installment on a bond, 633 *g*.
after defence of forgery, 634 *a*.
of proceedings against insurance companies, 634 *b*.
after supplemental complaint, 634 *j*.
without notice to attorney, 634 *k*.
of appeal, 634 *l*, 638 *h*.
of actions by overseers, 634 *g*.
of action to recover personal property, 390 *g*.
as to one defendant at the trial, 634 *i*.
by executor, &c., 623 *e*.
is a final determination, 441 *a*.
in justice's court, by reason of title coming in question, 68.
election as to, 634 *m*.
setting aside, 635 *a*.
Discovery, action for, abolished, 744.
of property, order for, 555.
of death of tenants for life, 835.
of books, *papers*, *&c.*, provisions of revised statutes as to, 736 *b*.
code not a substitute for provisions of revised statutes, 735.
superior court, court of common pleas, and mayors' and recorders' courts may order, 46, *b*, *d*.
views of the superior court on application for, stated, 737 *b*.
at what stage of the action the order may be made, 738 *g*.
who may make an order for, 738 *h*.
when the order will be granted, 738 *i*.
to prepare pleading, 855, 740 *f*, 741 *h*.
order for, what to state, 855.
to operate as a stay, 856.
further, when ordered, 741 *a*.
motion for, how made, 741 *f*, 855.
costs on motion for, 742 *f*.
of inspection, 742 *g*.
inspection, 743 *a*.
appeal from order for, 743 *a*.

Discovery—*continued.*
order for, how enforced, 856.
proceedings for, is not an action, 18 *b*.
under subpœna duces, 747 *a*.
Dishonoring note, complaint against banker for, 212 *a*.
Dismissal *of appeal, for want of prosecution*, in the court of appeals, 840.
on appeals from justices' court, 695 *j*, 700.
to general term, 675 *k*.
of complaint, for not serving copy, 506, 510 *d*.
a substitute for judgment, as in case of non-suit, 468 *a*.
referee may order, 497 *f*.
for not filing security for costs, 590 *c*.
for not proceeding in action, 138 *h*, 510 *d*, 511 *c*, 859.
is a judgment, 512.
at circuit without putting cause on calendar, irregular, 459 *g*.
effect of on injunction, 400 *e*.
See, *Nonsuit*.
Disposing *of property*, confessing judgment is not, 723.
Dissolved companies, receiver of, 438.
actions against shareholders, &c., in, 118 *a*.
Distrained *property*, answer in action to recover, 331.
cattle, &c., doing damage, proceedings as to, not affected by the code, 836.
District, the word defined, 882.
courts, in the city of New York, appeals from, 47, 922.
transfer of actions from, 923.
may issue commission, 758 *e*.
supreme court rules apply to, 834 *b*.
Division, of act, 19.
of actions, 19.
of remedies, 17.
of causes of action, on allowance of demurrer for misjoinder, 345.
of cause of action. See, *Splitting cause of action*.
Divisions *and definitions*, 17.
Divorce, when superior court has jurisdiction of actions for, 46.
summons in action for, may be served by publication, 168.
section 72 does not apply to actions for, 87 *b*.
complaint for, 897.
answer in action for, 282 *a*.
Divorce—*continued.*
counter-claim in action for, 294 *b*.
joinder of causes for, 333 *l*.
alimony, 898 *l*.
counsel fee for wife, 898 *l*.
proof of marriage and residence in, 899 *o*.
cruel and inhuman treatment, what amounts to, 900 *b*.
judgment by default or consent cannot be taken in, 868.
place of trial of, 145 *d*.
when issues need not be framed, 456 *d*.
trial of issues in actions for, 862.
proceedings in, not to be published, 901.
reference to take proof of material facts stated in the complaint, 897.
order for reference, 495, 900.
objections to legitimacy of children to be stated in complaint, 901.
manner of settling the issues in, 862.
examination of parties in, as witnesses, 745 *l*, 900.
judgment in, 867, 900 *c*, 901.
vacating judgment of, 900 *d*.
defence in action for, 900.
questioning legitimacy of children, 901.
See, *Alimony*.
Docket *of justice's judgment*, 69, 84.
Docket of judgment, entry on, of the words, "*secured on appeal*," 518.
on petition, in what cases, 878.
Docketing judgment, on filing judgment-roll, 518.
of justice's court, 69.
Documents, appeal from judgment for delivery of, 664.
See, *Admission, Discovery, Production*.
Dog, action for injury by, 224 *h*.
Domestic, exemption on judgment for work by, 550 *i*.
Domicile. See, *Residence*.
Dormant execution, 518 *d*, 535 *b*.
Dormant partner, to join as plaintiff, 126 *h*.
Double *costs*, 585.
damages, 475 *a*. See, *Damages*.
time, 790.
Dower, tenant in, interest of, how calculated, 896.
complaint for admeasurement of, 827 *g*.
defence in action for, 294 *e*, 827 *a*.

Dower—*continued.*
costs in action for, 600.
admeasurement of, 39.
inchoate right of, 816 *b*, 864 *j*.
when not barred, 888 *k*.
in surplus money, 890 *g*.
ejectment for, 827 *b*, *c*, 294 *a*.
limitation of action for, 90 *a*.
not assignable, 112 *i*, *j*.
Drunkard. See, *Habitual Drunkard.*
Due, answer admitting part of claim to be, 432, 439 *k*.
Duly, meaning and effect of, 196 *a*, 326.
Duplicity, not a ground for demurrer, 258 *h*.
section 150. a prohibition of, 296 *b*.
Duty, allegation of, 197 *b*.

E.

Ejectment, statutes relating to, 819 *b*.
when it lies, 819 *c*.
place of trial of, 143.
attorney for plaintiff to produce his authority, 106 *c*, 820 *d*.
time of limitation in, 91.
by husband and wife, 820 *e*.
for lands conveyed during infancy, 820 *f*.
between tenants in common, 820 *g*.
who may be named as plaintiff, 106, 820 *c*.
arrest in action of, 371 *j*, 528 *f*.
who to be defendants, 820 *i*.
claim of title, what amounts to, 821 *b*
complaint in, 821 *c*.
how to allege title, 821 *d*.
describe premises, 822 *a*.
allege unlawful withholding, 822 *b*.
form of, held sufficient, 822 *c*.
joinder of causes of action, 822 *e*.
may unite claim of possession and mesne profits in one action, 822 *g*.
not to contain several statements of one cause of action, 823 *a*.
may unite claim for possession, and to set aside fraudulent deed, 823 *b*.
cannot unite trespass and ejectment and trespass *quare clausam fregit*, 823 *g*.
for non-payment of rent, 823 *c*.
equitable defence to, 823 *h*.
defence by landlord, 824 *l*.
answer of title in defendant, 824 *b*.
answer in action of, by the people, 824 *c*.

Ejectment—*continued.*
adverse possession, 824 *d*.
proof of title, 824 *f*.
receiver, 824 *g*.
restraining by injunction, 824 *h*.
waste pending, 824 *i*.
plaintiff taking possession pending, 824 *j*.
change of occupancy pending the action, 825.
proceedings where plaintiff's title terminates pending the action, 825 *d*.
death of plaintiff, 824 *m*.
defendant, 825 *b*.
new trial in, 825 *e*.
mesne profits on restitution, 825 *g*.
verdict, recovery, 826 *b*.
amendment on trial of, 351 *f*.
judgment, effect of, 825 *k*.
writ of assistance, 826 *g*.
execution, 826 *h*.
by purchaser at sheriff's sale on execution, 826 *j*.
on surrogate's decree, 827 *a*.
landlord defending for his tenant liable for costs, 629 *f*.
offer in, 734 *a*.
affidavit of merits is necessary to prevent an inquest, 860 *f*.
not to be brought by or against receiver unless by order of the court, 435 *j*.
for dower, against whom it lies, 827 *b*.
parties to, 827 *b*.
limitation, 827 *d*.
counter-claim, 827 *c*, 294 *c*.
defence, 827 *c*, 294 *c*.
Election, *day of*, elector cannot be served with process on, 167 *a*.
judgment may be rendered on, 79 *e*.
of remedy, a party suing in two courts for the same cause of action will be made to elect in which he will proceed, 279 *e*.
of remedy as to form of action, 179 *b*.
of count or statement in complaint, 252 *b*.
between counter-claim and cross-action, 289 *g*.
Endorsement of papers, 853.
of papers on taking a default, 878.
Enlarging time *to take proceedings*, time to take any proceedings except an appeal may be enlarged, 783.
to serve complaint, 159 *d*.

Enlarging time—*continued.*
to answer, 255 *a*, 858.
can the time to appeal be enlarged? 645 *i*.
by order for discovery, &c., 856.
a judge at chambers cannot enlarge the time to make a case *after* the time for making it has expired, 783 *d*.
orders for, how granted, 858.
to make a case, 783 *d*, 781.
how computed, 787.
See, *Time.*
Entitling affidavit, 785.
order, 775 *d*.
motion papers, 880 *b*.
Entry, *or right of entry*, action after, 92.
of appearance, when allowed, 853.
of order, 687, 684 *a*, 775 *e*, 851, 851 *b*, 911.
of judgment, manner of, 506.
the decision of the court in writing is not, 516 *e*.
not until all issues disposed of, 515 *c*, *d*.
after offer, 515 *b*, 734 *b*.
fees for, 618.
on petition, 878.
in mortgage cases, 884.
in judgment book, 516.
See, *Docketing judgment.*
of satisfaction, how effected, 551 *g*.
See, *Forcible entry.*
Enumerated motions, what are, 870.
when to be noticed, 870.
papers to be furnished on, 870, 871.
when motion may be made to strike from the calendar, 871.
Equitable *bail.* See, *Ne exeat.*
defences, 283 *h*, 823 *h*.
relief, 253 *a*, 333 *c*, 334 *a*, *k*, 823 *b*.
remedies, distinction between, and legal abolished, 17.
Equity *cases*, meaning of this phrase, 49 *a*.
reference of, 494 *e*.
new trial in, 480 *i*.
Erie county, first subdivision of section 30 not to apply to, 40.
motions in actions triable in, 780 *b*.
Orleans county may be made in, 780 *a*.
Error writ of, 637 *a*. See, *Appeal.*
Error *in fact*, appeal for, 701, 711 *a*, 705 *d*.
Errors *and defects* when to be disregarded, 357.
See, *Amendments.*
Escape, time of limitation in action for, 98.
re-arrest after, 531 *d*.
action for, 55, 531 *d*, 835 *a*.
answer in action for, 282 *g*.
Eviction, defence of, 288 *g*.
Evidence of foreign laws, 796 *a*.
of foreign public records, 796 *a*.
provisions as to, applied to justices' courts, 72.
on the trial of an issue of fact by the court, how reviewed, 486.
pleadings as, 338 *f*.
pleadings not to be, in criminal proceeding, 307.
examination in supplementary proceedings not to be, in criminal proceedings, 557.
See, *Admissions, Examination of parties, Examination of witnesses.*
Examination *of parties*, only in the cases prescribed by the code, 744.
in matters of account as agent, 745 *a*.
under provisions of revised statutes as to perpetuating testimony cannot be had, 750 *c*.
may be on the trial, conditionally or on commission, 747.
before trial, 747.
defendant against his co-defendant, 752.
and production of books, &c., under subpœna duces, 747 *a*.
in actions for divorce, 745 *l*.
after order for new trial, 747 *e*.
attendance for purposes of, how compelled, 749.
punishment for refusing to submit to, 750.
testimony on, may be rebutted, 751.
credit to be given to the testimony of, 744 *c*.
on their own behalf when, 756.
for whose benefit action is prosecuted or defended, 751.
where assignor of thing in action is examined, 759.
of co-plaintiff or co-defendant, 752.
of joint contractors, or parties united in interest, 752.
of witnesses, witness not excluded by reason of interest, 755.
party for whose immediate benefit action is prosecuted or defended, 751.
assignor of cause of action, 759, 758 *e*.

Examination—*continued.*
at circuit, mode of, 860.
court may control, 466 *d.*
on a motion, 44 *note.*
witnesses and parties, by commission, 756 *k.* See, *Commission.*
conditionally, 766 *h.* See, *Conditional examination of witnesses.*
on interrogatories by consent, 770 *h.*
orally, on motion, 44, 746 *c*, 757 *g*, 779.
of applicants for admission to practice as attorneys, &c., 849.
in supplementary proceedings, 568. See, *Supplementary Proceedings.*
Exceptions, to a matter of law arising on the trial of an issue of fact by the court, may for the purpose of an appeal be taken within ten days after written notice of the judgment, 486.
to be reduced to writing, or entered in the minutes of judge, 484.
how stated in a case, 865.
form of, and what to contain, 471 *b*, 866.
settlement of, 865.
filing, 867.
when deemed waived, 867.
to be filed *nunc pro tunc*, 487 *d.*
ordering to be heard at general term, 471 *f.*
making case does not extend time for, 487 *d.*
to sureties on appeal, 667.
on claim and delivery, 894.
not necessary in justice's court, 702 *a.*
order extending time to make is not a stay of proceedings, 781 *a.*
to bail, 881.
Exchange of causes on calendar, 844, 845.
Execution, *of course*, within five years, 521.
by order, after five years, 523.
cannot issue after the death of the judgment creditor, 523 *a.*
should not issue until record filed, 521 *b.*
sheriff to indorse, 534 *f.*
kinds of, 526.
form of, 531, 533 *a.*
to be deemed process, 526.
need not be sealed nor subscribed, except as prescribed, 526.
to what counties it may issue, 526.

Execution—*continued.*
may issue to several counties at the same time, 526.
on judgments entered before July, 1848, 521 *a.*
may issue immediately after judgment perfected, 521 *b.*
when it may issue after five years, 523.
against joint debtors, 533 *b.*
the property of a deceased judgment debtor, 522 *a.*
in favor of deceased judgment creditor, 522 *i.*
against executors, 522 *b*, 532 *f.*
against New York city, 522 *a.*
after discharge under insolvent debtor's act, 523 *c.*
on satisfied judgment, 523 *d.*
against husband and wife, 523 *g.*
charging defendant in, 530 *i.*
debtor of execution debtor may pay, 564.
leave to issue, how obtained, 523.
against the person, 527, 528 *a.*
on justice's judgment, 529 *b.*
how discharged, from, 529 *h.*
effect of discharge, from, 530.
form of, 531.
return of, in what time, 533.
how compelled, 852.
may be by mail, 533 *e.*
should be to the clerk with whom judgment-roll is filed, 533.
may be to clerk or attorney, 533 *e.*
existing provisions of law, applied to, 534.
when may be levied, 534 *h.*
sheriff bound to levy, 534 *g.*
what attorney may issue, 534 *i.*
priority of, 534 *k.*
dormant, 535 *b*, 518 *d.*
indemnity to sheriff on, 534 *g*, 539 *e.*
death or removal of sheriff, 535 *e.*
sheriff's fees and poundage, 535 *f.*
may be attached for not paying over money, 536 *a.*
lien of, on personal property, 536 *c.*
what personal property may be levied on, 536 *f.*
levy on personal property, how made, 538 *e.*
sale of personal property on, 539 *b.*
levy on and sale of real estate, 540 *f.*
leaseholds, 542 *j.*

Execution—*continued.*
redemption of real estate from sale, 547.
what property is exempt by statute from, 548 *b*.
for costs on a motion, 621 *i*.
effect of appeal upon, 666 *b*, 696.
on judgment by confession, 729.
on judgment of justice's court, 71, 81 *c*.
proceedings supplementary to, 555. See, *Supplementary proceedings.*
Executors *and administrators*, action by, on note, for debt of testator, 127 *g*.
provisions of revised statutes as to, not repealed, 835.
in actions by or against, those who have not administered need not be joined, 127 *f*.
parties to actions against, 116, 127, 133 *b*.
death, of pending action, 136 *b*.
complaint by and against, 188 *a*, 217 *c*.
set-off by, 294 *d*.
costs in actions by or against, 622, 626 *h*.
cannot be sued in justices' courts, 54.
may sue in justices' courts, 55.
may sue without joining party in interest, 116.
may sue in his own name, 238 *c*.
answer by one for all, 267 *f*.
judgment against, 516 *b*.
may appeal without giving security, 665, 666 *d*.
execution against, 522 *b*.
bond, action on, 55, 208 *b*.
reference of claims against, 622, 624, 625, *f*.
Exempt property, 548.
Exemption law retained by the code, 837.
Existing *practice*, when it may be adopted, 832.
rules abrogated, 833.
suits, appeals in, 636 *a*, 828.
no writ of error allowed in, 828.
execution in, on judgment docketed before July, 1848, 521, 529.
application of code to, 829.
issues of fact in county court in, 830.
section 401 does not apply to, 779 *a*.
costs in, 581 *a*, 584 *g*.
provisions and rules relating to, 829, 902.
Ex-parte order, how vacated or modified, 638.
no appeal from order granting or refusing, 680 *e*.
for examination of judgment debtor, how vacated or modified, 561 *l*.
need not be entered, 687 *c*.
when may be made, 778.
proceedings stayed by, 778, 780 *e*. See, *Order.*
extending time to answer, 255 *a*, 858.
appeal, 783.
See, *Enlarging time.*
Expectancy, not assignable, 111 *g*, 112 *i*, *j*.
Extending time. See, *Enlarging time.*
Extraordinary *terms*, governor may appoint, 34, 829.
Extra allowance. See, *Allowance.*

F.

Factor, when liable to arrest, 363.
See, *Foreign factor.*
Fact, what is, 193 *e*.
See, *Questions of fact. Issue of fact. Error in fact.*
Failure *of proof*, what is, 343.
False *imprisonment*, action for, cannot be brought in justices' courts, 54.
must be within two years, 98.
complaint for, 217 *d*.
costs in action for, 581 *j*, 591.
representation, to induce credit, complaint for, 218 *a*.
return, action for, 56.
answer, 298 *c*. See, *Sham answer.*
warranty, complaint for, 218 *b*.
action for is on contract, 364 *d*.
Family, what is, 551 *f*.
Federal courts. See, *United States' courts.*
Fee bill, abolished, 580. See, *Costs.*
Fees, judges of superior court and New York common pleas not to receive, 48.
for serving notice of no personal claim, 160 *b*.
for serving summons, 176 *d*, *e*.
in justices' courts, 54.
of clerks, 618.
of county judges, 38 *a*.
of referees, 501 *a*, 619, 779.
to witnesses, 616, 617, 577, 744 *d*.
of sheriff on attachment, 430.
on execution, 535 *f*.
may be required, in advance, 792 *c*.

Fees—*continued.*
to party attending as a witness, 744 *d*, 617 *f*.
for copies of papers, 618.
trial, 602 *f*, 919.
to a justice for his return, 697.
of attorney and counsel, 580, 581 *h*. See, *Attorney*.
of commissioners in lunacy, 896.
assignment of claim for, 110 *c*, 110 *e*.
See, *Term fee*.
Feigned issues abolished, 87.
substitute for, 87.
new trial of, 479 *k*, 862.
former practice on, 87 *a*.
allowance on, 609 *d*.
See, *Issues*.
Female, when she cannot be arrested, 364, 372 *h*, *i*, 366 *d*.
Ferries, jurisdiction of county court as to, 39.
Ferry licence, assignment of, 111 *q*.
Fictitious *name*, party may be sued by, when real name unknown, 356.
Fiduciary capacity, what it is, 367, 368.
arrest for money received in, 363, 367.
Filing *transcript of judgment*, effect of, as a lien, 518.
perfecting an appeal and giving security does not prevent the respondent from, 518.
of justices' courts, 69, 84.
summons and pleadings, 791.
complaint, 169, 173 *a*.
notice and affidavit in claim and delivery, 397.
notice of lis pendens, 161, 162 *f* 853 *a*, 885 *c*.
notes of issue, 870.
case, 867.
undertakings, 794, 851.
affidavits, 851.
affidavits used on motion, 687 *c*, 774 *a*, 851.
papers, 851.
copy, in lieu of original, 794.
orders as judgments in certain cases, 878.
See, *Recording*.
Final determination, what is a, 441 *a*.
Final order defined, 680 *c*.
appeal from, to court of appeals, 25, 654 *k*.
Finding of facts, 486, 488 *a*.
of referee, 503 *c*.
Fine, power of county court to remit, 39.
New York common pleas to remit, 46 *c*.
Fine—*continued.*
arrest in action for, 363.
See, *Forfeiture*, *Penalty*.
Fire company, action by, 84 *a*, 91 *c*.
Firm. See, *Partnership*.
First judicial district, proceedings commenced before one judge in, may be continued before another, 36.
motions in, 778, 780 *d*, 782 *a*.
rules of court in, 907.
rules of supreme court in, 907.
rules as to terms and calendars, 907.
position on calendar of causes called and passed, 908.
special circuit calendar for short causes, 908.
preferred causes, 909.
mortgage or sale by religious corporation, 909.
sales by order of the court, 909.
trial fees, when collected, 910.
substitution of attorney, 910.
special term and motions, 910.
admission of attorneys, 911.
entry of orders, 911.
regulation of calendar, 911.
See, *Superior court*, *Common pleas*.
Fisheries, jurisdiction of county court as to, 39.
Folios of case in court of appeals, to be numbered and printed on margin, 841.
the like in supreme court, 857.
of pleadings, &c., to be marked, 857.
Forcible entry, costs in proceedings for, 585.
Foreclosure *of mechanics' lien*, complaint for, 219 *c*.
of mortgage, county court has jurisdiction of, 39, 40 *a*.
parties to actions for, 129 *d*.
publication of summons in, 169.
appointment of guardian for infant defendant, 124.
place of trial of, 143, 143 *a*.
complaint for, 218 *c*.
answer in, 283 *a*, 295 *a*.
discontinuance of action for, 633 *d*.
actions for, will not be consolidated, 336 *f*.
section 304 not applicable to, 596 *c*.
allowance in addition to costs in actions for, 607.
notice of *lis pendens* in actions for, 161, 162 *f*.
referee's report of amount due must be confirmed before judgment can be entered, 883, 889

Foreclosure—*continued.*
staying sale on, 894.
appeal from order setting aside sale on, 681, *e*, *g*, 682 *b*, 683 *i*.
by advertisement, not affected by the code, 836.
See, *Mortgage cases.*
Foreign consul. See, *Consul.*
Foreign corporation, *action against*, in what court and by whom it may be brought, 45 *a*, 797.
is a proceeding against property only, 798 *a*.
can only be brought where the cause of action arose, or the corporation has property, within this State, 798.
receiver of, 46.
is a person out of the State, and statute of limitation does not run against, 101 *d*.
action by officer of, 119 *b*, 120.
residence of, 145 *b*.
incorporation of, how proved, 796 *e*.
statute of limitations does not apply to actions against, 89 *l*, 800 *e*.
by appearance in justice's court confers jurisdiction, 55.
service of summons on, 168 *b*.
by publication, 168.
to appoint a person on whom service to be made, 168 *b*, 800 *d*.
who is a managing agent of, 164 *a*.
attachment against the property of, 414.
effect of code on existing laws relating to actions against, 798 *b*.
may sue another foreign corporation, 799 *b*.
must give security for costs, 393 *b*, 588 *c*, 682 *e*.
complaint in suit by, 213 *a*, 800 *f*.
pleadings in actions by or against, 800.
See, *Corporation.*
Foreign executor, power of, 219 *a*, 678 *f*.
suit against, 22 *c*.
Foreign *judgment*, how pleaded, 326 *b*.
records, how proved, 796 *b*, *e*.
laws, how proved, 795, 796.
how pleaded, 219 *e*.
Foreign factor, action against, 233 *c*.
See, *Factor.*
Foreign government, parties to actions by or against, 120 *f*, *g*, 129 *g*.
assignment of claim against, 109 *j*.
jurisdiction of actions by and against, 22 *c*.
to give security for costs, 588 *b*.
Forfeited recognizances, power of county court to remit, 39.
costs of proceeding on, in New York city, 582 *e*.
power of New York common pleas as to, 46 *c*.
proceedings on, the code applied to, 20 *a*, 836 *c*.
provisions of revised statutes not repealed, 835.
See, *Recognizances.*
Forfeiture, action for, within what time to be commenced, 98, 99.
provisions of revised statutes not repealed, 835.
place of trial of action to recover, 144.
judgment of, against corporation, 808.
to people, actions for, 809.
Form *of action*, abolished, 85.
no embarrassment, as to, 180 *a*.
of pleading, abolished, 179.
of summons, 153, 157, 167, 172 *b*.
of complaint, 185.
Forma pauperis. See, *Poor person.*
Former practice, when it may be adopted, 832, 903.
inconsistent with the code abrogated, 832, 833.
Franchise, action against persons claiming, 804.
penalty for usurping, 807.
Fraud, certain actions for, may be in courts of justices of the peace, 51, 56.
when right of action accrues in cases of, 97.
time of limitation in actions for relief on the ground of, prescribed, 97.
on service of process, 167 *c*.
how alleged in pleading, 219 *f*.
defence of, 284 *a*.
arrest when defendant has been guilty of, 363, 369.
assignment of claim of damages for, 110 *a*, *r*.
See, *Deceit.*
Fraudulent certificates, action to cancel, 128 *b*.
Fraudulent deed, complaint to set aside, 240 *i*, 323 *b*.
assignment of right to set aside, 112 *a*.
parties to action to set aside, 128 *d*.
Fraudulent representations, assignment of right of action for, 110 *a*.
Freight, action for, 108 *b*.

Frivolous *demurrer, answer or reply*, party prejudiced by, may move for judgment on, 450.
what is a frivolous pleading, 450 *c*, 452.
answers adjudged to be frivolous, 450.
motion for judgment on, 452 *a*.
costs on such motion, 453 *f*.
decision on, 453 *d*, 778 *a*.
appeal from order for judgment on frivolous pleading, 453 *h*, 674 *b*, 680 *a*, 684 *c*.
decision on motion for judgment on, is an order, 453 *d*, 778 *a*.
Fuel, *for courts*, supervisors to furnish, 37.
Fulton *and Hamilton*, when considered one county, 33.
Further account may be ordered, 315, 316.
Further time. See, *Enlarging time.*
Future debt, assignment of, 110 *f*.

G.

Gaming, assignment of right of action arising from, 112 *f*, 108 *i*, 111 *j*.
complaint for money lost by, 234 *f*.
See, *Wager.*
General *denial*, what evidence is or is not admissible under, 273 *b*, 274 *d*.
when and how made, 268 *a*.
striking out, 298 *c*.
guardian, security to be given by, 880.
how appointed, 880.
proceedings on petition for, 881.
See, *Guardian, Partition, Special Guardian.*
and special term, number of counsel on hearing at, 878.
distinction between powers of court at, 33 *b*, 34 *b*.
term, appeal to, 481.
ordering exceptions to be heard at, 471 *f*.
finding of facts at, 486, 488 *a*.
terms of supreme court, number of, annually, 33.
judgment, how given at, 33.
extraordinary, 34, 829.
existing provisions of law as to, repealed, 29,
General *terms, &c.—continued.*
inability of judge to sit at, 36.
of the superior court. See, *Superior Court.*
of New York common pleas. See, *Common Pleas.*
verdict, 472. See, *Verdict.*
Goods *sold*, summons in action for, 157 *c*.
complaint to recover price of, 220 *a*.
answer in action for, 280 *i*.
Governor to appoint terms, 34, 829.
Grantee of the people, limitation of action by, 91, 92.
of real estate, action by, where grant void, 106.
Great western railroad *of Canada*, proceedings against, 415 *e*.
Guardian *ad litem, for infant*, when necessary, 123.
complaint by, 189 *b*.
answer by, 123 *c*.
appointment of, 123, 779 *e*.
should be a responsible person, 125 *a*.
married woman, husband may be, 125 *c*.
in partition suits, 812, *d*.
attorney may subscribe pleadings for, 306 *a*.
may verify pleadings, 309 *e*.
a married woman, when not necessary, 125 *a*.
liable for costs, 622.
to continue in court of appeals, 841.
accountability of, 793.
not to receive the property of an infant until he has given security to account, 793, 880.
officers of the courts to act as, 880.
not a party to the action, 105 *e*.
not necessary for a married woman, 121.
for lunatic, idiot, &c., 123 *e*.
liable for costs, 622.
duties and compensation of, 880.
who not to be appointed, 879.
not to receive funds of infant until he has given security, 880, 793.
complaint by, 189 *b*.
may be surety, on claim and delivery, 393 *b*.
to give security for costs, 587 *k*.
on appeal, 123 *g*.
See, *General guardian, Special guardian.*
Guarantee, assignment of claim on, 110 *i*.

H.

Habeas corpus, proceedings on, not affected by code, 836.
discharge from arrest on, 530 *c*.
discharge of persons from United States army on, 22 *c*, 23.
to remove proceedings, 47 *e*.
Habitual drunkard, county court has jurisdiction of, and of the estate of, 39, 41 *d*.
other powers of county court as to, 39.
parties to actions by and against, 118 *f*.
when he may sue without a next friend, 118, *f*.
service of summons on, 163, 165 *c*.
when cannot be sued unless by leave of the court, 118 *f*.
complaint against committee of, 191 *a*.
provisions of revised statutes as to, not affected by the code, 835.
Hamilton *and Fulton*, when considered one county, 33.
Harbor masters, action by, for an account, 127 *h*.
Hatchway, complaint for leaving open, 224 *g*.
Hearing on appeal from order, 686 *c*.
See, *Trial*.
Heirs, suits by and against, not affected by code, 835.
of deceased judgment debtor, proceedings against, 719.
parties to actions against, 128 *f*.
complaint against, 222 *g*.
See, *Joint debtors, &c.*
Highways. See, *Commissioners of Highways, Railroads, Turnpike roads.*
Holder *and owner*, allegation of being, 203 *a*.
Homestead, exemption of from execution, 549 *b*.
Householder, who is, 551 *c*.
Husband and wife, when they should join or be joined as parties, 121, 122.
waiver of improper joinder of, 265 *e*.
service of summons on, 167 *d*.
security for costs in actions by, when wife is an infant, 587 *k*.
order of arrest in action against, 372 *f*
judgment in action against, 231 *a*, 447 *e*, 507 *a*, 508 *a*.
Husband and wife—*continued*.
execution against, 523 *g*.
as witness for or against each other, 744 *f*, 563 *c*, 754 *f*.
See, *Divorce, Married woman, Wife, Widow.*
Hypothetical pleading, how far permissible, 277 c.

I.

Idiot, action by, and against, 118 *f*.
custody and disposition of estate of, provisions of revised statutes concerning, not affected by the code, 835.
service of summons on, 165 *c*, *d*.
Immaterial *variance*, 341 *f*, 342.
See, *Irrelevant, Variance.*
Impartial trial, change of place of trial to obtain, 148 *d*.
See, *Changing place of trial.*
Impeaching *witness or deponent*, 776 *j*, 467, 749.
Imprisoned *convict*, cannot assign debt, 112 *m*.
Imprisoned debtors, jurisdiction of county court as to, 39.
petition for discharge of, cannot be entertained at chambers, 37 *a*.
proceedings against, 106 *b*.
provisions of revised statutes as to, not affected, 835.
Imprisonment *for debt*, act as to, not affected by the code, 361.
warrant under act relating to, may issue in all cases prescribed thereby, 362 *b*.
Inability *of judge* to hold a special term, circuit court, or sit at general term, or preside at oyer and terminer, provided for, 36.
of mayor or recorder's court, 45.
of justice, 57.
of county judge to try case, 40, 41 *e*.
of county court to hear appeal, 878.
See, *Disability.*
Inconsistent statutory provisions repealed, 832.
rules and practice abrogated, 833.
defences, 297 *a*.
Indefinite *and uncertain pleading*, may be made more definite and certain by amendment, 320.
what is, 323 *f*.
uncertainty is to be remedied by motion, 325 *b*.
motion for amendment, 877, 326 *a*.

Index to case in court of appeals, when necessary, 841.
Indian, no jurisdiction of action against, 23.
Indian annuities not assignable, 112 *g*.
Indian lands, railroads through, county court has jurisdiction of, 39.
nation, parties to action by, 120 *d*.
complaint by, 240 *h*.
Indorsement *on papers*, of name and residence, 853.
Infancy, costs after defence of, 597 *c*, 634 *f*.
discontinuance after a defence of, 634 *f*, 597 *c*.
Infant, in suits by, defendant is entitled to security for costs, 587 *k*.
when a party to a contract sued on, must be joined as defendant, 129 *h*.
plaintiff, costs against, 622.
service of summons on, 163.
discontinuance of action against, 597 *c*, 634 *f*.
guardian of, liable for costs, 622.
of, may verify the pleadings, 309 *e*.
attorney may subscribe the pleadings as attorney for the guardian, 306 *a*.
an infant married woman suing jointly with her husband need not have a guardian, 125 *c*.
when an infant defendant may petition for appointment of a guardian, 124.
sale, mortgage, or other disposition of real estate of, county court may decree, 39.
specific performance by, county court may decree, 39.
to appear by guardian, 123.
guardian for, how appointed, 123, 124.
for, on appeal, 123 *g*.
judgment against, without appointment of a guardian, irregular, 123 *b*.
answer for, 123 *c*.
papers, how signed on motion to set aside proceedings against, 123 *b*.
complaint by, 189 *b*.
guardian must be appointed before commencing a suit for the infant, 125 *a*.
sale of real estate of, 37 *a*, 39.
admission in pleading of, 338 *d*.
examination of as a witness, 749 *d*.
action for partition by, 811 *f*.
Infant—*continued*.
proceeds of sale of real estate of, to be brought into court, 882.
costs on reference as to sale of real property of, 882.
guardian of, to give security to account, 793, 879.
guardian *ad litem* of, not a party to the action, 105 *e*.
statute of limitations does not run against, 95.
guardian *ad litem* for, his rights and duties, 125 *h*.
proof under answer of, 339 *b*.
Inferior court, costs on review of a decision of, in a special proceeding, 628.
record of, how proved, 796 *e*.
appeal to supreme court from, 670.
appeal to county court, or New York common pleas from, 688.
Information *in nature of quo warranto* abolished, and action substituted, 801.
denial on, 270 *a*.
Informer, parties to action by, 120 *b*.
Injunction, order under section 297 is not, 575 *e*.
writ of, abolished, and order substituted, 397.
kinds of, 397 *b*.
may be by the court, or a judge, or a county judge, 398.
may be at general term, 398 *a*.
order will not be modified *ex parte*, 638 *a*.
against State officers, 402 *a*.
against municipal corporations, 402 *c*.
to stay proceedings in another action, 402 *d*.
to suspend business of corporation, 410.
application for, is a motion, 409 *h*.
effect on, of removal of action into United States' courts, or dismissal of complaint, 400 *a*.
in what case granted, 398, 400 *f*, 401 *a*, *c*, 403 *b*.
is not retroactive, 398 *c*.
continuance of, 401 *e*.
can only go against party to action, 398 *b*.
to restrain summary proceedings to recover possession of real property, 405 *g*.
to restrain a nuisance, 403 *h*.
to restrain the imposition of a tax, 404 *u*.
to aid action to recover personal property, 403 *c*.

Injunction—*continued.*
to restrain a partner, 405 *f*.
action of ejectment, 824 *h*.
to restrain use of trade mark, 401 *f*.
to restrain transfer of stock, 403 *b*.
to restrain the exercise of a trade, 404 *k*.
to restrain a party from giving his services to another, 405 *p*.
to restrain publication of private letters, 403 *f*.
to prevent injury to property, 403 *k*.
cases in which it has been refused, 404.
by defendant, 399 *d*.
how served, 399 *e*.
copy of affidavit to be served with, 399 *f*.
filed, 850.
effect of dismissal of complaint on, 400 *e*.
must be obeyed, 399 *g*.
appeal from, 400 *c*, 669 *a*.
may be granted at any stage of the action before judgment, 405.
how grounds for issuing may be shown to the court, 405.
granting of, rests in discretion of the court, 399 *a*.
after answer, 406.
security upon, 406, 407 *d*.
to stay business of corporation, 410.
in superior court, 407 *c*.
to stay proceedings after judgment, 407 *a*.
reference to ascertain damage on, 408 *g*.
damages allowed on, 408 *g*.
action on undertaking on, 409 *f*, 126 *c*.
defendant may be heard before granting of, 409.
motion to vacate or modify, 410.
vacating for non-prosecution of action, 412 *e*.
stay by, effect of, on time of limitation, 103.
perpetual, appeal from judgment awarding, 669 *a*.
Injury, *to the person or character*, defendant may be arrested in action for, 363.
limitation of action for, in cases not specially provided for, 97.
causing death, complaint for, 222 *h*.
to the person, criminal conversation is, 364 *a*.
seduction is, 364 *a*.
cruelty to wife is, 364 *a*.
adultery is not, 364 *a*.
Injury *to person, &c.*—*continued.*
actions for in justices' courts, 50.
to real or personal property, action for in justices' court, 50.
Innkeeper, not liable to arrest in action to recover goods lost by a guest, 364 *c*.
assignment of claim against, 110 *l*.
form of summons in action against, 157 *h*.
Inquest, in what cases, 461, 860.
intention to take, must be expressed in the notice of trial, 860.
affidavit to prevent, 461 *a*.
by whom to be made, 462 *c*.
affidavit to prevent, form of, 462 *a*.
to be filed, and copy served, 463 *a*.
service of, 463 *b*.
when it may be taken, 463 *c*, 860.
proceedings on, 463 *h*.
waiving or setting aside, 464 *e*.
in actions against the several parties to a bill or note, 462 *b*.
claim admitted by pleading to be allowed on, 464 *a*.
in superior court, 463 *d*.
See, *Affidavit of merits.*
Inquiry *of damages.* See, *Assessment of damages.*
Insane person, discharge of, from arrest, 373 *d*.
service of summons on, 165 *c*.
See, *Unsound mind.*
Insolvent debtors, jurisdiction of county court as to, 59.
security for costs in actions by, in certain cases, 585 *j*.
provisions of revised statutes as to, retained in force, 835.
Insolvent corporation, receivers of, 438 *a*.
provisions as to supplementary proceedings, do not apply to, 555 *p*.
costs of closing up, 585.
Insolvent *discharge*, how pleaded, 280 *h*.
Insolvent, sureties becoming, 662, 590 *a*.
Inspection *of books, &c.*, 735.
See, *Discovery.*
Installments, execution for, on judgment by confession, 729.
in mortgage cases, allowances on, 609.
action for, on bond, 51.
Instrument *in writing*, parties to actions upon, 133.
how filed, 71, 202 *b*.
costs, where several actions on one instrument, 591.

Instrument—*continued.*
for payment of money, action or defence on, how pleaded, 327.
in justices' courts, 71.
allowance in addition to costs, in action for construction of, 607.
See, *Sealed instrument.*
Insufficient meaning of the term, 305, *a*
Insurance companies, insolvent, costs of winding up, 585, 200 *c*.
Insurance policy, complaint upon, 224 *i*.
consolidating actions on, 335 *h*.
action on, 108 *m*.
assignment of claim on, 110, 108 *m*, 115 *a*.
Intent *to defraud*, 369 *e*.
Interest, on verdict or report of referee, when allowed, 612.
when jury may assess, 474 *b*, *c*.
not to disqualify a witness, 755.
party in, to sue, 105.
all parties in, to be joined, 131.
when all parties in, need not be joined, 131.
transfer of, not to abate action, 133, 137 *f*, *g*, 138 *c*.
Interlocutory *costs*, how collected, 621 *i*.
within what time to be paid, 878.
power to tax, 613, 615 *c*.
what are, 622 *f*.
adjustment of, 613.
Intermediate order, when may be reviewed in the court of appeals, 642.
Interpleader, when it will be ordered, 139.
costs in, 142 *b*.
appeal from order for, 142 *c*.
Interrogatories, how settled, &c. 760 *d*.
examination on, by consent, 770 *h*.
Irregular judgment, setting aside, 448 *c*, 723 *e*, 729 *e*, 651 *f*, 772 *f*.
review of order setting aside, 683 *c*, *d*, *k*, 680 *p*.
Irregularity, notice of motion for, to specify irregularity complained of, 772 *f*, 729 *e*, 868.
at circuit, 471 *a*.
motions on account of, where made, 773 *b*.
Irrelevancy, not a ground for demurrer, 258 *c*.
Irrelevant answer and defences may be stricken out, 298.
pleading, what is, 300 *b*.
motion to strike out, 300 *d*, 877.
or redundant matter may be struck out on motion, 320 *d*.

Irrelevant —*continued.*
and redundant, not equivalent terms, 320 *c*.
matter defined, 300 *b*.
instances of allegations adjudged to be irrelevant or redundant, 331.
motion to strike out as, when and how made, 325 *d*, 326 *a*.
entire pleading cannot be struck out as redundant, 325 *b*.
circuit is the best place to decide what is, 325 *d*, 465 *g*.
cannot be demurred to, 325 *d*, 258 *c*.
order refusing to strike out or striking out, is not appealable, 301 *i*, 681 *h*.
waiver of objection to, 326 *a*.
Issues, different kinds of, 454.
feigned, abolished, 178.
See, *Feigned issues.*
when they arise, 454.
when issues of fact arise, 454.
when issues of law arise, 454.
of law and fact may arise in one action, 454.
when there are issues of law and fact, the issues of fact to be first tried, unless court otherwise order, 454.
practice in cases where there are issues of law and fact to be tried, 455 *a*.
must be all disposed of before judgment can be entered, 515 *c*, *d*.
trial is the judicial examination of, 455.
how tried, 455, 860.
may be tried in any place the parties may agree upon, 456 *f*.
may be referred, 489.
should be joined as to all defendants before cause noticed for trial, 464 *h*.
of law to be tried by the court, unless they are referred, 456.
of fact in action for the recovery of money only, or specific real or personal property, or for a divorce, to be tried by a jury, unless jury trial is waived, or a reference be ordered, 456.
in other actions, to be tried by the court, except a jury trial or a reference be ordered, 456.
of fact, triable by the court may be tried at circuit or special term, 456, 860.
of fact triable by a jury or by the court, to be tried before a single judge, 456.

Issues—*continued.*
of fact in the supreme court, to be tried at a circuit when the trial is by jury, otherwise at circuit or special term, 456.
how settled, 862.
of law to be tried at a circuit or special term, 456.
of law to have preference on the calendar, unless the court otherwise direct, 456.
where tried, 456.
may be referred, 456.
either party may notice for trial, 457.
note of, to be furnished to clerk, 457.
to be entered on calendar, 457.
how disposed of on the calendar, 460.
of fact joined in a county court before July, 1848, 830.
of fact cannot be sent to be tried by a sheriff's jury, 464 *b*.
date of, 460 *b*, 504 *d*, 850 *f*, 870, 888 *j*.
when either party may bring to trial, 460.
in divorce cases, 456 *d*, 862.
costs where there are several, and plaintiff succeed on some only, 582 *b*.
See *Note of issue, Trial, Verdict.*
Items of account, when need not be inserted in pleading, 315.
how to be delivered, 315.
further particulars of, 315.

J.

Jail liberties, jurisdiction of the county courts as to, 39, 40 *b*.
extent of, 530 *d*.
defendant entitled to, 530 *d*.
Jailor, cannot be bail, 378 *b*.
Joinder of causes of action, 832.
of defences, 287, 297 *b*.
of parties, 126, 127, 131.
See, *Parties.*
joinder of parties, where some refuse to join, 131.
where parties very numerous, 131.
Joint debtors, who are not, 133 *e*.
costs in action against representative of, 596 *d*.
confession of judgment by, 722 *c*.
offers of compromise by, 732 *f*.
Joint *and several debtors*, proceedings against, where the summons is served on one or some of the defendants only, 173.
where the summons is served on all the defendants, 174.
judgment in action against, 506, 173.
execution against, 533 *b*.
debtors, attachment against, 416 *b*, *c*.
judgment for want of answer against, 443 *d*, 444 *a*.
payment by one does not revive liability of the others, 104 *b*.
costs in action against, 596 *f*, 597, 598 *e*.
debtors, heirs, devisees, legatees and tenants holding under a judgment debtor, proceedings against, 519.
on judgment against one of several joint debtors, those not served may be summoned to show cause why they should not be bound by the judgment, 519.
if judgment debtor die after judgment, his heirs, devisees, or legatees, or the tenants of real property owned by him, and affected by the judgment, may be summoned to show cause why judgment should not be enforced out of estate of deceased, 520.
form of summons, 520.
summons to be accompanied by affidavit of amount due, 520.
answer by party summoned 521.
subsequent proceedings the same as in an action, 721.
answer and reply to be verified as in an action, 721.
attachment may issue to compel application of property to payment of the judgment, 721.
Joint *reference*, when ordered, 494 *h*.
stock companies, may sue and be sued in the name of their president, 117 *d*.
parties to actions against, 117 *d*, 118 *a*.
actions on judgments against, 86 *f*.
complaint by officer of, 190 *b*, 213 *c*.
Judge not to sit in cause in which he is a party, 57.

Judge—*continued.*
order of, when enforced in same manner as an order of the court, 398.
how vacated or modified, 638.
inability of, to hold a special term, circuit court, or sit at a general term, or preside at oyer and terminer, provided for, 36, 35 *a*.
disability of, 782, 782 *f*.
at chambers, powers of, 36, 37, 779 *e*.
county judge has power of, in actions in the supreme court, 782.
adjustment of costs by, 618.
order of, not to be treated as a nullity, 781 *c*.
appeal from order of, 638, 678, 782.
of court of appeals may adjourn court, 28.
orders by, 845.
may enlarge time for taking any proceedings, 845.
may take part in deciding cases in which he took part in deciding below, 839 *d*.
of supreme court, may be appointed to supply places of judges of court of appeals, 839 *e*.
to transact business out of court, 36.
business commenced before one judge in first judicial district, may be continued before another, 36.
has power throughout the State, 36 *a*.
has the special jurisdiction before the code vested in vice-chancellors, &c., 36 *a*.
inability of, 36, 35 *a*.
of superior court, to take no fees for services, 48.
of New York common pleas, review of orders of, 923.
vacancies in office of, how supplied (Laws 1859, ch. 173).
of county court, powers of, 639 *b*, 778.
See, *County Judge*, *Justice of the Peace*.
Judges to meet and revise rules, 833.
Judgment and order, distinction between, 772 *a*, 453 *d*, 777 *i*, 778 *a*, *b*, *c*.
defined, 441.
on failure of defendant to answer, 441, 858.
proof of no answer received, 443 *b*.

Judgment—*continued.*
against one of several defendants, 444 *a*.
order for judgment, 444 *b*, 515.
death of defendant before, 444 *c*.
compelling party to perfect, 645 *k*.
notice of, 646 *b*.
where application for is to be made, 444 *d*.
when notice of application for, must be given, 444 *e*.
proof of plaintiff's demand, when necessary, 445 *a*.
plaintiff's damages, how assessed, 446.
commission to take testimony of witness on assessment of damages, 447 *a*.
setting aside on writ of inquiry, 447 *d*.
after service by publication, 447 *e*, *f*, 442, 859.
for the difference on an admitted demand and admitted counter-claim, 442.
restitution on reversal of, 447 *g*, 443.
in the alternative, 514.
distinction between, and order, 453 *d*.
motion in arrest of, 483 *d*.
settling form of, 516 *c*.
clerk to enter pursuant to verdict, 476.
manner of entering, 506, 516, 853.
may be for or against any of the parties, 506.
may grant defendant affirmative relief, 506.
against one, leaving action to proceed against the rest, 506.
against married woman, 506.
clerk to insert costs in entry of, 613.
can only be filed during office hours, 853.
on the pleadings, motion for, 304.
where there are issues of law and fact, 515.
against joint debtors, 506, 173.
against executor, 516 *b*.
on penal bond, 516 *a*.
for want of reply to answer, 304, 655.
on frivolous demurrer, answer, or reply, 450.
to be entered in judgment book, 516.
when and how docketed, 69, 518.
entry on docket of, "secured on appeal," 518.

Judgment—*continued.*
on report of referee, 502 *d.*
on issue of law, 488.
on bond and warrant, &c., executed before July, 1848, 795.
of court of appeals, 28.
of superior court, how pronounced, 48.
of New York common pleas, how pronounced, 48.
of supreme court general term, 33.
of justices, power of county court over, 39.
of justice of the peace, 79 *d.*
complaint in action on, 224 *d.*
to set aside, 241 *c.*
how pleaded, 326, 281 *e.*
answer to complaint on, 283 *j.*
not to be entered till all issues disposed of, 515 *c.*
order on petition may be enrolled or docketed as, 878.
on appeal, 642, 701, 644, 671.
to recover personal property, 514.
in foreclosure cases, 883, 889.
in divorce cases, 901.
taken against a party through his mistake, inadvertance, or surprise, or excusable neglect, court may relieve from, 355, 701, 709, 685 *b.*
opening, and letting in defendant to defend, 168, 173 *e*, 448 *e.*
recovered, answer of, 281 *b.*
how enforced, 525, 524.
after service by publication, 173 *d.*
when a lien on real estate, 518, 519, 47 *a*, 70, 84.
of United States court, provisions of code as to lien of judgment extended to, 518 *a.*
restitution on reversal of, 713, 642, 443.
satisfaction of, how entered, 551 *g.*
payment of, does not prevent an appeal, 656 *f.*
will not be reversed for technical defects, 355, 701, 709, 685 *b.*
actions on, regulated, 85, 86, 96.
actions on, in justices' courts, 51, 80 *b*, *c*, 86.
time for commencing action on, 96.
defence to action on, 283 *j.*
presumption of payment of, 96 *c.*
of court of special jurisdiction how pleaded, 326.
book, clerk to keep, 516.
lien of, 47 *a*, 518.
on confession, 51, 55, 722.
on counter-claim, 293 *d.*
for amount admitted due, 448 *b.*

Judgment—*continued.*
set-off of, 116 *a*, 553 *d.*
stay of proceedings on, action for, 131 *a.*
debtor, debts due may be paid to sheriff, 564.
proceedings against, after execution returned unsatisfied, 555.
See, *Supplementary proceedings.*
debtor deceased, proceedings against representatives of, 520.
execution against property of, 522 *e.*
creditor deceased, execution in favor of, 522 *f.*
roll, when clerk to make up, 516.
of what constituted, 316 *k*, 516, 517.
it is the clerk's and not the attorney's duty to make up, 517 *a.*
on submission of controversy without action, 718.
on confession of judgment without action, 729.
on appeals to court of appeals, 648.
on appeal to common pleas, 712.
amending, 353 *c.*
amendment after, 353 *i.*
irregular, setting aside, 448 *c*, 513 *b*, 520 *a.*
non obstante, 483 *e.*
standing as security, 521 *c.*
after appeal to court of appeals, 660 *c*, 642.

Jury. See, *Trial by jury*, 461.
objections to, how waived, 465 *b.*
struck, 465 *c.*
charging, 466 *d.*
deliberation of, 470 *f.*
separation of, 470 *h.*
interference with, 470 *i.*
counsel addressing, 465 *e.*
one of, may be called as a witness, 467 *m.*
verdict of, 472. See, *Verdict.*
may take out papers, 470 *f.*
may be polled, 470 *l.*
in county court and court of sessions, how drawn and summoned, 42.
for adjourned circuit and county court and oyer and terminer, 35.

Jurisdiction *of courts*, generally, 21, 22, 23, 24.
of court of appeals, 25.
of supreme court, 29.
of circuit courts, 30 *f.*
of oyer and terminer, 30 *g.*
of county court, 38, 40.
of superior court, 43, 45.
of N. Y. common pleas, 43, 45.
of justices' courts, 50.

Jurisdiction—*continued.*
courts acquire, from time of service of summons, or allowance of provisional remedy, 177, 416 *a*.
of courts continued, except as altered, 22.
when and how it must be alleged, 326.
demurrer to complaint for not stating, 260 *a*.
costs where court has not, 585.
Justice. See, *Courts of justice, Judge, Justice of the peace.*
when, cannot act, 57.
death of, 697, 699.
out of office, 699.
fees to, for return, 697.
Justices' courts *of New York city*, 83.
of Buffalo, appeals from, 689.
of cities, jurisdiction of, 83.
general provisions as to, 83.
appeal to court of appeals, 26.
transcript of judgment of, 84.
transfer from, to common pleas, 923.
appeals from, to common pleas, or county court, 689.
when judgment of, deemed judgment of N. Y. common pleas, 84.
supplementary proceedings on judgment of, 558 *d*.
Justices *of the peace, courts of*, existing provisions of law as to, abolished, 50, 54 *n*.
jurisdiction of, 50, 54 *a*, 56 *a*.
process in, 57.
long summons, 57.
form of summons, 57.
short summons, 58.
attachment, 58.
security, 59.
warrant, 60.
service of summons, 60.
return of service, 60.
appearance, 61.
effect of appearance, 61.
discontinuance of action by non-appearance, 62.
proceeding to call and try action, 62.
defendant appearing pending the trial, 62.
defendant cannot be admitted to defend, after submission of cause, 62.
adjournment, 62.
security on adjournment, 64.
adjourning court, 64.
answer of title in, 64.
Justices *of the peace, courts of*—*continued.*
rules in, 70.
pleadings, 70.
complaint, 70, 72 *a*.
demurrer, 70, 73 *c*.
answer, 70, 74 *a*.
construction, 74 *k*.
amendment, 71, 74 *l*.
verification, 74 *j*.
variance, 71, 75 *d*.
docketing judgment, 69, 72, 84.
either party may be required to exhibit his account, 72.
offer to allow judgment, 72.
provisions of code respecting forms of action, parties to actions, rules of evidence, times of commencing actions, and service of process upon corporations, apply to, 72.
plaintiff required to prove his case in, 75 *e*.
plaintiff not appearing after defence of counter-claim, 76 *b*.
waiver of jury, 76 *c*.
appearance on the trial, 76.
justice required as witness, 76 *g*.
objections to jury, 76 *h*.
examination of witnesses, 77 *d*.
nonsuit, 77 *j*.
charging jury, 78 *a*.
deliberation of jury, 78 *b*.
verdict, 78 *d*.
judgment, 79 *d*, 84.
costs and fees, 80 *i*.
execution, 71, 81 *e*.
contempts, 82 *d*.
judgment by confession in, 51, 55.
fees to, for return on appeal, 697.
how to make a return, 697, 699.
appeal to court of appeals in actions commenced before, 26, 651 *d*.
provisions as to security for costs do not apply to, 586 *a*.
new trial on appeal from, 670 *k*.
judgment of, how reviewed, 26, 86.
how pleaded, 326 *c*, 281 *e*.
transcript of, may be filed and docketed with county clerk, 69.
effect of filing such transcript, 69.
when a lien on real estate, 69.
powers of county court as to, 39.
execution against the person on, 529 *c*.
action on, 55.
action against, 54 *a*.
See, *Justice.*

Justification of slander, how pleaded, 329 *a*.
of bail, 882, 852. See, *Bail*.
of sureties, 667, 852. See, *Sureties*.
of arrest, how pleaded, 281 *e*.
of sureties for costs, 589 *j*.
necessary in all cases, 852.

K.

Kings county, first subdivision of section 30 of the code not to apply to, 40.
lis pendens in, 853 *a*.
regulation of business at special term in, 913.
See, *Second judicial district*.
Knowledge, when to be alleged in pleading, 245 *h*.
denial of, 269 *a*.

L.

Landlord, defending ejectment against his tenant, is liable for the costs, 629 *f*.
and tenant, effect of relation of, on time for commencing action to recover real property, 94.
admitting to defend, 140 *b*.
interpleader by, 141 *e*.
defence in action by, 294 *e*.
Land, trespass on, provisions of revised statutes retained, 581 *a*, 835.
summary proceedings to recover possession of, 40 *b*, 689 *d*.
patent for, how proved, 796 *d*.
See, *Indian lands*, *State lands*, *Real property*.
Laws of other States and governments, how proved, 795.
inconsistent with code repealed, 832.
Leasehold, sale of, on execution, 542 *j*.
Leave *and license*, defence of, 281 *f*.
to sue, when to be alleged, 191 *b*.
Legacies, parties to actions to recover, 129 *b*, *c*.
Legal *and equitable relief* may be demanded in the same action, 253 *a*, 333 *c*, 334 *a*, *k*, 823 *b*.
Legal notices, time for publication of, how computed, 795.
Legatees, proceedings by and against, not affected by the code, 835.
See, *Joint debtors*, *&c.*
Legitimacy *of children*, how questioned in actions for divorce, 901.
Letters patent, action to vacate, 804.
Letters *private*, injunction to restrain publication of, 403 *f*.
Letters, rogatory, superior court will not issue, 766 *g*.
Levy. See, *Execution*.
Liability *created by statute*, within what time to be sued upon, 98.
Libel, *actions for*, cannot be brought in justices' courts, 54.
must be brought within two years, 98.
parties to action for, 126 *g*, 121 *e*.
arrest in action for, 364 *f*.
injunction to restrain publication of, 405 *c*.
complaint in action for, 225 *e*, 328, 333 *e*, 332 *b*, *c*.
answer in action for, 329, 278 *b*, 331 *d*.
justification on ground of truth, how pleaded, 329 *a*.
what are mitigating circumstances, 278 *b*, 330 *a*.
mitigating circumstances, no demurrer to, 331 *c*.
costs, 581 *j*, 591.
rule of damages in, 331 *g*.
See, *Slander*.
Liberties. See, *Jail liberties*.
License, answer of, 281 *f*, 64 *e*.
Lien, effect of order in proceedings supplementary to execution as, 562 *b*.
by judgment on real estate, 47 *a*, 70, 84, 518, 543 *b*.
by execution on personal property, 536 *c*.
by attachment on real estate, 422 *g*.
by referee for his fees, 501 *a*.
by attorney for his fees, 553 *i*, 582 *f*, 816 *g*.
costs in actions to enforce, 595 *g*.
counter-claim of, 294 *i*.
law, proceeding under, appealable to county court, 40 *b*.
proceeding under, witnesses in, 746 *d*.
provisions of, not repealed by the code, 835.
Life interest, how computed, 896, 904.
Life tenant. See, *Tenant for life*, *Curtesy*, *Dower*.
Lights, for courts, supervisors to furnish, 37.

Limitations, when the court will restrain the defendant from interposing the defence of, 448 *a*.
defence of, must be set up in answer, 9), 285 *b*.
revival of debt barred by, 104.
statute of, of other states, 89 *m*.
of counter-claim, 293 *c*,
of actions, repeal of existing limitations, 88.
when action deemed commenced, 100, 177 *a*.
effct of absence from State on, 90 *b*, 101 *a*, *b*, *c*.
See, *Times for commencing actions. Foreign corporations.*
Limited divorce. See, *Divorce.*
Limited jurisdiction, pleading determination of court or officer of, 326, 281 *a*.
Limited partnerships, complaint to distribute assets of, 235 *d*.
parties to actions by and against, 126 *h*.
Liquidated damages, form of summons in action to recover, 157 *d*.
Liquidate damages, defendant may offer to, 734.
Lis pendens, *notice of*, when may be filed, 160.
what to contain, 160.
in foreclosure suits, 160, 162 *f*.
when constructive notice, 161.
court may order it to be removed from the files, 161.
in Kings county, 162 *b*, 853 *a*.
to be recorded, laws 1864, ch. 53.
Lockport and Niagara Falls Railroad, jurisdiction of county court as to, 40 *b*.
Long account, what is a, 492 *c*, *d*, *e*, *f*.
Long summons, 57.
Lost paper, &c., place of, how supplied, 794.
Lost bond, complaint on, 208 *a*.
note, 211 *h*.
Lunacy. See, *Commission of Lunacy.*
Lunatic, county court has jurisdiction of the person and estate of, 39.
action against, 118 *f*.
judicially declared such, cannot be sued except by leave of the court, 165 *c*.
service of summons on, 165 *c*, *d*.
discharge of, from arrest, 373 *d*.
custody and disposition of estate of, provision of revised statutes as to, not affected by the code, 835.
committee of, payment of costs by, 896.
actions by and against, 165 *c*, 118 *f*.
confession of judgment by, 723.
See, *Commission of Lunacy.*

M.

Mail, service of papers by, 788, 789.
time of service by, 790.
party to whom paper sent takes the risk of the failure of the, 789 *a*.
sheriff may return process by, 533 *a*.
Malicious prosecution, complaint for, 228 *c*.
defences in action for, 297 *b*.
action for, cannot be brought in justices' courts, 54.
costs in actions for, 581 *j*, 591.
Malicious trespass, costs in action for, 585.
Managing agent *of a corporation*, who is, 164 *c*.
service of summons on, 164 *c*.
Mandamus, proceedings on, not affected by the *second* part of the code, 834.
on return to, rule to plead may be entered, 877.
appeal from order for, 666 *h*, 637 *a*, 679 *h*, 834 *c*.
verdict on, 473 *d*.
relator may be a witness, 746 *h*.
code not to apply to, 834.
sections 169 to 177 of code relating to amendments applied to, 834.
costs in, 877 *h*.
Manifest injustice, new trial in justice's court to prevent, 709 *a*.
Manufacturing companies, action against, parties to, 118 *c*.
in Herkimer county, 241 *d*.
Marine court, of New York city, 83.
action on judgment of, 96 *a*.
judgment of, may be reviewed in New York common pleas, 47, 688, 692 *i*.
may issue commission, 758 *a*.
execution against the person on judgment of, 529 *c*, *a*.
jurisdiction of, 581 *j*.
costs on appeal in, 716 *a*.
regularity of judgment of, will not be reviewed by New York common pleas on motion, 688 *a*, 692 *j*.
appeal to court of appeals in action commenced in, 26.
supreme court rules apply to, 834 *b*
Marriage, breach of promise of, form of summons in action for, 158 *d*.
arrest in action for, 363.
complaint for, 229 *a*.
female cannot be arrested in action for breach of promise of, 366 *d*.

Marriage—*continued.*
not to abate action, 183.
action to declare void, 897.
See, *Divorce.*
Married woman, parties to action by and against, 121.
costs against, 585 *d.*
need not prosecute or defend by guardian or next friend, 121.
complaint to charge separate estate of, 229 *f.*
domicil of, 145 *d.*
complaint by, 231 *e.*
answer by, 257 *a*, 128 *a*, 281 *h.*
confession of judgment by, 723.
when she may be a witness to contradict her husband, 563 *c*, 744 *f.*
cannot appoint an attorney, 128 *a.*
action to charge separate estate of, 56, 506.
statute of limitation does not run against, 95, 102.
assignment by, 109 *b*, *c.*
judgment against, 506, 512 *g*, 518.
execution against, 523 *g*, 526, 527 *b.*
the person of, 529 *a.*
levy on property of, for debt of husband, 537 *g*, *c.*
supplementary proceedings against, 558 *b.*
Material allegation, what is, 337 *c.*
if not denied, deemed admitted, 337.
Material variance, what is, 339, 340.
Ma yor, &c., *of New York*, appeal by, from marine court or justices' judgment, 692 *a.*
actions against, 23 *b*, 45 *a.*
allegations in complaint against, 235 *e.*
costs against, 581 *c.*
See, *Municipal corporation*, *City authorities.*
Mayor's court, proceedings in, may be transferred to county court, 41 *f*, 45.
jurisdiction of, 45.
power of, to order production of documents, 736 *c.*
appeal from, to supreme court, 670.
Mechanics' *lien law.* See, *Lien Law.*
lien, complaint to foreclose, 219 *c.*
examination of witness to sustain, 746 *d.*
appeal from justices' judgment in proceedings on, 40 *b*, 689 *b*, 692 *e.*
Mercantile factor, trustee of express trust, 119 *b.*
Merger of right to prosecute criminally, civil action is not, 19.
Merits, affidavit of, when necessary, 461, 860.
requisites of, 462 *c.*
service and filing of, 463 *a*, *b.*
order involving, what is, 684 *d.*
Mesne profits. See, *Ejectment.* 825.
Metropolitan police act, when parties holding office under, cannot be arrested, 361 *a.*
when parties holding office under, cannot be subpœnaed, 756 *j.*
Mileage *to witnesses*, 578 *a.*
Minister of the Gospel, not allowed to testify to certain matters, 755 *a.*
Minor, service of summons on, 163.
See, *Infant.*
Minutes, special verdict or finding to be entered on, 472.
verdict to be entered on, 476.
motion for new trial founded on, 476.
of judgment, when cannot be settled *ex parte*, 516 *c.*
entry on, of filing mortgage with the clerk, 891,
Misjoinder *of parties*, remedy for, 131 *d.*
Misnomer, in summons, 155 *d.*
See, *Fictitious name.*
Missionary societies, sale or lease of real property of, 29 *c.*
Mistake, the court may at any time order an amendment by correcting a mistake in the name of a party, or a mistake in any other respect, 355.
court may relieve a party from a judgment order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, 356, 355, 701, 709, 685 *b.*
of officer of the court, party, when not to suffer by, 340 *b.*
See, *Amendment*, *Variance.*
Mitigating circumstances, pleading, 278 *b.*
what are, 330 *a*, 278 *b.*
cannot be demurred to, 331 *c.*
Moneyed corporations, time of limitation not applicable to actions against, 103.
injunction to restrain misapplication of funds by, 403 *g.*
effect of code on proceedings to dissolve, considered, 836.
Moneys, order for payment of, 895.
of infants, when to be paid to guardian, 883.

Moneys—*continued.*
brought into court, to whom paid, 894.
account of, how kept, 895.
of unknown owners, proceedings on claim of, 905.
had and received, complaint for, 232 *a*.
lent, complaint for, 233 *d*.
paid, complaint for, 234 *b*.
See, *Surplus moneys.*
Mortgage. See, *Foreclosure, Satisfaction.*
parties to action to set aside, 129 *f*.
cases, court need not be furnished with copy pleadings in, when plaintiff's right not contested, 870.
counter-claim in, 295 *a*.
receiver in, 437 *e*, 888 *n*.
reference to report amount due in, 883, 885 *k*.
absent defendants and infants in, 888.
application for judgment in, to be at special term, 883.
referee's report to be confirmed before judgment entered on, 883.
proof of filing notice of *lis pendens* in, 883.
judgment for sale in, 883, 889.
appeal from judgment for sale of mortgaged premises, 665.
surplus on sale of, to be deposited, 889, 894.
how surplus moneys obtained out of court, 889, 892.
mortgage must be recorded before deed executed, 891.
clerk to enter in minutes the filing the mortgage, 892.
sheriff to sell in parcels, unless otherwise ordered by the court, 891.
notice of sale, how to be published, 894.
staying sale, 894.
setting aside sale, 887 *e*.
by railroad company, complaint upon, 240 *f*.
See, *Foreclosure.*
Mortgage creditors, right of, to redeem from sale on execution, 544 *e*.
Mortgaged chattels, levy upon, on execution, 536 *f*.
Motion *and order*, 772.
defined, 778, 779 *b*.
application under section 223 is not, 409 *h*.
Motion—*continued.*
to be on notice or order to show cause, 772 *b*, 868.
when must be made to the court, 772 *c*.
to set aside for irregularity, 772 *f*.
one in several actions, 773 *c*.
papers to be legibly written, 773 *d*.
to be filed, 774 *a*, 687 *c*, 851.
all objections to be comprised in one motion, 773, *e*.
death of party pending, 773 *i*.
order upon, concludes only parties and privies, 773 *j*.
order upon binding until set aside, 773 *k*.
stay of proceedings pending, 773 *l*.
denying motion for party refusing to be examined orally, 776 *c*.
commission to examine witnesses on, 757 *g*.
to be heard on pleadings, 776 *f*.
right to begin on, 776 *h*.
objecting to complaint on, 776 *i*.
impeaching a deponent on, 776 *j*.
to be for first day of term, 773 *f*.
grounds of, to be stated, 773 *g*.
countermand of notice of, 773 *h*.
order on by default, 773 *m*, 868.
preliminary objection to, 774 *b*.
affidavits on, 774 *c*.
deposition on, 44 *note*, 746 *c*, 757 *g*, 779.
amendment on, 351 *c*, 392 *b*.
extent of relief on, 774 *d*.
amending moving papers, 392 *b*, 774 *g*.
renewal of, 386 *d*, 449 *j*, 775 *a*.
decision on, is an order, 772 *a*.
within what district to be made, 778, 779 *f*, 780.
preference of certain, 778, 910.
in actions arising in Erie county, 780 *b*.
Orleans county, 780 *c*.
First district, 780 *d*, 36, 772 *a*, 910.
in superior court, 44 *note*, 777 *h*.
in New York common pleas, 44 *note*.
how noticed, and defaults thereon, 870, 876, 781.
enumerated, 869.
non-enumerated, 869.
reference on, 44 *note*, 746 *c*, 757 *g*, 779.
papers to be furnished on, 870, 871.
to dismiss appeal, 675 *k*.
for discovery, 855.
contested, 869.

Motion—*continued.*
for new trial, 476, 477, 478 *a*.
for judgment at general term, 482.
to have cause heard in an adjoining county, by reason of the relationship of the justice, &c., 35 *a*.
to strike out irrelevant or redundant matter or to make pleading definite and certain, 877.
to vacate or modify provisional remedy to have a preference, 778.
transfer of, 782, 36, 44 *note*.
points on, 875.
questions of fact arising on, may be referred, 44 *note*, 757 *g*, 779, 776 *c*, 489, 493 *c*.
in court of appeals, 844.
in lieu of appeal, 637 *h*, 651 *f*.
costs on, allowed in discretion of the court, 620.
when allowed, 620 *a*, 776 *k*, 686 *l*.
order should determine amount of, 621 *c*.
where order by default, 621 *h*.
how collected, 621 *j*.
order allowing or denying not reviewable, 680 *r*.
Municipal corporation, costs in action against, 591 *b*.
security on appeal, 637 *e*.
injunction against, 402 *c*, 802 *j*, *k*.
Municipal ordinance, allegation of violation of, 328 *f*.

N.

Name, change of, pending an action, 349 *c*.
to be endorsed on papers, 853.
to be stated in pleadings, 323 *a*.
fictitious, when party may be sued by, 357.
mistake as to, 186 *c*.
of court in summons, 154 *b*.
complaint, 185 *a*.
of parties in the complaint, 186 *c*.
Naturalization of aliens, jurisdiction of county court as to, 40 *b*.
Ne-exeat, when it may issue, 362 *c*.
Neglect, court may relieve from judgment taken through, 355, 701, 709, 685 *b*.
Negligence, parties to actions for injury by, 129 *i*.
complaint for injury by, 224 *a*.
Negligence—*continued.*
how alleged, 246 *f*.
assignment of claim of damages for, 109 *n*, 110 *g*, *h*.
New action, what is, 720 *a*, 637 *g*.
New assignment, not allowable under present practice, 302 *d*, 345 *a*.
New matter, defined, 275 *d*.
must be pleaded, 276 *b*.
in confession and avoidance, 276 *c*.
New promise, to take case out of limitation, 104.
New trial, motion for, 476, 477, 478 *a*.
where to be heard, 477.
is a proceeding distinct from appeal, 478 *a*.
on feigned issue, 479 *k*.
for newly-discovered evidence, 479 *m*.
for verdict against evidence, 479 *l*.
excluding evidence, 479 *n*.
want of evidence, 479 *o*.
surprise, 480 *c*.
charge of judge, 480 *d*.
for misdirection, 480 *a*.
admitting improper evidence, 480 *b*.
for excessive damages, 480 *e*.
for inadequate damages, 480 *f*.
for perverse verdict, 480 *g*.
in penal action, 480 *h*.
in equity cases, 480 *i*.
on payment of costs, 607 *e*.
when granted, 480 *k*, 644 *b*, 642, 677 *m*.
on appeal from judgment, 642, 701.
on appeal from city court of Brooklyn, 670 *g*.
on appeal from justices of the peace, 670 *h*.
after trial by referees, 501 *g*.
county court may grant, 40, 689.
costs on motion for, 480 *t*, 602 *e*.
costs on appeal from order, 481 *g*.
may be allowed on appeal from a judgment in a justice's court, 689, 690 *a*, *b*, 700, 701, 702, 716, 709.
appeals to court of appeals from orders granting, 25, 650 *g*, 712 *a*.
general term from orders granting or refusing, 679, 685 *b*.
examination of parties on, 747 *a*.
in ejectment, 825 *e*.
in divorce cases, 862.
evidence on, 480 *s*.
motion for, 481 *e*.
New York city, common pleas and superior court of, 43.
charter, how proved, 795 *c*.

New York city—*continued.*
costs in actions against, 581 *a.*
service of summons on, 164 *a.*
setting aside judgments against, 450 *b*, 682 *q.*
execution against, 522 *a.*
See, *First judicial district, Charter, District court, Mayor of New York, Streets, Superior court.*
New York county, *supervisors*, service of summons on, 164 *b.*
New York common pleas.
See, *Common pleas.*
New York, *superior court of.*
See, *superior court.*
Next circuit, what is meant by, 859 *b.*
Next friend *for married woman, not necessary*, 121.
Next *of kin*, who are, 128 *g.*
Non-enumerated motions, what are, and where to be heard, 869, 870.
hearing of, 876.
See, *Motions.*
Non-imprisonment act, warrant may issue under, 862 *b.*
not affected by code, 860.
Non-joinder *of parties*, 282 *a.*
See, *Parties.*
Non-repair of premises, action for injury by, 224 *f.*
Non-resident, who is, 364 *g.*
debtor, jurisdiction of county court as to, 39.
service of summons on, by publication, 168.
attachment against, 46 *b*, 417 *c*, 416 *b.*
may issue an attachment, 417 *c.*
arrest of, 363.
security for costs in actions by, 587.
service of papers on, 791.
has benefit of exemption law, 550 *h.*
may be compelled to convey the title to property out of the state, 568 *d.*
attorneys, 850, 792.
See, *Attachment.*
Nonsuit, plaintiff may submit to, or may be nonsuited on trial before referees, 861.
for insufficiency of complaint, 465 *h.*
has no right to submit to, after the jury have retired to consider their verdict, 861.
in what cases, 467 *n.*
effect of, 468 *e.*
on inquest, 463 *h.*
in justice's court, 77 *j.*
See, *Dismissal of complaint.*
Note of issue, party giving notice of trial to furnish, 457.
requisites of, and when to be furnished, 457, 460 *a.*
in superior court, 917.
duty of clerk on receipt of, 457.
for general term, 871.
notice of argument in place of, in court of appeals, 847.
Notes. See, *Bills and notes.*
surrender of on the trial, 222 *d.*
Notice, to be in writing, 787.
of non-acceptance, &c., of bill or note, defence of, 278 *e.*
publication of, how proved, 795 *a.*
service of, 787.
personal or as prescribed, 788.
by mail, 789, 788, 790.
irregularity in, how waived, 789 *g.*
when not required, 790.
on party out of the State, 791.
to bring party into contempt, 792.
where party appears by attorney, 790.
proof of, 787 *f.*
of motion generally, length of, 781, 876, 870.
countermand of, 773 *h.*
of judgment, 646 *b.*
of judgment of affirmance, or reversal by default, when necessary, 844.
of appearance or retainer, to be deemed an appearance, 853.
of bail, imports notice of retainer 834 *b.*
of trial, 457.
at adjourned circuit, county court, or oyer and terminer, 35.
before referee, 497 *c.*
where two actions between the same parties, 459 *e.*
should state intention to take inquest, 860.
should state intention to take assessment of damages, 459 *e.*
and for affirmative relief to defendant, 459 *e.*
insufficient, will render verdict irregular, 459 *f.*
either party giving, may bring issue to trial, 461.
of argument of appeal to general term, 675 *i.*
of argument in court of appeals, 847.
of adjusting costs, 613.
of settling the form of the judgment, when it must be given, 516 *a.*

Notice—*continued.*
of sale of real estate on execution, requisites of, 540 *f*.
of no personal claim, 160. See *Personal claim.*
of *lis pendens*, 160, 853. See, *Lis pendens.*
of appeal, 640 *a*, 690. See, *Appeal.*
legal publication of, 795.
of claim of surplus money, 892.
See, *Constructive notice.*
Nuisance, injunction to restrain, 403 *h*.
writ of, abolished, and action substituted, 818.
parties to action to restrain continuance of, 126.
Nullity, a pleading cannot be treated as a, 256 *f*, 306 *g*, 857.
of marriage, not to be declared by default, 902.
order, when not to be treated as a, 781 *c*.
Nunc pro tunc, judgment, 515 *f*, 644 *h*, 678 *d*.
leave to sue, 86 *e*.
exceptions, 487 *d*.
amending return, 534 *d*.
Numbering causes of action or defence, 856.
folios, 857.
Number of counsel to be heard, 878.

O.

Oaths, referees may administer, 793.
Object *of action*, notice of, 160, 853.
Occupants *of State lands*, removal of, within jurisdiction of county court, 39.
Occupation, when deemed to be under legal title, 93.
under written instrument, 93.
Offer *of defendant to compromise the whole or part of the action*, defendant may before trial or verdict offer to allow judgment for a certain sum and costs, 72. 714.
in what actions, 732 *a*.
form, 732 *b*.
when it may be served, 732 *d*.
amendment by plaintiff, effect in, 732 *e*.
by joint debtors, 732 *f*, *g*.
by partners, 733 *a*.
acceptance of offer, 731.
Offer, *&c., to compromise*—*continued.*
when offer deemed withdrawn, 732.
effect of offer if plaintiff do not recover a more favorable judgment, 732.
to liquidate the damages, 734.
effect of such offer, 734.
effect of acceptance or refusal of such offer, 734.
what is a more favorable judgment, 733 *b*.
costs after, 733 *d*.
entry of judgment, 734 *b*.
of respondent, to correct judgment appealed from, 714.
Office, action for usurping, 804.
Officer *of corporation or banking association*, when liable to arrest, 368.
of court, mistake of, not to prejudice party, 340 *b*.
to act as guardian, 880.
to require sureties to justify, 852.
how compelled to return process, 852.
clerk and chamberlain are, 567 *g*.
See, *Public officer*, *Official bond.*
Official bonds, of sheriffs, surrogates, and other officers, proceedings on, not affected by the code, 835.
Official capacity, what officers may sue in, 117 *b*.
parties to action in, 107 *a*.
Omission, court may supply, 356. See, *Mistake.*
Opening judgment by default, 448 *e*, 678 *h*, 168, 173 *e*.
review of order on motion to open default, 682 *u*, 681 *f*, *q*.
judgments against New York city, 450 *b*, 682 *q*.
Oral examination on motion, 746 *e*, 757 *g*, 779.
Order, definition of, 772.
review of, on appeal from judgment, 642.
concludes only parties or privies, 773 *j*.
binding, until set aside, 773 *k*.
at chambers after order of the court, 775 *c*.
benefit of, how lost, 851.
time for complying with, 878.
distinction between, and judgment, 453 *d*, 772 *a*.
conditional order, 774 *b*.
in superior court, 777 *h*, 918.
by default, 773 *m*.
made out of court, how vacated or modified, 638.

Order—*continued.*
after order of court, is irregular, 775 *c*.
entitling, 775 *d*.
entry of, 775 *c*, 684 *a*, 637, 911.
service of, 777 *f*.
to what time it relates, 776 *a*.
void order, 776 *b*.
out of court, 778.
staying proceedings, 778, 780 *c*, 878.
copy affidavit to be served with, 783, 784 *a*, 858.
by county judge, 778, 788, 782.
See, *County judge*.
must be entered, before appealed from, 684 *a*, 775 *c*.
at chambers, review of, in common pleas, 923.
on petition, to refer to petition, 878.
on petition may be enrolled or docketed, 878.
on banks for payment of money, 895.
appointing guardian, 881.
to show cause, 409, 781.
in second district, 913.
motions, to be on, or on notice, 781, 868.
appeal from, 25, 777 *g*.
in superior court, 777 *h*.
in common pleas, 923.
See, *Conditional order*, *Final order*, *Intermediate order*.
Ordinary proceedings, provisional remedies are not, 790 *c*.
Original, when copy may be used instead of, 794.
Orleans county, motions in actions pending in, 780 *c*.
Orphan asylum, sale or lease of real property of, 29 *c*.
Owner, 538 *e*, 203 *a*.
a conclusion of law, 195 *z*, 196 *p*.
allegation that plaintiff is, 203 *a*.
of boats, vessels, or stages, actions against, who may be made parties to, 118 *a*.
Oyer and Terminer, existing provisions of law as to terms of, repealed, 29.
jurisdiction of, 30 *g*.
extraordinary, 34.
may be adjourned, 35.
juries may be drawn for adjourned court, 35.
causes may be noticed for trial at adjourned court, 35.
inability of judge to preside at, 36.
rooms for holding, 37.

P.

Papers, *service of*, how made, 788.
by mail, 788, 789.
irregularity in service of, how waived, 789 *g*.
when not required to be served on defendant, 790.
on party out of the State, 791.
where party appears by attorney, to be on the attorney, 791.
to bring party into contempt, 792.
lost or withheld, how place of supplied, 794.
to be filed, 792, 851.
transfer of, on change of place of trial, 851.
attorney to endorse his name and residence on, 853.
to be furnished the court, on motions, 870.
on appeal, 871.
to be furnished on appeal to the court of appeals, 657 *d*, 843.
to be printed, 871, 841.
to be marked by folios, and legibly written, 857.
production of, on *subpœna duces*, 747 *a*.
See, *Discovery*.
Parol argeement. See, *Agreement*.
Part *of claim*, order to satisfy, 432, 439 *k*.
payment, answer of, 284 *b*.
Partial defence, when allowed, 277 *c*.
See, *Mitigating circumstances*.
Particulars. See, *Bill of particulars*.
Parties to actions, who are, 105, 144 *c*, 746 *a*.
guardians *ad litem*, are not, 105 *c*.
provisions as to, applied to justices' courts, 72.
how designated, 85.
in complaint, 186 *c*.
provisions as to, 105.
party in interest to sue, 105.
rule in equity as to, adopted, 106 *a*.
by assignees, 115.
by administrators, 116.
by executors, 116.
by trustees of express trust, 116, 119 *b*.
by and against public officers, 117 *b*.
by and against private partnerships, 117 *d*.
carriers, 118 *a*.
by board of education, 118 *c*.
by and against persons not in being, 120 *h*.

Parties to actions—*continued.*
by the United States, 121 *a*.
on bond of town superintendents, 121 *b*.
by trustees of religious societies, 121 *c*, 117 *d*.
by parties authorized by statute to sue, 116.
against owners of vessels, boats, or stages, 118 *a*.
by and against joint-stock companies, 117 *d*.
to recover compensation for causing death by wrongful act, 118 *d*.
by banking association, 118 *b*.
on bond taken in the name of the people, 116 *e*.
on note given to executor for debt of his testator, 127 *g*.
on administration bond, 116 *c*.
on constable's bond, 117 *a*.
on covenant, 119 *a*.
for penalties, 120 *b*.
by and against boards of health, 120 *c*.
by Seneca nation of Indians, 120 *d*.
by a republic, 120 *f*.
by officer of foreign government, 120 *g*.
by receivers and sheriff, 120 *e*.
by N. Y fire companies, 117 *d*.
by and against limited partnerships, 117 *d*.
against shareholders and stockholders in dissolved companies for manufacturing purposes, 118 *e*.
by member of unincorporated association, 117 *d*.
by one on behalf of himself and others, having a common interest, 131, 132 *f*.
on bills and notes, &c., 133.
by and against idiots or lunatics, 118 *f*.
town and country officers, 117 *b*.
habitual drunkards, 118 *f*.
common informers, 120 *b*.
under act relating to port wardens and pilots, 120 *b*.
by auctioneers, 119 *b*.
by mercantile factors, 119 *b*.
for injunction to restrain the continuance of a nuisance, 108 *e*.
to set aside mortgage as usurious, 129 *f*.
to foreclose a mortgage, 130 *d*, 885 *a*.

Parties to actions—*continued.*
by and against husband and wife, 121.
plaintiff, 126.
defendant, 127.
for slander, 130 *i*.
for partition, 811 *d*, 815 *i*.
where infant a party, 128.
of ejectment, 820 *c*, *i*.
in creditors' suit, 128 *d*.
infant joint contractor must be, 129 *h*.
who to be joined as, 126, 127, 131.
on bills and notes, 133.
death of, *pendente lite*, 133, 134, 500 *j*, *k*, 515 *f*, 144 *c*, 802, 816 *e*, *f*, *g*, 870, 824 *m*, 835 *b*, 860 *e*.
marriage of, *pendente lite*, 133.
transfer of interest of, 133
court may determine controversy between, 139.
when they may interplead, 139.
demurrer for defect of, 257, 260 *e*.
amendment as to, 348 *g*, 351 *e*, *f*.
when others may be ordered to be brought in, 139.
examination of, as witnesses, 744.
when allowed witnesses' fees, 617 *f*, 744 *d*.
service of notices and papers on, 788.
not to suffer by delay of court, 340 *b*.
mistake of officers of the court, 340 *b*.
judgment against one of several, 506, 507 *a*.
attorney to disclose residence of, 106 *d*.
See, *Party*, *Verification*, *Death*.

Parties to appeal, how designated, 639.

Partition, provisions of revised statutes apply to action for, 810.
county court has jurisdiction in action for, 39, 40 *a*.
section 173 of code applies to, 349 *a*.
must be by action 811 *a*.
suit is in *rem*, 810 *c*.
in what cases, 810 *d*, 893.
place of trial of, 143.
of part of premises, 811 *e*.
parties to, 811 *d*.
bringing in new parties by amendment, 815 *i*.
by infant plaintiff, 811 *f*.
where there are "unknown owners," 812 *a*.
complaint for, 812 *b*.

Partition—*continued.*
notice of pendency of action, 812 *a.*
infant *feme covert* defendant, 812 *d.*
infant or idiot defendant, guardian for, 124, 779 *e*, 812 *e.*
defence of *non tenent insimul*, 813 *e.*
defence of action pending, 813 *f.*
where defendant does not answer, 813 *g.*
advertising for liens, 813 *h.*
court will not try disputed title in, 814 *a.*
contesting validity of devise in, 814 *b.*
allowance for improvements or injury, 814 *c.*
contingent interest of person not in esse, 814 *d.*
and sale, when decreed, 814 *e*, 893.
judgment 814 *f.*
new trial, 814 *j.*
manner of sale, 814 *k.*
notice of sale, 815 *a.*
sheriff to account for proceeds of sale, 815 *c.*
death of plaintiff, effect of, 815 *e.*
defendant, effect of, 815 *g.*
discharging purchaser, resale, 815 *j.*
proceeds of sale to be brought into court, 816 *a.*
inchoate right of dower, how provided for, 816 *b.*
amendments, 816 *c.*
plaintiff to prosecute with reasonable diligence, 816 *d.*
value of inchoate tenancy by the curtesy, 816 *e.*
costs, 816 *f.*
attorney's lien on judgment, 816 *g.*
reference as to title, 893.
reference as to sale, 893.
staying sale, 894.
examination of witnesses in, 754 *f.*
of personal property, 810 *b.*

Partner, cannot arrest his co-partner, 873 *a.*
assignment by, 109 *d*, 112 *o.*
joinder of, 126 *h*, 130 *b.*
complaint by and against, 235 *a.*
amending pleadings in actions against, 344 *e.*
liable for fraud of co-partner, 371.
confession of judgment by, 723.
offer of compromise by, 733 *a.*

Partnership, discontinuance of, action for settlement of affairs of, 633 *c.*
property, attachment against, 416 *b*, *c.*
receiver to protect, 437 *i.*
reference in suits as to, 437 *h.*

Partnership—*continued.*
actions by, silent partner to join, 132 *b*, 126 *h.*
amending pleadings in actions against, 344 *e.*
limited, parties to actions, 126 *h.*
complaint, 235 *d.*
parties to actions by and against, 126 *g*, 130 *b.*
complaint on note signed in name of, 209 *b.*
confession of judgment for, 723.
offer of compromise by, 733 *a.*
See, *Joint stock company.*

Party, a person not served with process is not, 106 *a.*
guardian *ad litem* is not, 105 *e.*
stockholder in corporation is, 105 *f.*
to action of ejectment, 106.
attendance of, in supplementary proceedings, 568.
attending as a witness entitled to fees, 744 *d*, 617 *f.*
attendance as a witness, how compelled, 749, 749 *a.*
aggrieved, who is, 639 *d.*
appealing, who is, 646 *a.*
in interest, action to be in name of, 105.
who is party in interest, 107 *b.*
denial that plaintiff is, how made, 282 *b.*
liable for costs, 629 *d.*
or attorney, these words do not include the clerk, 787 *a.*
united in interest, when he may be a witness in his own behalf, 752.
for whose immediate benefit the action is prosecuted or defended, examination of, 751.
See, *Parties to action.*

Patent, for land, how proved, 796 *d.*
no jurisdiction as to, 23.
action to vacate, 804.

Payment, presumption of, 90 *c*, 96 *a.*
answer of, 284 *b.*
allegation of in pleading, 284 *b.*
answer of part payment, 277 *a.*
of part, effect of, on time of limitation, 104, 105.
into court, of deposit, in lieu of bail, 383.
into court, 731 *b*, *c.*
of amount admitted due, 439 *k.*
after action commenced, 630 *a.*
by one joint debtor not a revival of the debt against the other, 104 *b.*
of judgment, does not prevent an appeal to court of appeals, 656 *f.*

Payment—*continued.*
may be made to justice, 80 *h*.
pending an appeal, 713 *a*.
Payments, particulars of, will not be ordered, 816 *c*.
Paupers. See, *Poor persons*.
Penal action, parties to, 108 *i*, 120 *b*.
summons in, 156 *e*, 157 *b*, *g*.
time of limitation in, 98, 99.
See, *Penalty*.
Penal bond, judgment on, 516 *a*.
Penalty, justices of the peace have jurisdiction of action for certain, 51, 54, 55.
actions for, not affected by code, 835.
action for, within what time to be commenced, 98, 99.
where to be tried, 144.
parties to action for, 108 *i*, 120 *b*.
complaint in action for, 235 *g*.
arrest in action for, 363.
Pending action. See, *Action pending*.
Pension, not assignable, 111 *f*.
People, when they will not sue for real property, 91.
they or their grantees to sue within twenty years in certain cases, 92.
time of limitation applies to actions by, 99.
when they cannot sue or be sued in justices' courts, 54.
parties to actions on bonds taken in the name of, 116 *e*.
injunction at instance of, to suspend business of corporations, 411.
service of summons on, 167 *e*.
costs in actions by, or in name of, 628.
place of trial of actions by, 144.
residence of, extends to every county of the State, 802 *f*, 145 *a*.
actions in name of, 802.
actions for forfeiture of property to, 809.
may appeal without giving security, 637 *c*, *d*.
may move cause out of its order on court of appeals' calendar, 844.
Per-centage, *in addition to costs*, 607.
in court of appeals, 601.
See, *Allowance*.
Perfected, when appeal is, 666 *a*.
Performance *of conditions precedent*, how pleaded, 327, 248 *c*, 284 *g*.
how alleged, 248 *c*, 284 *g*.
answer of, 284 *g*.
Performance—*continued.*
specific, county court may order, 39.
complaint for, 241 *j*.
answer in action for, 287 *e*.
may be enforced by execution, 525.
Perishable property, proceedings on attachment of, 423.
may be sold notwithstanding an appeal, 668.
Permission *to sue*, when to be alleged, 191 *b*.
when necessary, 86, 208 *d*, 165 *e*, 435 *j*, 436 *a*, *b*, 811 *f*, 409 *f*.
Perpetuating testimony, proceedings for, 750 *c*.
Person, clerk or chamberlain is not a, 567 *g*.
for whose immediate benefit action is prosecuted or defended, 751.
name of, 323 *e*.
injuries to, cause of action for, may be joined with cause of action for injury to property, 332 *d*.
crim. con. and seduction are, 364 *a*.
adultery is not, 364 *a*.
cruelty is, 364 *a*.
time for commencing actions for, 97.
of unsound mind, sale, mortgage, or other disposition of real estate of, county court may decree, 39.
care and custody of the person and estate of, may be decreed by county court, 39.
service of summons on, 163, 165 *d*.
when cannot be sued except by leave of the court, 165 *d*.
confession of judgment by, 728.
provisions of revised statutes as to custody of person and estate of, not affected by the code, 835.
execution against, 527, 528 *a*.
Personal claim, *notice that none is made*, when it may be served, 160.
what to contain, 160.
effect of defending after, 160.
is not part of the process, 160 *b*.
fee for service of, 160 *b*.
certificate of service of, 160 *b*.
service of copy complaint after, 160.
Personal property defined, 831.
action for fraud in sale of, 51.
injury to, 55, 56.

Personal property—*continued.*
time for commencing action for taking, detaining, or injuring, or for recovery of possession of, 97,
summons in action for converting, 157 *l.*
complaint for, 237 *a.*
place of trial, in actions to recover, 143.
complaint for partition of, 235 *f.*
no partition of, 810 *b.*
arrest in action to recover, 363.
judgment in action to recover, 514.
costs in actions to recover the possession of, 591.
distrained, action for recovery of, where to be tried, 143.
doing damage, answer, 331.
judgment, on failure to answer in action to recover, or its value, 446 *g.*
verdict in action to recover, 473 *a.*
levy and sale of, on execution, 536 *e, f.*
appeal from judgment for delivery of, 664, 669 *c.*
See, *Claim and delivery of personal property.*
Personal representatives, who are, 222 *h.*
Personal tax, commitment for non-payment of, 46 *d.*
Personal service, what sufficient, 165 *a.*
appearance equivalent to, 177.
Petition, motion for discovery of books, &c., to be on, 741 *f.*
for discovery, what to contain, 855.
orders granted on, to refer to, 878.
order or judgment on, may be enrolled or docketed, 878.
on appeal from surrogate, 873 *m.*
for appointment of guardian, 881.
for admeasurement of dower, 827 *f, g*, 835.
how addressed, 772 *e.*
Physicians, jurisdiction of county court as to, 39.
not to testify to certain matters, 755 *b.*
Pilots, of port of New York, action by, 120 *b.*
Place, how alleged in pleadings, 323 *a*, 326 *b.*
of residence, 789 *h, i.*
See, *Residence.*
of sale of lands, 909, 890
Place of trial *of actions*, to recover real property, 143.
any estate or interest in real property, 143.
Place of trial—*continued.*
to determine right or interest to real property, 143.
for injuries to real property, 143.
for partition of real property, 143.
to foreclose a mortgage of real property, 143.
to recover personal property distrained for any cause, 143.
to recover a penalty or forfeiture imposed by statute, 144.
against a public officer or his deputy, 144.
in other actions where parties reside, 144.
in actions by the people, 144 *a.*
may be changed, 145.
in what cases it may be changed, 145.
effect of change of, 146.
of issue of law, 252 *e.*
of motions, 778, 779 *e.*
See, *Changing place of trial.*
Plaintiff, the party complaining is, 85.
address of, 106 *d.*
first pleading of, 184.
who should be joined as, 126.
when execution may issue against the person of, 529 *b.*
relief to, 512.
an infant, costs against, 622.
non-suit of, before referees, 861.
non-suit of, on an inquest, 463 *h.*
when no right to submit to non-suit, 861.
need not be called when jury render their verdict, 861.
judgment against one of several, 506.
in person must endorse name and residence on papers and process, 853.
when to furnish the court with copy pleadings, &c., 471.
may stipulate to proceed to trial, 859.
when he must give security for costs, 585 *j.*
when address of, to be furnished, 106 *d.*
cannot have security for costs, 588 *a.*
when to give security before taking judgment, 443.
sannot serve summons, 162.
death of, pending the action, 133, 134, 135, 500 *k*, 816 *e*, 888 *j*, 860 *e*, 824 *m.*
See, *Parties to Actions, Separation.*

Plank roads, proceeding to lay out, is a special proceeding, 18 *c*.
appeal from, 680 *i*.
Pleadings, *in courts of record*, forms of, abolished, 179.
sufficiency of, to be determined by the rules prescribed by the code, 179.
by corporations regulated, laws 1864, ch. 422.
lost or withheld, place of, how supplied, 794.
the complaint, 184, 185.
See, *Complaint*.
the demurrer, 255.
See, *Demurrer*.
the answer, 266.
See, *Answer*.
the reply, 302.
See, *Reply*.
general rules of, 305.
mistakes and amendments, 339.
See, *Amendments*.
to be subscribed, 305, 306 *a*.
subscription of, 306 *a*.
to be verified, except demurrers, 305.
how verified, 307.
when verification may be omitted, 308 *a*.
when agent or attorney may make the verification, 309 *e*.
form of verification by the party, 310 *a*.
attorney or agent, 311 *e*.
verification, before whom, 311 *b*.
omitting verification, 306 *f*, *g*, *h*.
defective verification, 306 *f*, *g*, *h*.
verification by all defendants, 314 *c*.
to be in English, 314 *e*.
writing, numbering, and endorsing, 314 *e*.
how an account is to be stated in, 315.
copy account to be furnished, 315.
further account may be ordered, 315.
bill of particulars, court may order to be furnished, 315.
to be liberally construed, 316.
irrelevant or redundant matter to be struck out of, 320.
indefinite or uncertain, pleading may be ordered to be made more definite and certain, 320.
judgments and determinations, how pleaded, 326.
denial that judgment or determination was duly given, effect of, 326.
Pleadings *in courts of record—contin'd.*
allegations of time, place, quantity, quality, and value, 322, 323.
copies served, may be treated as true copies by the opposite party, 267 *c*.
objecting to, on trial, 465 *g*.
to state names of persons, 323 *a*.
conditions precedent, how pleaded, 327.
in action or defence founded on instrument for the payment of money, 327.
private statutes or rights derived therefrom, how pleaded, 328.
libel and slander, how stated in complaint, 328, 225 *a*.
answer in actions for libel and slander, 329.
in actions to recover property distrained doing damage, 331.
what causes of action may be joined, 332.
allegations not denied, when deemed true, 337.
new matter in answer (not a counter-claim) is to be deemed controverted as upon a direct denial or avoidance, 337.
the like of new matter in a reply, 337.
cannot be used as evidence in criminal proceedings, 307.
to be legibly written, 314 *e*, 857.
folios to be marked, 314 *e*, 857.
each cause of action or defence to be separately numbered, 856.
discovery to enable party to prepare, 855.
party may be sued by a fictitious name, 356.
errors and defects not affecting substantial rights, to be disregarded, 357.
supplemental pleading, when allowed, 357.
when amended, to be answered anew, 263, 344.
court to be furnished with copy of, 471.
to be filed, 791.
copies of, not to be given out in divorce cases, 901.
using as affidavit, 409 *j*.
admissions in, 338 *b*, 304 *f*.
reading in evidence, 338 *f*.
motion for judgment on, 304, 917.

Pleadings—*continued.*
defective, should be returned, and not treated as nullities, 256 *f*, 306 *g*, 857.
in justices' courts, 70.
in actions against foreign corporations, 800 *f*.
in actions against corporations, Laws 1864, ch. 422.
See, *Amended pleading*, *Answer of Title*, *Answer*, *Complaint*, *Demurrer*, *Reply*, *Supplemental pleading*.
Points defined, 843 *b*.
to be printed, 841, 875.
to be furnished, 875, 843.
facts deemed established to be stated on, 875, 843.
Police. See, *Metropolitan police*.
Policy of insurance, complaint on, 224 *i*.
consolidating actions on, 835 *h*.
Polling the jury, 470 *l*.
Poor persons, suits by, not affected by the code, 835.
cannot appeal in *forma pauperis*, 637 *b*.
not required to give security for costs, 587 *a*.
Port warden and *Pilot Act*, actions for penalties under, 120 *b*.
Possession *of land*, when presumed, 93.
summary proceedings to recover, not affected by the code, 835.
summary proceedings to recover, appeal from justice's decision to county court, 40 *b*.
of personal property, action to recover in justice's court, 51.
action to arrest in 368 *c*.
of real property, when presumed, 93.
adverse, 93.
Possibility, assignment of, 109 *h*, 111 *h*.
Postage, to be paid on papers served by mail, 789 *c*.
Postponement, costs on, 619.
at circuit, 466 *b*.
See, *Adjournment*.
Poundage, sheriff, when entitled to, and amount, 535 *f*.
Practice, all inconsistent with the code repealed, 833.
in cases not provided for, 832.
Preference, motions to vacate or modify a provisional remedy to have, 778.
appeals from orders allowing provisional remedies to have, 778.
of appeals, 27.
cases, 27.
of causes in first district, 909.
of motions in first district, 910.
Preliminary injunction. See, *Injunction*.
Preliminary objection on motion, 774 *b*.
Premium note, complaint in action upon, 211 *g*.
counter-claim against, 295 *c*.
President *of corporation*, not bound to produce books, &c., of corporation, 747 *c*.
Presumption of payment, 90 *c*, 96 *c*.
of possession, 93.
Priest not allowed to testify to certain matters, 755 *a*.
Principal, liability of for act of agent, 371.
and surety joined as defendants, 131 *c*.
counter-claim between, 295 *d*.
Prisoner. See, *Imprisoned convict*, *Imprisoned debtor*.
Private roads, 41 *a*, 692 *f*.
Private statutes, how pleaded, 328.
Privilege *from arrest*, 361 *a*.
Proceeding. See, *Special proceeding*.
Process out of justices' courts, provisions of code as to service on corporations applied to, 72.
execution to be deemed, 526.
notice of no personal claim is not, 160 *b*.
attachment under the code, is it? 416 *d*, 420 *b*.
indorsement on certain, 377 *c*, 853, 534 *f*.
duty of sheriff and coroner as to, 792.
return of, how compelled, 852.
assignment of right of action for abuse of, 111 *l*, *m*.
See, *Summons*.
Production *and discovery of books, papers, &c.*, 735.
application for, in what cases, 741 *f*, 855.
petition for, what to state, 855.
order for, what to specify, 855.
appeal from order, 681 *o*.
operates as a stay of proceedings, 856.
referee cannot order, 499 *b*.
will be ordered on referee's certificate, 739 *c*.
of documents or chattels on the trial, 468 *k*.
of books, &c., on trial, 747 *a*.
See, *Admission*, *Inspection*, *and Discovery*.
Profert and oyer, in pleading, 250 *a*.
Prohibition not affected by the second part of the code, 834.

Prohibition—*continued.*
on filing return to, rule to plead may be entered, 877.
review of judgment in, 637 *a.*
Promise to pay debt of another, how to be alleged, 204 *d.*
Promissory notes. See *Bills and notes.*
complaint on, 209 *a.*
Proof of service of summons, 175, 856.
of commencement of action, 100 *a.*
of notice of affirmance or reversal of judgment, 844.
of motion, when counsel to endorse his name on, 878.
of laws of other States, &c., 795.
of public records of other States, 796 *b.*
of plaintiff's demand, 445 *e.*
of no answer received, 443 *b.*
of execution returned unsatisfied, 561 *a.*
of filing notice of *lis pendens*, 884.
of service, where party serving is dead or insane, 787 *f.*
of citizenship, &c., by applicant for admission as an attorney, 849.
of charter of city of New York, 795.
of land patent, 796 *d.*
of incorporation of foreign corporation, 796 *e.*
of records in court of Canada, 796 *e.*
of inferior courts, 796 *e.*
of corporation ordinances, 796 *e.*
of records in supervisors' office, 796 *e.*
office of collector of customs, 796 *e.*
See, *Like Proof.*
Property, the word defined, 832.
sold and delivered, complaint for, 220 *e.*
causes of action for injuries to, and the person, may be joined in one complaint, 332 *d.*
distrained doing damage, answer in action for, 331.
arrest in action for taking or detaining, 363, 368 *e.*
execution against, 526.
exempt from execution, 548 *b.*
ordered to be applied to execution, 568.
appeal from judgment for sale or delivery of, 665.
disposal of, 723.
See, *Personal property, Real property.*
Provisional remedies, 360, 431.
waiver of, 360 *a.*
Provisional remedies—*continued.*
the provisional remedies mentioned in the code are not "special proceedings," 649 *e.*
are not the ordinary proceedings in an action, 790 *c.*
appeals to general term from order granting or refusing, 679.
issue *ex parte*, 790 *e.*
motion to vacate or modify, to have a preference, 778.
appeals from orders allowing, to have a preference, 778.
See, *Arrest, Attachment, Claim and Delivery, Injunction, Receivers, Remedies.*
Public nuisance. See, *Nuisance.*
Public officer, actions against, where to be tried, 144.
actions by and against, how brought, 117 *b.*
when liable to arrest, 363.
who is, 368 *d.*
complaint, by and against, 189 *c.*
rights of, as to place of trial, 144.
waiver of rights of, as to place of trial, 144 *a.*
confession of judgment by, 723.
delivery up of books by, 46 *d.*
abatement of action by or against, 137 *c.*
See, *Officer.*
records, of foreign State, how proved, 796 *b.*
statute, how pleaded, 236.
Publication of appointment of terms of supreme court, &c., 35.
of terms of county courts, 42.
of legal notices, time for, 795.
of notice of motion for leave to issue execution, 523.
of advertisement, how proved, 175, 176 *a*, 795.
service of summons by, in what cases, 167.
affidavit on order for, to be filed, 851.
copy summons and complaint to be mailed, 172 *e.*
personal service out of State, 171 *a.*
when defendant allowed to defend after, 169.
complaint must be filed, 169, 173 *a.*
need not be published, 173 *f.*
time to answer after publication, 175 *a.*
when service complete after, 175.
proof of, 175.
application for judgment after, 442, 447 *e, f*, 859.

Purchaser. See, *Vendor.*
at judicial sale, 660 *h*, 653 *i*, 681 *e*, *g*, 682 *b*, 683 *i*, 815 *j*, 887 *m*.

Q.

Qualifications of bail, 382.
Quantity *and quality*, when to be alleged in pleading, 323 c.
Question *of fact*, 194 *a*.
arising on motion or otherwise, references to ascertain, 489, 493 *c*.
trial of, by court or jury. See, *Trial.*
appeal on. See, *Appeal.*
court will not hear extended discussion on, 843, 875.
of law, 195 *d*.
mixed of law and fact, 195 *m*.
of practice, review of, in N. Y. common pleas, 923.
Quo warranto, writ of, proceedings by information in the nature of, abolished, and action substituted, 801.
place of trial of action in nature of, 145 *a*.

R.

Railroad, through Indian lands, county court has jurisdiction of, 39.
corporation, where resident, 145 *b*.
service of summons on, 163 *a*.
act, complaint on, 240 *a*.
bond, complaint on, 208 *a*.
mortgage, complaint on, 240 *f*.
company, complaint against, 240 *d*, 236 *j*.
appeal from award for lands taken for, 679 *d*, 654 *j*.
Rate of damages, what recoverable, 514.
Real estate, when a justice's judgment is a lien on and may be enforced against, 69, 84.
judgment lien on, 518.
levy on and sale of, on execution, 540 *f*.
proceeds of, belonging to infants, how disposed of, 882.
See, *Real property*, *Religious corporation.*
Real name, when not known, party may be sued by fictitious, 356.
Real *party in interest*, who is, 107 *h*.
defence that plaintiff is not, 109 *e*, 282 *b*.
See, *Party in Interest.*
Real property, definition of, 831.
out of the State, actions respecting, 23.
of benevolent, charitable, scientific, or missionary societies, or orphan asylums, supreme court may order lease or sale of, 29 *c*.
testing validity of, 29 *c*.
action for fraud in sale of, 56.
action by grantee of, in name of his grantor, when allowed, 106.
bringing in parties in action to recover, 139.
arrest in action for recovery of, 371 *j*.
general provisions relating to actions concerning, 819.
title to, sold under judgment, afterwards set aside, 169, 542, *c*.
costs in actions to recover, 591.
wheh title to, in question, 592 *a*, 64.
lien on, by attachment, 422 *g*.
lien on, by judgment, 69, 70, 84, 47 *a*.
adjudged to be sold, where to be sold, 890, 527.
sale and redemption of, on execution, 542 *k*.
actions to determine conflicting claims to, 817.
general provisions as to actions relating to, 819.
time for commencing actions for trespass on, 97.
for the recovery of, 91.
entry on, 92.
partition of, 810.
sale of, where to be had, 527.
summary proceedings to recover possession of, 40 *b*, 689 *d*.
adverse possession of, what is, 93, 94.
notice of *lis pendens* in actions affecting, 160, 853 *a*.
place of trial of actions relating to, 143.
See, *Conflicting claims*, *Ejectment*, *Partition*, *Infant*, *Real Estate*, *Religious corporation*, *Habitual drunkard*, *Lunatic*, *Person of unsound mind*, *Forcible Entry.*

Re-argument of appeal, 678 *g*.
Reasonable time, what is a, 250 *f*.
Re-assignment of thing in action, 114 *b*.
Rebutting testimony of party called as a witness, 749, 749 *f*.
Receiver, in what cases he may be appointed, 431.
when and how appointed, 432 *a*.
when he will be appointed, 433 *i*.
general powers of, 438 *a*.
who may act as, 434 *c*.
is an officer of the court, 434 *e*.
taking property from possession of, a contempt, 434 *i*.
when title vests in, 434 *f*.
delivery of property to, 434 *h*.
represents creditors, 435 *a*.
compensation to, 435 *b*.
chargeable with interest, 435 *f*.
accounts of, 435 *g*.
order on, to discharge liens, 435 *i*.
suits by and against, 435 *j*.
what attorney he is to employ, 436 *f*
change of, 436 *g*.
when to be defendant, 130 *f*.
discharge of, 437 *c*.
in mortgage cases, 437 *e*, 888 *n*.
over real estate, 438 *r*, 820 *g*.
in actions to close up partnership concerns, 437 *h*. 824 *g*.
of insolvent or dissolved corporations, rights, powers, and duties of, 438 *c*, 438 *a*.
under revised statutes, 439 *a*.
of insolvent mutual insurance company, 439 *c*.
costs in actions by and against, 437, 623 *b*.
of lunatic or habitual drunkard, suit by or against, 118 *f*.
parties to action, 120 *e*, 130 *f*, 133 *c*.
complaint by, 190 *e*.
of religious corporation, county courts cannot appoint, 40 *c*.
of foreign corporation, 46.
of corporation, 808.
review of order on motion for, 681 *d*.
costs to, 901.
may sell doubtful debts, 901.
in supplementary proceedings, when may be appointed, 571, 572 *d*, 439 *j*.
order appointing to be filed, 571.
vesting of property in, 573 *e*.
complaint in action by, 190 *e*, 209 *a*.
Recognizances, judgment on, New York common pleas has jurisdiction of, 46 *e*.
code applies to proceedings on, 20 *c*.
Recognizances—*continued*.
complaint on, 240 *g*.
costs of action on, 591, 596 *g*, *h*.
See, *Forfeited recognizances*.
Record, amendment of, 353 *g*, *h*, 354 *e*, 841.
of foreign State, how proved, 796 *e*.
of courts in Canada, how proved, 796 *e*.
of inferior court, how proved, 796 *e*.
of supervisors' office, how proved, 796 *e*.
of office of collector of customs, how proved, 796 *e*.
See, *Judgment-roll*.
Recorder, orders of, how reviewed, 678.
Recorder of Troy, may issue order in supplementary proceedings, 560 *a*.
jurisdiction of, 37 *c*.
Recorder's court, jurisdiction of, 44.
removal of proceedings from, 41 *f*, 45.
power of, to order production of documents, 736 *c*.
appeal from, to supreme court, 670.
orders of, 678.
Recording mortgage before sale in foreclosure, 891.
Recoupment, claim of, must be pleaded, 289 *d*.
See, *Counter-claim*.
Recover, meaning of the term, 419 *g*, 596 *b*.
Recovery, set-off of, 714.
Redemption of real estate sold on execution, 542 *k*.
Redundancy, not a ground for demurrer, 258 *e*.
Redundant, 320 *c*. See, *Irrelevant and redundant*.
Re-entry, assignment of right of, 112 *e*.
Referee defined, 491 *a*.
when not to be nominated by the parties, 491 *d*.
who will be appointed, 495 *f*.
change of, 495 *g*.
death of, 496 *c*.
time and place of meeting of, 496 *h*.
powers of, 793.
compelling attendance of witnesses before, 497 *a*.
notice of trial before, 497 *a*.
to be sworn before proceeding, 497 *b*.
adjournment of proceedings before, 497 *d*.
trial before, 497 *f*.

Referee—*continued.*
may administer oaths, 793.
swearing and examination of witnesses, 497 *g*.
amendments, on trial before, 498 *i*.
production of books before, 499 *b*.
report of, 499 *d*.
time for making, 500 *a*.
who entitled to, 500 *e*.
amendment of, 500 *f*.
setting aside, 501 *g*.
motion to set aside, 502 *a*.
costs on setting aside, 502 *b*.
confirmation of, 502 *c*.
judgment on, 502 *d*.
is not a verdict, 779 *d*.
fees of, 501 *a*.
findings of, 503*c*.
irregularity in appointment of, how waived, 496 *e*.
cannot be a witness, 498 *a*.
notice of judgment on report of, 502 *h*.
appeal to general term from judgment on report of, 503 *a*.
stay of proceedings on, 503 *b*.
case on, 503 *e*.
settlement of case on, 504 *b*.
date of issue on, 504 *d*.
proceedings on, 504 *e*.
reviewing order for change of, 680 *t*.
to set aside report of, 682 *v*.
appeal to court of appeals from judgment on report of, 505 *d*.
in proceeding supplementary to execution, 576.
Reference, defined, 491 *b*.
by consent, 489, 491 *c*.
by compulsion, 489, 491 *f*.
when ordered, 491 *f*.
to take an account, &c., 493 *a*, 495 *e*.
of question of fact arising pending an action, 493 *c*.
in special proceedings, 493 *f*.
of equity causes, 494 *c*.
order for is necessary, 494 *d*.
when to be applied for, 494 *e*.
motion for, 494 *g*.
cross motion for, 494 *h*.
joint, 494 *h*.
opposing motion for, 494 *i*.
no appeal from order for, 495 *b*.
amendment after order for, effect of, 495 *c*.
after judgment on issue of law, 488.
of issues, 456, 862.
on judgment for want of answer, 442.
Reference—*continued.*
effect of order for, 496 *d*.
construction of, 496 *f*.
service of, 496 *g*.
costs on, 499 *a*.
production of books, &c., on, 499 *b*.
proceedings after order for, 496.
in proceedings supplementary to execution, 567.
in foreclosure cases, 885.
on a motion, 779, 757 *g*, 746 *c*, 44.
of claim against deceased person, 622, 624.
in actions for divorce, 495 *d*, 862.
partition, 893.
to ascertain damages on injunction, 408 *g*.
review of order for, 680 *m*, 683 *p*.
Rehearing, in court of appeals when to be had, 27, 28.
on appeal from justices' court, 712 *b*.
See, *New trial*.
Relator *in action by the people*, may be joined as plaintiff, 805.
may assume office on judgment in his favor, 806.
Relief, demand of, 253 *a*, 185, 258 *g*.
legal and equitable, in the same action, 253 *a*, 333 *c*, 823 *b*.
alternative, when cannot be had, 253.
amendments as to amount of, demanded, 352 *a*, *j*.
when there is no answer, extent of 512.
judgment taken by mistake, &c. 355, 701.
prayer for, not necessary in answer, 278 *c*.
to plaintiff, 512.
to defendant, 476, 506, 509 *d*.
to be clearly specified in judgment, 516.
time of limitation in action for certain, 99.
on motion, 774 *d*, 637 *h*, 651 *f*.
in cases of mistake, 355.
See, *Affirmative relief*. *Alternative relief*.
Religious corporation, county court may decree mortgage or sale of real property of, 39.
sale of real estate of, 30 *a*, 909.
receiver of, 40 *c*.
jurisdiction of N. Y. common pleas and superior court as to, 45 *a*.
parties to actions by and against, 121 *c*, 117 *d*.
proof in action by, 213 *b*.

Remedies, division of, 17.
civil and criminal not merged, 19.
See, *Election of remedy*, *Provisional remedies.*
Remittitur, from court of appeals, 27.
cannot be made on dismissal of appeal pursuant to Rule II., 658 *k.*
clerk to sign, &c., 844.
after affirmance, or reversal by default, 844.
judgment after, 659 *d*, 642,
Removal, of occupants from State lands, within the jurisdiction of the county court, 39.
of causes to United States court, 30 *h*, 720 *a.*
to common pleas from district courts, 923.
of sheriff, 535 *e.*
of judge, 782 *f.*
See, *Transfer of causes.*
Renewal of motions, special motions cannot be renewed without leave, 386 *d*, 449 *j*, 869 *a*, 775 *a.*
of execution in justice's court, 81 *e*, *f.*
Rent, proceedings for recovery of, not affected by the code, 835.
complaint in action for, 242 *f.*
answer in action for, 287 *c*, 294 *e.*
counter-claim in action for, 294 *e.*
not due is not a thing in action, 756 *b.*
See, *Use and occupation.*
Repeal of inconsistent laws, 832.
Replevin, the chapter of the code relating to the claim and delivery of personal property is a substitute for the action of, 390 *e.*
bond, action on, 109 *l*, 133 *g*, 208 *c.*
Reply, when to be put in and what to contain, 302.
demurrer to, 305.
counter-claim to, 303 *b.*
to amended answer, 302 *e.*
leave to, after cause referred, 303 *a.*
motion for judgment for want of, 304.
btaining time to, is not a waiver of objection that answer is sham, 301 *f.*
amendment by adding, 303 *a.*
counter-claim in, 303 *b.*
supplemental, when may be put in, 357.
new matter in, deemed controverted, 337.
frivolous, judgment on, 450. See, *Frivolous demurrer.*
Reports *of cases* adjudged in foreign States, books of, presumptive evidence of the law in such States, 795.
of referees, form of, 499 *d*, 861.
time for making, 500 *a.*
who entitled to, 500 *e.*
amendment of, 500 *f.*
setting aside, 501 *g.*
confirmation of, 502 *c.*
judgment on, 502 *d.*
interest on, 612, 613 *a.*
Representative of deceased person, who is, 756 *e.*
Republic, *foreign*, party to action, 120 *f.*
Request, in pleading, 246 *g.*
Re-sale, on execution, 539 *g.*
in partition, 815 *j.*
on foreclosure, 682 *b*, 681 *g*, 888 *e.*
Rescinding, a contract of sale, action for, 219 *h.*
Reserving causes in first district, 911.
Resettlement of case or exceptions, 865 *f.*
of order, 647 *f.*
Residence of attorney to be endorsed on papers and pleadings to be served, 853.
of plaintiff, when defendant may require to be informed of, 106 *a.*
place of, what is meant by, 789 *h.*
of the people, 145 *a.*
of railroad corporation, 145 *b.*
of married woman, 145 *d.*
Resident, who is, 364 *g.*
Resident defendant, when he may be served with summons by publication, 169 *a.*
Resignation of judge, 782.
Respondent, who is, 639.
offer by, to correct judgment, 714.
Restitution on reversal of judgment, 443, 447 *g*, 642, 643 *e*, 713.
after judgment for want of an answer, 443, 447 *g.*
in ejectment, 825 *g.*
Retainer, notice of, an appearance, 853.
notice of bail imports notice of retainer, 854 *b.*
Return of process, &c., how compelled, 852.
of summons, sheriff to make, 852, 792.
of justice, 697, 699, 878.
of clerk to court of appeals, 641, 839.
Revenue stamp. See, *Stamp.*

Reversal *of judgment*, costs on, 644 *a*, 714.
as to one of several defendants, 644 *a*.
in what cases, 677 *i*, 704 *f*, 705 *a*, *b*, *c*, *d*, *e*.
by default, 844, 846, 700 *a*.
time for commencing action after, 102.
of justices' judgment, 644 *a*, 704, 705, 706, 707.
restitution on, 443, 447 *g*, 642, 643 *e*, 713.
Review of questions of law and fact arising on a trial of a question of fact by the court, how obtained, 486 *b*, 487 *e*.
of adjustment of costs, 617 *h*.
See, *Appeal*.
Revised Statutes, certain parts of not repealed, 837.
to govern supreme court, superior court of New York, New York common pleas and county courts, 833.
Revivor *and supplement*, complaint in nature of, when necessary, 184 *a*.
See, *Supplemental complaint*.
Right of entry, action after accrual of, 92.
Right to begin. See, *Begin*.
Road. See, *Turnpike roads*, *Railroads*, *Private road*.
law, motion for new trial under, 772 *d*.
Roll. See, *Judgment roll*.
Rooms, supervisors to provide, 27.
sheriff to provide, 28.
Rules, all inconsistent with code repealed, 833.
judges to meet to revise, and make new, 833.
in cases not provided for, 902.
of court of appeals, 839.
of supreme court, 849.
of superior court, 914.
of New York common pleas, 920.
in justices' courts, 70.
of evidence. See, *Evidence*.
of pleading. See, *Pleading*.
of construction, 832.
Rulings at trial, 468 *g*.

S.

Sale *of mortgaged premises*, county court may order, 39.
Sale—*continued*.
real property of infant or person of unsound mind, county court may order, 39.
real property of religious corporations, county court may order, 39.
application for, 909.
of infant, rules regulating, 832.
adjudged to be sold, 527, 909.
of benevolent, charitable, scientific, missionary societies, or orphan asylums, 29 *c*.
in partition, 815 *a*.
by order of the court, 909.
of real property on execution, 542 *k*.
of personal property on execution, 536 *c*, *f*.
action for fraud in, 51.
to recover possession of, 51.
action to rescind, 219 *h*.
of perishable property, 668, 433.
of vessels, 423.
by receiver, 901.
by sheriff of evidences of debt seized under an attachment, 426.
Salvage, jurisdiction in cases of, 45 *a*, 23.
Satisfaction *of execution*, when debtor to judgment debtor may make, 565.
what property may be ordered to be applied to, 568.
of part of claim admitted to be due, 432, 439 *k*.
by taking the person in execution, 529 *g*.
of judgment, how effected, 551 *g*.
appeal from order on motion to enter, 683 *a*.
of mortgage, county court has jurisdiction of, 39.
levy of attachment is not, 421 *e*.
Scandalous matter, court may strike out, 325 *e*.
School property. See, *Board of Education*.
Scienter. See, *Knowledge*.
Scientific societies, sale or lease of real property of, 29 *c*.
Scire facias, writ of, abolished, and action substituted, 519 *d*, 801.
Sealed instrument, time for commencing action on, 96.
Sealed verdict, 470 *k*.
Sea, actions for torts at, 22 *c*.
Seamen, actions by, in justice's court, 54 *a*.

School teacher, action by, for wages, 54 *a*.
Second appeal, when allowed, 638 *g*, 660 *g*.
Second judicial district, rules in, 912. See, *Kings county*.
Secured on appeal, entry of, on docket, 518, 519 *q*.
appeal from order, 680 *n*.
Security, *for costs*, may be required of a plaintiff who is an executor or administrator, trustee of an express trust, or a person expressly authorized by statute to sue, 622, 627 *j*.
provisions of revised statutes as to, 585.
practice on applying for, 586.
when to be demanded, 588 *h*.
form of the order for, 589 *e*.
effect of order for, 589 *f*.
bond for, 589 *i*.
action, 590 *g*.
effect of omitting to file, 590 *c*.
waiver of order for, 590 *d*.
not required if one plaintiff a resident, 587 *d*.
pauper plaintiff not required to give, 587 *e*.
temporary absence does not entitle defendant to, 587 *i*.
where plaintiff an infant, 587 *k*.
by next friend, 587 *k*.
by foreign government, 588 *b*.
by foreign corporation, 588 *c*.
plaintiff cannot have, 588 *a*.
in superior court, 587 *e*.
from a non-resident administratrix, 587 *h*.
not ordered after judgment, 588 *h*.
one surety sufficient, 589 *i*.
plaintiff's attorney may be surety for, 589 *i*.
justification of surety for, 589 *j*.
substituted, 590 *a*.
amount of, 589 *j*.
on arrest, plaintiff to give, 375.
on attachment, plaintiff to give, 419.
by defendant, on return of property to him, 429.
on claim and delivery, by plaintiff, 393.
by defendant, 394.
on injunction, where no special provision on the subject, 406, 407 *d*.
to stay proceedings after judgment, 407 *a*.
in the superior court, 407 *c*.
to suspend business of corporation, 410.
Security—*continued*.
on appeal to court of appeals, 660, 662, 665.
to supreme court from inferior court, 671.
from special to general term, 673, 674 *c*.
orders, 685 *h*.
justices' courts, 691, 695, 696.
by the people, state officers, &c., not required, 637 *c*, *d*.
by municipal corporations not required, 637 *e*.
on taking a judgment by default, 443 *a*.
judgment standing as, 521 *c*.
by guardian, 880, 882, 812 *e*.
Seduction, is an injury to the person, 364 *a*.
action for, cannot be brought in justices' courts, 54.
costs in actions for, 591.
assignment of right of action for, 111 *p*.
Seisin, when necessary in action or defence founded on title, 92.
Seneca Indians, parties to actions by, 120 *d*.
complaint by, 240 *h*.
Separate, *estate* of married woman, complaint to charge, 229 *f*.
answers, when proper, 267 *d*.
judgment, when may be rendered, 506, 509 *i*.
trial, when court may order, 461.
Separation, *action for*, reference to take proof of material facts in compalint, 897.
complaint, 897.
plaintiff may be examined in, 900.
Sequestration of property of judgment debtor, order for, not necessary, 555 *b*, 570 *h*.
Sequestrator, action by, 108 *k*.
Servant. See, *Domestic*.
Service *of summons*, by whom, 162.
on whom, 163.
time of, 166 *c*.
how made, 162, 163.
by publication, 167.
on foreign corporation, 163 *b*.
on railroad corporation, 163 *a*.
on party unknown, 169.
out of the State, 171 *a*.
time for, may be fixed, 162.
when complete, 175.
proof of, 175, 856.
admission of, 176 *c*.
gives jurisdiction, 177.
voluntary appearance equivalent to, 177.

Service *of summons—continued.*
fee for, 176 *d*, *e*.
on Sunday, 166 *c*.
on day of town-meeting, 167 *b*.
on election day, 167 *a*.
on the State, 167 *e*.
on corporations, 164 *c*, 163 *a*, *b*.
on corporation of New York city, 164 *a*.
on supervisors, 164 *b*.
on the people, 167 *e*.
on a witness, 167 *f*.
on insane persons, 163, 165 *c*.
on husband and wife, 167 *d*.
defective, 167 *g*.
fraud in service, 167 *c*.
substituted service, 167, 169 *a*.
disputing service, 176 *a*.
in justices' courts, 60.
on corporations, provisions as to, applied to justices' courts, 72.
of complaint, with summons, 158.
with notice of no personal claim, 160.
after demand, 158.
time for, 159 *d*.
of answer by mail, 255 *c*.
of notices and other papers, on party or attorney, 787, 788.
how made, 788.
by mail, 255.
on sheriff, 787 *g*.
proof of where party serving is dead or insane, 787 *f*.
of injunction, 399 *e*.
of order, 777 *f*.
"person making," who is, 789 *e*.
of affidavit to prevent an inquest, 463 *b*.
irregularity in, how waived, 789 *g*.
on defendant of notice of proceedings in action when necessary, 790.
on a party residing out of the State, 791.
on attorney for the party, 791.
sections 408 to 418 not to apply to service of summons, or process, or paper, to bring a party into contempt, 792.
by mail, 788, 789.
on Sunday, is irregular, 788 *b*.
Services, assignment of contract for, 110 *j*, 109 *k*.
Set-off, assignor of right of action takes subject to, 115.
of part of a split demand, 111 *d*, 184 *e*.
in what cases, 115.
answer of, 293 *f*.
in an action by an assignee, 293 *g*.
of judgments, 116 *a*, 553 *d*, 552 *f*.
Set-off—*continued.*
particulars of, 316 *c*.
of costs and recovery, 509 *b*, 554 *d*, 714.
of costs and recovery on appeal to N. Y. common pleas, 714.
See, *Counter-claim*.
Settlement, costs on a, 630.
of case, 504 *b*, 864.
of form of judgment or order, 516 *c*, 647 *f*.
Several *actions* on one instrument, 591.
attachments may issue at the same time, 420.
executions, 526.
statement of one cause of action, 252 *b*.
causes of action, may be united in one complaint, 332, 334 *a*.
demurrer for omitting to state separately, 261 *d*.
counter-claims may be set up, 287.
See, *Counter-claim*.
debtors. See, *Joint and several debtors*.
defences, may be set up, 287.
to be separately stated, 287, 296 *e*.
each defence must be perfect in itself, 296 *c*.
what may be pleaded together, 297.
consisting of denials only need not be separately stated, 296 *c*.
in abatement and bar, allowed, 297.
of denial and new matter, 297.
each to be plainly numbered, 296 *e*, 856.
defendant's costs in case of, 597.
defendants, answers by, 267 *d*.
judgment against one of, 444 *a*.
issues, costs on recovery on some only, 582 *b*.
Severance, of action, 345, 462 *b*, 506, 509.
of damages, 475 *b*.
of defence, 267 *d*.
Sham *answers and defences*, may be stricken out on motion, 298.
what is a sham answer, 298 *c*.
part of a defense cannot be struck out as sham, 300 *d*.
demurrer after motion to strike out, when it will be allowed, 301 *g*.
appeal from order striking out, 301 *i*, 681 *h*.
judgment after answer struck out as sham, &c., 301 *k*.
See, *Frivolous*.

Shareholders. See, *Stockholders.*
Sheriff, to serve summons, &c., as if it were process, &c., &c., 162.
when a party, coroner to perform the duties of, 792.
may be arrested, 362.
may be sued in justice's court, when, 55.
action against, to be within three years, 98.
for escape, to be within one year, 98.
may sue in his own name, 120 *e*, 108 *f*, 109 *m*.
action against, 108 *f*, 109 *m*.
complaint in action by or against, 241 *f*.
when a party may serve the summons, 162 *g*.
sheriff and deputy may be sued together for a tort, 130 *h*.
cannot be bail, 378 *b*.
to return summons, 162.
proof of service of summons by, 175, 175 *b*, *c*, *d*.
return of process, &c., by, how compelled, 852.
may return process by mail, 533.
to provide rooms, &c., 28.
fees, on attachment, 430.
for serving summons, 176 *d*, 792 *c*.
death or removal of, 535 *e*.
service of notice, &c., upon, 787 *g*.
liable for proceeds of sale in partition, 815 *c*.
liability in case of escape, 835 *a*.
duties of, &c., incident to arrest:
to execute order by arresting defendant, 377.
to deliver copy order of arrest and affidavit to defendant, 377.
to accept bail or deposit, 377.
to detain defendant at instance of bail, 378.
to deliver order, with return endorsed, and certified copy undertaking of bail, to plaintiff, 381.
may give notice of justification of bail, 381.
when exonerated from liability, 383.
to give defendant a certificate of deposit, 383.
to pay deposit into court, 384.
when liable as bail, 384.
proceedings on judgment against, as bail, 385.
liability of bail to, 385.
Sheriff, *duties of incident to arrest—continued.*
to file affidavits on which arrest is made, 852.
duties of, incident to attachment:
to proceed on, as in case of attachment against absent debtors, 420.
to attach all the real and personal estate in the county, 420.
to make an inventory, 420.
inventory to be signed and returned, 430.
in case of claim of third party, to summon a jury to try the claimant's right, 421.
to collect and receive debts, 420.
to take legal proceedings to recover debts, credits, &c., of the defendant, 420.
to sell perishable property, 423.
to sell vessels, 423.
as to property incapable of manual delivery, 423.
to satisfy judgment out of property attached, 424.
as to residue of attached property after satisfaction of judgment, 426.
may apply to court for leave to sell evidences of debt, 426.
may permit actions to be in name of plaintiff, 427.
on judgment for the defendant, 428.
on discharge of the attachment, 428.
to return warrant and proceedings thereon, 430.
fees of, 430.
duties, &c. incident to claim and delivery of personal property.
to take property, 393.
to deliver to defendant a copy of the affidavit, notice, and undertaking, 393.
responsible for plaintiff's sureties, 394.
when to deliver property to the plaintiff, 394.
when to deliver property to the defendant, 394.
when responsible for defendant's sureties, 395.
proceedings by, where the property is concealed in building or inclosure, 396.
to keep property in a secure place, 396.
when property claimed by third party, 396.
to file notice and affidavit, with proceedings thereon, 397

Sheriff—*continued.*
duty of, &c., incidental to execution.
to endorse on execution time when received, 534 *f.*
to return execution, 533.
former laws apply to, 534.
cannot refuse to levy execution, 534 *g.*
cannot enforce execution for his own benefit, 535.
to levy on and seize goods, 291 *f.*
to sell real estate, 540 *f.*
fees and poundage, 535 *f.*
may be attached for not paying over moneys, 536 *a.*
official bond of, 536 *b.*
service of papers on, 787 *g.*
to sell and convey real property adjudged to be sold, 890, 527.
proceedings on official bond of, not affected by the code, 835.
Sheriff's jury. See, *Assessment of damage.*
Ships, proceedings for collection of demands against, not affected, 835.
attachment against, 423 *d.*
See, *Vessels.*
Short summons, 58.
Sickness of judge, 782.
Silent partner to join as plaintiff, 132 *b*, 126 *h.*
Slander, *actions for,* cannot be brought in courts of justices of the peace, 54.
must be brought within two years, 98.
parties, 130 *i.*
complaint in action for, 225 *e*, 322 *e*, 328.
answer in, 329.
costs in, 591, 581 *j.*
See, *Libel.*
Slander of title, complaint for, 228 *b.*
Special *circuit calendar,* in first district, 908, 919, 921.
case, what is, 40 *a.*
county judge, review of orders by, 678.
damage, allegation of, 204 *f.*
amendment to insert, 352 *a.*
finding, when court may direct, 472.
guardian, application to appoint, 881.
security by, 882.
proceedings, defined, 18.
what is and what is not a special proceeding, 18 *c*, 19 *a.*
appeal in, 679 *a.*
arresting, by certiorari, 30 *c.*
Special *proceedings*—*continued.*
appeal from final order in, to court of appeals, 25.
provisional remedies are not, 649 *e.*
proceedings supplementary to execution are, 19 *a.*
costs in, 582 *c.*
on appeals in, 582 *d.*
of reviewing the decision of an inferior court in, 628.
terms, and general terms, distinction between powers of court at 33 *b.*
appeal from, 673.
of supreme court, existing provisions of law as to, repealed, 29.
prescribed, 33.
extraordinary, 33.
inability of judge to hold, 36.
transfer of, 782.
verdict, 472. See, *Verdict.*
Specific performance, county court may decree, 39.
parties to action for, 131 *b.*
complaint for, 241 *j.*
answer in action for, 287 *c.*
by execution, 525.
Splitting cause of action, 55, 111 *d*, 182 *b.*
Stages. See, *Owner.*
Stamp on summons, 154 *a.*
defense of want of, 287 *f.*
Stakeholder, action against, 233 *a*, 241 *k.*
See, *Gaming.*
State, when action cannot be brought by grantee of the, 91.
service of process on, 167 *e.*
lands, removal of occupants from, within jurisdiction of county court, 39.
officers, injunction against, 402 *a.*
appeal by, 637 *d.*
Statement of facts. See, *Facts.*
Statute, complaint in actions given by, 236 *g*
action on, 98.
defense under, 285 *a.*
rule of strict construction of, not to apply to code, 832.
foreign, how pleaded, 328 *e.*
private, how pleaded, 328.
public, how pleaded, 236.
of limitation, 88, 105.
answer of, 90, 285 *b.*
See, *Times for commencing actions.*
Statutory *liability,* limitation for action on, 97.
provisions, all inconsistent with code repealed, 832.

Statutory *provisions—continued.*
certain, not affected by the second part of the code, 834.
defence, how pleaded, 285 *a*.
remedies, special not affected by the second part of the code, 834.
Stay *of proceedings*, order for, for more than twenty days cannot be granted, except on notice, 778, 780 *a*.
pending a motion, 778 *l*.
parties to action for, 181 *a*.
right to amend is not, 845 *b*.
after judgment by injunction, 407 *a*.
on appeal to court of appeals, 665.
to supreme court from an inferior court, 671.
from special to general term on a judgment, 673, 674 *c*.
from order at special term, 685 *i*.
to county court or common pleas from justice's judgment, 695, 695 *a*.
order for discovery to operate as, 856.
when does not prevent creditor instituting supplementary proceedings, 566 *d*.
how ordered within ten days of the trial, 867.
stay of sale in partition or foreclosure cases, 894.
right to amend of course is not, 845 *b*.
no judge has power to order arbitrarily, 780 *a*.
till costs of former suit paid, 584 *c*, 824 *k*.
till costs of former appeal paid, 638 *g*.
to move to change place of trial, 149 *a*.
order for time to make a case is not, 781 *a*.
order for time to answer is not, 781 *b*.
order for discovery is, 855.
cannot be treated as a nullity, 781 *c*.
on judgment does not extend the time to appeal, 645 *c*.
to move for a commission, 759 *d*.
until security for costs given, 586.
court of appeals, or judge thereof, may make order for, 845.
does not prevent filing transcript, 518 *a*.
effect of, on time of limitation, 103.
Stenographer to be appointed for courts, 456.
Steuben *county court*, appeal to, 41 *b*.
Stipulation, to try at next circuit, 859.
as to proceedings to be in writing or entered on minutes, 854.
not to appeal, court may enforce, 659 *c*.
Stock broker, complaint against, 241 *l*.
Stockholder in moneyed corporations, provisions as to limitations not to apply to actions against, 103.
docketing judgments against, 519 *p*.
supplementary proceedings against, 555 *a*.
in dissolved companies, action against, 118 *e*.
appeal from order charging, 679 *f*.
requisites of complaint against, 241 *d*, *m*.
parties to actions to charge, 128 *h*.
See, *Building society*.
Streets in New York city, appeal in cases of opening of, 679 *e*, 681 *a*, *l*, *m*, 683 *f*.
costs of opening, 582 *a*.
jurisdiction as to, 30 *b*.
Strict foreclosure, proceedings on, 888 *o*.
king *out pleading* for party refusing to be examined as a witness, 750.
as sham or irrelevant, 298.
scandalous matter, 325 *e*.
Struck jury, in what cases, 465 *c*.
Submitting cause on printed arguments, 844.
Submitting controversy *without action*, 717.
who to furnish papers on arguments of, 871.
judgment as in other cases, but without certain costs, 718.
judgment-roll, how constituted, 718.
judgment may be enforced, or appealed as in an action, 718.
no appointment of guardian on, 125 *b*, 718 *b*.
Subpœna from superior court of New York, 43 *a*.
Subpœna duces, party to action to produce documents, on being served with, 747 *a*.
Subrogation, defence of, 287 *g*.
Subscription to summons, 153, 156 *a*.
to pleadings, 305, 306 *a*.

Subsequent pleading, meaning of the term, 306 *j*.
application for order, when first refused, 858.
extension of time, 858.
Substantial right, what is meant by term, 685 *a*.
Substituted service, *of process*, 167. See, *Publication*.
Substitution of attorney, 854, 910, 919.
Substituting *a party*, in cases of transfer of interest *pendente lite*, 133, 138 *e*.
bail for deposit, 883.
when ordered in case of two or more claimants of one subject-matter, 139.
See, *Interpleader*.
Suit. See, *Action*.
pending, defence of, 260 *d*, 279 *a*.
Suitors, not to be prejudiced by delay of the court, 340 *b*.
Summary proceedings, to recover possession of lands. Appeals from justice's decision to county court, 40 *b*, 689 *d*.
injunction to restrain, 405 *g*.
provisions of revised statutes as to retained, 835.
Summing up, at circuit, one counsel only allowed to, 860.
Summons, actions to be commenced by service of, 153.
when considered issued, 415 *a*.
form of, ordinarily, 153, 154.
after discontinuance of action in justices' courts by reason of title coming in question, 156 *b*.
when served without copy complaint, 158.
by publication, 167, 169.
in penal action, 156 *e*, 157 *b*.
by or against party in representative character, 156 *e*.
in action against a county, 156 *d*.
notice to be inserted in, 157.
stamp on, 154 *a*.
amending, 155 *a*.
misnomer in, 155 *d*.
complaint to agree with, 192 *b*, *c*.
service of, by whom it may be served, 162.
how it must be served, 162, 163.
out of the State, 171 *a*.
on corporation, 164.
on foreign corporation, 167 *b*.
on railroad corporation, 167 *a*.
on minor under age of fourteen, 163.
Summons *service of—continued*.
on person judicially declared to be of unsound mind, &c., 163, 165 *c*, *d*.
in other cases, 163.
on unknown party, 169.
on corporation of N. Y. city, 164 *a*.
personal service, 165 *a*.
place of service, 166 *b*.
time of service, 166 *c*.
on day of town meeting, 167 *h*.
on election day, 167 *a*.
on Sunday, 166 *c*.
defective, 167 *g*.
party subscribing may fix time for service, 162.
by publication, when ordered, and how made, 167.
on board of supervisors, 164 *h*.
on the people, 167 *a*.
on a witness, 167 *f*.
fraud in service, 167 *c*.
in action by the sheriff, 163 *g*.
when complete, 175.
proof of service of, 175, 856.
effect of service, to confer jurisdiction, 177.
fee for service, 176 *d*, 792 *a*.
amendment of, 155 *a*, 350 *a*.
voluntary appearance is equivalent to personal service of, 177.
to be filed, 169, 791.
in proceedings against heirs, &c. of deceased judgment-debtors, 790.
in justices' courts, 57.
Sunday, when reckoned in the computation of time, 786 *b*.
service on, is irregular, 166 *c*, 788 *h*.
judgment cannot be entered on, 79 *a*.
execution cannot be levied on, 534 *h*.
Superior court *of Buffalo*, transfer of causes from, 30 *e*.
appeal to court of appeals from, 25, 657 *l*.
appeals to, 689 *a*.
of the city of New York, jurisdiction of, 20 *b*, 43, 45.
jurisdiction of transferred suits, 49.
transfer of causes from, to supreme court, 44.
transfer of causes to, from supreme court, 44, 49.
inquest in, 917, 463 *d*.
power of, to order production of documents, 46 *b*.
has concurrent jurisdiction with United States courts in admiralty cases, 45 *a*.

Superior court *of the city of New York —continued.*
jurisdiction cannot be conferred on by fraud, 46 *a*.
voluntary appearance confers jurisdiction on, 45 *a*, 46 *a*.
statutory provisions regulating, 43 *a*.
terms of, 47, 48.
special terms of, how held, 48.
judges of not to receive fees, 48.
judgment of, where given and how pronounced, 48.
crier to be appointed, 48.
to consist of six justices, 48.
vacancies, how filled, see Laws 1859, ch. 173.
section 28 of code to apply to, 49.
motions in, 44 *note*, 777 *h*, 915, 917.
notes of issue in, 917, 916.
entry of order in, 917.
motion for judgment in, 917.
practice in on security for injunction, 407 *c*.
on opening defaults, 678 *j*.
appeal in, from special to general term, 673.
rules in, 914.
business at general term, time of opening, 914.
trial term, 914, 918.
special term, 914, 918.
non-enumerated motions, 914, 918.
appeals from, 915.
attendance of justices at chambers, 915.
motion to set aside verdict as against evidence, 915.
case and exceptions on motion to set aside verdict, 915.
hearing on motion to set aside verdict, 916.
appeals from order granting or refusing a new trial, 916.
costs on appeal, 916.
motion for rehearing before referees, 916.
notes of issue, 916, 917.
inquests, 917.
filing papers, 917.
entering orders, 917.
motion for judgment, 917.
regulation as to calendars, 917.
general and special terms, 918.
ex parte orders, 918.
appeals from orders, 918.
day calendar, 919.
reserving causes generally, 919.
substitution of attorney, 919.

Superior court *of the city of New York, rules in—continued.*
short causes, 919.
defence interposed for delay, 919.
Supersedeas, to discharge from custody, 531 *a*.
order for, where to be made, 780 *d*.
Supervisors, service of process on, 164 *b*.
records of, how proved, 796 *a*.
to provide rooms, &c., 37.
See, *Public officers*.
Supplemental *pleading*, when allowed, 138 *f*, 357, 358, 683 *g*.
demurrer to, 359 *b*.
complaint, action may be continued by, 133.
answer to, 358 *e*.
Supplementary *proceedings*, provisions as to, 555.
nature of the proceedings, 557 *a*.
jurisdiction, 557 *b*.
to what cases provision applies, 557 *b*.
assignee may take proceedings, 558 *g*.
on judgment against corporations, 555 *a*.
against stockholders in banking corporations, 555 *a*.
against insolvent corporations, 555 *a*.
on justices' judgment, 558 *d*.
against married woman, 558 *b*.
cannot test validity of insolvent discharge in, 558 *e*.
on judgment after service by publication, 558 *f*.
when an order for the examination of the judgment debtor may be applied for, 558 *f*, *h*.
who may make the order, 559 *e*, 560 *b*.
requisites of affidavit to obtain order, 560 *d*.
the order, the person, place, and time, before whom and at which the debtor may be required to appear, 561 *b*.
service of the order, 561 *h*.
proof of service of order, 561 *j*.
objections to order, 561 *l*.
effect of order as a lien, 562 *b*.
examination upon order, 562 *i*.
discontinuance of proceedings, 563 *k*.
death of debtor pending, 137 *d*.
appeal from order in, 563 *o*.
second order in, 564 *a*.

Supplementary *proceedings — continued.*
commission to take testimony in, 568 *j*.
against debtor of judgment debtor, or of those having property belonging to him, 565.
order to examine debtor, 566 *a*.
affidavit to obtain order, 567 *b*.
proceedings on order, 567 *c*.
witnesses, how required to appear and testify, 568.
examinations to be on oath, 568.
what property may be ordered to be applied to execution, 568.
appointment of receiver, 571.
order appointing a receiver to be filed, 571.
prohibiting transfer of property, 571.
where a third party claims property alleged to be the property of the judgment debtor, 575.
where the alleged debtor to judgment debtor denies his indebtedness, 575.
reference may be ordered, 576.
costs of proceedings and fees to witnesses, 577, 568 *a*.
disobeying order, 578.
appeal in, 680 *b*, *w*, 681 *r*, *s*, 682 *m*, *t*.
witness in, 746 *f*.
judge going out of office pending, 782 *f*.
Supreme court, terms of, 33, 34, 35.
jurisdiction of, 29, 30.
general terms, 33.
special terms, 33.
rooms, attendants, fuel, &c., to be provided for, 37.
transfer to, of actions, &c., from county court, 40, 41 *a*.
transfer to, of actions from superior court and New York common pleas, and superior court of Buffalo, 30 *e*, 44.
transfer of actions from, to superior court, 49.
to U. S. circuit court, 30 *h*.
rules of, 849.
judges to frame rules, 833.
judges. See, *Judge*.
former rules of, abrogated, 833.
appeals to, 670, 673.
Sureties, to justify in all cases, 667, 852. See, *Justification*.
on appeal to court of appeals not liable on dismissal of appeal, 661 *h*.
bonds, &c., of, to be proved and acknowledged, 852.
Sureties—*continued.*
cannot be sued jointly with principal, 131 *c*.
admitting them to defend, 429 *a*, 664 *d*.
liability of, 660 *j*, 661 *a*, 663 *j*, 664 *a*, *b*, *c*, 695 *b*, 696 *f*.
becoming insolvent, 662, 663 *h*, *i*, 590 *a*.
See, *Bail*, *Security*, *Principal and surety*.
Surety bonds, *actions on*, justice of the peace has jurisdiction of, 51.
See, *Bonds*.
Surgeons, not allowed to testify to certain matters, 755 *b*.
Surplus moneys, how disposed of, 889, 892.
complaint in action for, 212 *i*.
application for, not within the 309th section, 609 *a*.
Surrender of notes on trial, 222 *d*.
Surrogate, appeals from, not affected by the second part of the code, 834.
appeal from, 668 *g*, 871, 653 *k*, 682 *r*, *s*, 836 *d*.
examination of parties, 744 *e*, 756.
appeals from, regulated, 871.
costs on, 581 *d*, 779 *b*.
proceedings on official bond of, not affected by the code, 835.
resale under decree of, 888 *k*.
ejectment on decree of, 827 *a*.
proceedings for admeasurement of dower before, 827 *f*.
proceedings before, 89 *i*, *j*, 90 *f*.
action on decree of, 96 *b*.
cannot try disputed claim, 624.
Surviving partner, joinder of, as defendant, with executors of deceased partner, 130 *e*.
Swamps, marshes, &c proceedings for draining of, not affected by the code, 836.

T.

Tax. See, *Personal Tax*.
Taxation *of costs*. See, *Adjustment*.
Technical defect. See, *Error or defect*, *Mistake*.
Tenants in common, joinder of, 127 *c*, *d*, *e*.
Tenant. See, *Landlord and tenant*.
Tenants holding under a judgment debtor, 719.
See, *Joint debtors*, *&c.*

Tenant for life, interest of, how calculated, 816 *b*, 896, 904.
Tender *after action brought*, 630 *e*, 731 *a*.
answer of, 285 *d*.
See, *Offer*.
Term *fee*, allowance of, 603 *k*.
Terms, on amendment, 354 *f*.
on giving leave to answer after time therefor has expired, 448.
on a postponement, 619.
of court of appeals, 27.
of supreme courts, circuit courts, and courts of oyer and terminer, 33.
extraordinary, 34, 829.
appointment of, to be transmitted to secretary of state, and published, 35.
of superior court, 47, 48.
of N. Y. common pleas, 47, 48.
of county courts, 41.
and calendars in first district, 907.
Testimony of parties, 744.
of witnesses, 755.
examination to perpetuate, under the revised statutes, 750.
taking by commission, 757.
conditionally, 766.
by consent, 770.
on a motion. See, *Motion*.
The people. See, *People*.
Thereby and *therefore*, meaning of the terms, 196 *dd*.
Thing in action, what may be assigned, 109, 115.
how it may be assigned, 112.
assignment of, in parcels, 111 *d*.
re-assignment of, 114 *b*.
who is an assignor of, 755 *e*.
Time to serve complaint after demand, 159, 159 *d*, *e*, *f*.
to answer or demur, 255, 858.
to answer after order of arrest, 376.
to reply, 302.
within which to amend of course, 344, 347 *b*.
for service of notices, &c., 790.
for notice of trial, 457, 790.
for appeal. See, *Appeal*.
to return execution, 533.
to comply with conditional order, 878.
to make a case, 783 *a*.
to turn case into special verdict or exceptions, 864.
to serve amendments to case or exceptions, 864.
allegation of, in pleading, 322 *d*, 320 *a*.
to what period of, allegations in pleadings refer, 320 *a*.
Time—*continued*.
to move to vacate order of arrest, 376.
for referee to make report, 500 *a*.
to take any proceeding except appeal, may be enlarged, 783.
how computed, 786, 786 *a*.
if last day be Sunday, 786, 786 *b*, *d*.
on notice of trial, 786 *a*, 790.
Sunday an intermediate day, is to be included, 786, 786 *b*.
for publication of legal notices, 795.
to take proceedings, except appeal, may be enlarged, 786.
additional, how computed, 787 *a*.
double, when service by mail, 790.
See, *Reasonable time*, *Enlarging time*.
Times *for commencing actions*, provisions as to, applied to justices' courts, 72.
in general, 88.
previous law as to, repealed, 88.
objection that action not commenced in time must be taken by answer, 90.
for the recovery of real property, 91.
other than to recover real property, 96.
general provisions as to, 100.
Title of affidavit, 785.
plaintiff to show, 208 *f*.
complaint for slander of, 228 *b*.
of action not changed on appeal, 639.
need not be set forth in answer to action to recover property distrained *damage feasant*, 331.
to real property, justices of the peace have no jurisdiction of actions involving, 54.
seizin when necessary in action or defence founded on, 92.
when it comes in question, 64 *e*.
when question of, cannot be raised, 55.
answer of title in justices' courts, 64.
certificate that it came in question, 591, 69.
costs when it comes in question, 591, 69, 592 *f*.
to property sold on execution, 169, 542 *c*.
See, *Entitling*.
Toll-gate, jurisdiction of county court as to, 40 *b*.

Toll-gate—*continued.*
appeal from decision as to location of, 679 *g*, 658 *j*.
Tort, may be waived, and suit brought on contract, 179 *b*.
counter-claim in action for, 298 *a*.
assignment of, 110 *s*, 109 *b*.
at sea, action for, 22 *a*.
by married woman, 121 *e*, *f*.
parties to actions for, 130 *i*.
Town *and county officers*, suits by, 117 *b*.
complaint by, 189 *a*.
Town superintendent, action on bond of, 121 *b*.
Town meeting, service of summons on day of, 167 *b*.
Trade-marks, injunction to restrain infringement of, 401 *f*.
Transcript *of judgment* may be filed, 518.
effect of filing as a lien, 518.
perfecting an appeal and giving security to stay proceedings does not prevent respondent from filing, 518 *a*.
of justices' judgment, 69, 84.
Transfer of proceedings from one judge to another, 36, 44, *note*.
of causes from supreme to superior court, 49.
to the U. S. circuit court, 30 *h*.
from superior court of Buffalo, 30 *a*.
from city court of Brooklyn, 30 *a*.
from superior to supreme court, 30 *e*, 44.
from mayor's or recorder's court, 45.
from county court to supreme court, 30 *a*.
from district court to common pleas, 923.
appeal from order for, 32 *h*, 47 *d*.
proceedings for, 47 *d*.
of property, judge may order judgment debtor to give undertaking not to make, 556.
when may be forbidden, 571.
confession of judgment is not, 723 *j*.
of hearing motion or order to show cause, 36, 44 *note*, 782.
of special proceeding, 782 *f*.
of interest not to abate action, 133.
of papers on file on change of place of trial, 851.
See, *Assignment*, *Removal of causes*.
Transitory action, place of trial of, 145 *a*.
Treble costs, 585.
damages. See, *Damages*.
Trespass *on real property*, time for commencing action for, 97.
provisions of revised statutes as to, not affected by the code, 581 *a*, 603 *a* to *e*, 835.
action for in justice's court, 54 *a*.
assignment of claim for, 112 *b*.
See, *Malicious trespass*.
Triable, meaning of the term, 779 *f*
Trial, definition of, 455.
what is a trial, 455 *b*.
place of, 143. See, *Place of Trial*.
notice of, 457.
either party giving notice may bring on, and in the absence of adverse party take a dismissal of the complaint or a verdict or judgment, 461.
separate, between a plaintiff and one or some of the defendants, may be had, 461.
copy summons and pleadings to court on, 471.
amendments at, 351 *a*.
costs on postponement of, 619.
number of counsel on, 860.
discontinuance on, 634 *i*.
plaintiff may stipulate to proceed to, 859.
dismissing complaint for not bringing cause to, 859.
notice of, either party may give, 457.
length of, 457, 790.
must be served on each defendant who appears separately, and by a separate attorney, 459 *d*.
where there are two or more actions between the same parties, 459 *e*.
in first district, 457.
must state plaintiff's intention to take an inquest, or he cannot do so, 860.
where besides the issue to be tried, there are damages to be assessed, 459 *e*.
when defendant notices the cause for trial, and he seeks relief other than a dismissal of the complaint with costs, 459 *e*.
if insufficient, and the party proceeds to trial, and in the absence of the other party obtains a verdict or judgment, such verdict or judgment will be irregular, 459 *f*.

Trial—*notice of*—*continued.*
before referees, 489.
either party giving, may bring issue to trial, 461.
cause should be at issue as to all defendants before noticed for trial, 464 *h*.
court to be furnished with copy pleadings, &c., 471.
dismissal of complaint for not proceeding to, 511 *c*.
dismissal of complaint on, 467 *n*, 497 *f*.
fee, 602 *f*, 910.
proceedings on, jury, 465 *a*.
struck jury, 465 *c*.
right to begin, 465 *d*.
counsel addressing jury, 465 *e*.
objecting to pleadings, 465 *g*.
postponement on payment of costs, 466 *b*.
examination of witnesses, 466 *d*, 860.
nonsuit, 467 *n*, 861.
effect of nonsuit or dismissal of complaint, 468 *e*.
rulings, 468 *g*.
production of documents or chattels, 468 *k*.
changing ground of action or defence, 468 *m*.
charging jury, 469 *d*.
deliberation of jury, 470 *f*.
separation of jury, 470 *h*.
interference with jury, 470 *i*.
sealed verdict, 470 *k*.
polling jury, 470 *l*.
irregularities at circuit, 471 *a*.
exceptions, 471 *b*.
ordering exceptions to general term in first instance, 471 *f*.
cannot be part by one judge and part by another, 484 *c*.
surrender of notes on, 222 *d*.
by jury, in what cases, 455.
how waived, 76 *c*, 484.
by the court, in what cases, 456.
of the question of fact, decision to be given in writing, and be filed with the clerk within twenty days, 484.
judgment on decision, how entered, 484, 486 *a*.
finding of judge on, what to contain, 484.
finding by judge on, to be treated as a verdict of a jury, 485 *d*.
for the purpose of an appeal, either party may except to a decision on a matter of law arising on, 486.

Trial *by the court of the question of fact*—*continued.*
a review of, how obtained, 486.
by referee, 489.
See, *Hearing*, *Notice of trial*, *Postponement of trial*, *New trial*, *Verdict*.
Troy, *recorder of*, may issue order in supplementary proceedings, 560 *a*.
Trust company, need not give security when guardian, 881 *a*.
accounts of deposits with, 895.
orders to draw moneys from, 895.
Trustee, cause of action against defendant as trustee cannot be united with a cause of action against him personally, 333 *j*.
complaint by, 190 *d*.
confession of judgment by, 723.
may be sued in an action for claims arising on contract and by operation of law, 332.
plaintiff may be required to give security for costs, 585 *j*.
when personally liable for costs, 622.
security on appeal by, 665.
of an express trust, may sue without joining party in interest, 116, 119 *b*.
who is a trustee of an express trust, 119 *b*, 623 *c*.
costs in an action by or against, 622, 623 *a*, *c*.
as to suits by, 108 *h*.
of religious society, action by and against, 121 *c*, 117 *d*.
Truth, defence of, 329 *a*.
Turnkey, cannot be bail, 378 *b*.
Turnpike roads, jurisdiction of county courts as to, 39.

U.

Uncertain allegations, 323 *f*.
See, *Indefinite and uncertain*.
Uncertainty, not a ground for demurrer, 258 *c*, 322 *c*.
remedy for, 325 *b*.
Undertaking, on answer of title in justices' courts, 66.
on order of arrest, 375, 376 *b*.
on attachment, 419.
on claim and delivery, 393, 394.
on injunction, 406, 407 *d*.
on appeal, 660, 662, 665, 666, 671, 690, 695.
to be proved or acknowledged, 852

Undertaking—*continued.*
to be filed, 669, 794, 851, 663 *a*.
to be delivered to parties, 794.
amendment of, 351 *a*, 393 *a*, *d*, 641 *d*, 661 *c*, 695 *f*.
action on, 242 *k*, 409 *f*, 419 *i*, 660 *j*, 673, 794.
See, *Permission to sue.*
summons in action on, 157 *m*.
answer in action on, 286 *e*, 395 *f*.
complaint on, 242 *k*.
deposit in lieu of, 662.
See, *Security.*
United States courts, provisions of code as to liens of judgment extend to judgments of, 518 *a*.
removal of causes to, 30 *h*, 720 *a*.
costs in, 581 *e*.
government contracts not assignable, 112 *h*.
action by or against, 121 *a*, 22 *c*.
discharge of persons enlisted in army of, 22 *a*.
Unknown owners, moneys of, 905.
in partition, 812 *a*.
Unknown party, service of process on, 169.
Unliquidated damage, assignment of, 110 *m*.
summons in action to recover, 157 *m*.
Unsound mind. See, *Persons of unsound mind.*
Use and occupation, complaint for, 243 *f*.
parties to action for, 127 *a*.
See, *Rent.*
Usurping *office or franchise*, action for, 804.
Usury, opening default to admit defence of, 448 *e*.
defence of, 285 *h*, 283 *e*, 299 *f*.
See, 214 *d*.

V.

Vacancy in office of judge, how supplied (Laws 1859, ch. 173).
Vacating order made out of court, 638.
Value, allegation of, in pleading, 323 *d*.
Variance, not to be deemed material unless it has misled the adverse party, 339.
instances of immaterial variances, 341 *f*.
immaterial amendment of, 342.
what is not a, 343.
in justices' courts, 75 *d*.
See, *Amendment*, *Mistake.*
Vendor *and vendee*, joinder of, 131 *k*.
and purchaser, counter-claim between, 295 *e*.
Venue. See, *Place of trial.*
of affidavit, 785 *h*.
affidavits to change, 879.
Verdict, general and special, defined, 472.
separate, 472 *c*.
what verdict jury may render, 472.
in actions to recover personal property, 473 *a*.
part for plaintiff and part for defendant, 473 *a*.
for damages exceeding amount claimed, 473 *f*.
for interest, 474 *b*, 474 *c*.
for double and treble damages, 475 *a*.
severance of damages on, 475 *k*.
contingent damages on, 475 *f*.
altering, 476 *a*, *b*.
sealed, 470 *k*.
polling jury, as to, 470 *l*.
amending, 352 *e*.
amendment after, 352 *f*.
special, controls general, 476.
assessing defendant's damages, 476.
subject to the opinion of the court, 477, 481 *g*, 648.
entry of, 476.
entry of judgment on, 476, 481 *g*.
special, how settled, 864.
what to state, 472 *a*.
calling plaintiff, before delivery of, 861.
in ejectment, 826 *b*.
interest on, when allowed, 612.
county judge cannot order stay of proceedings after, 778.
may be amended, 352 *e*.
judge may entertain motion to set aside, 476.
death of party after, 134.
cures defects in pleading, 251 *a*.
in justice's court, 78 *d*.
on writ of inquiry, 447 *d*.
report of referee is not, 779 *d*.
stay of proceedings after, 778.
Verification *of pleadings*, when necessary, 305, 306 *f*.
how to be made, 307.
when it may be omitted, 307, 308 *a*.
by the attorney or agent, 309 *c*, 311 *c*.
should not be before the attorney of the party, 311 *h*.
by the party, 310 *a*.
before whom, 311 *b*.
reason for, 339 *a*.

Verification, *&c.—continued.*
copy of, must be served with pleading, 306 *h*.
out of State, 310 *h*.
form of, by party to action, 310 *a*.
attorney or agent, 311 *a*.
effect of omitting, or of defect in, 306 *f*, *g*.
by all the defendants, when required, 314 *c*.
when corporation is a party, 307.
in justice's court, 74 *j*.
Vessels, proceedings for collection of demands against, not affected by the code, 835.
sale of, on attachment, 423.
action for hire of, 127 *d*.
See, *Freight*, *Owner*.
Void order, 716 *b*.
Voluntary appearance, 177, 177 *d*.
See, *Appearance*.

W.

Wager, right of action on, not assignable, 111 *j*, 108 *i*.
parties, 126 *f*.
See, *Stakeholder*.
Waiver of irregularity in service of notice, 560 *j*.
of irregularity in service of summons or other paper, 177 *c*, 789 *g*.
of irregularity in appointment of referee, 496 *e*.
of exemption law, 551 *a*.
of security on appeal, 660.
of motion, 773 *a*.
of tort and suing on contract, 179 *b*.
of appeal, 637 *f*, 840.
of right to security for costs, 590 *d*.
of costs of circuit, 606 *a*.
of defect in process, 177 *a*.
of defence, 265, 704 *d*.
of defect in verification of a pleading, 306 *f*, 311 *b*.
as to time to appeal, 645 *h*.
of objection to a complaint, 265, 255 *b*.
of objection to referee, 496 *e*.
of objection to arrest, 385 *f*.
of trial by jury, 76 *c*, 484.
of jury, 76 *a*.
of objection to jury, 465 *b*.
of inquest, 464 *e*.
Waiver—*continued.*
of objection that papers not followed, &c., 857.
of case, 865.
of exceptions, 867, 504 *g*.
of default, 340 *a*.
of provisional remedy, 360 *a*.
by public officer, as to place of trial, 144 *a*.
Warrant, under act abolishing imprisonment for debt may now issue in all cases prescribed by that act, 153 *b*.
of attorney, given before July, 1848, judgment on, 795.
of attachment. See, *Attachment*.
for arrest of judgment debtor, 556.
Warranty. See, *False warranty*.
Waste, action of, abolished, and action under the code substituted, 818.
who may bring, 108 *d*.
restraining, 324 *i*.
Whereby, meaning of, 196 *dd*.
Widow, cannot assign debts due her late husband, 112 *p*.
Wife. See, *Husband and wife*, *Married woman*.
of assignor of chose in action may be a witness, 746 *g*.
admissions by, 524 *f*, *g*.
action for enticing away, 54.
domicile of, 145 *d*.
Will, action for construction of, allowance in addition to costs, 439.
of real estate, validity of, may be determined in supreme court, 29 *c*.
See, *Surrogate*.
Withheld *papers*, how supplied, 794.
Witness, *how compelled to attend*, on trial, 749, 497 *g*.
on supplementary proceedings, 412.
not entitled to counsel, 409 *e*.
fees of, for attendance, 577, 616.
fees to a party to the action, 617 *f*, 744 *d*.
allowance to, in proceedings supplementary to the execution, 577.
punishment of, for disobedience to orders of judge or referee, 578.
change of place of trial for convenience of, 148.
before referee, 497 *g*.
referee cannot be, in a reference before him, 498 *a*.
parties to action may be, 744.

Witness—*continued.*
interest not to disqualify, 755.
examination on foreign commission, 46.
service of summons on, 167 *f*.
juror may be, 467 *m*.
not entitled to counsel, 563 *e*.
review of order on motion for attachment against, 683 *j*.
examined on commission may also be examined on the trial, 766 *h*.
co-plaintiff or co-defendant may be examined as, 752, 758 *a*.
examination of on commission, 756 *k*.
conditionally, 748 *e*, 768 *b*.
by consent, 770 *h*.
on motion, 746 *c*.
in supplementary proceedings, 568.
in surrogates' courts, 744 *e*, 756.
on trial, 466 *d*, 860.
in interlocutory proceedings, 746 *c*.
physician cannot be, in certain cases, 755 *b*.
clergy cannot be, as to confession, 755 *a*.
metropolitan police, when cannot be subpœnaed as, 756 *f*.
assignor of thing in action, 759.
wife of assignor may be, 746 *g*.

Witness—*continued.*
wife cannot be, against husband, 745 *g*, *l*, 746 *f*.
under mechanics' lien law, 746 *d*.
in divorce cases, 745 *l*.
privileged from arrest, 361 *a*, 379 *d*.
contradicting witness, 749 *f*.
punishing, for refusing to testify, 750.
See, *Attesting witness*, *Perpetuating testimony*, *Account books*.

Work *and services*, complaint for, 244 *d*.

Wrecks, jurisdiction of county court as to, 89.

Writ of *ne exeat*, when it may issue, 362 *c*.
of injunction, abolished, 397.
of nuisance, abolished, 818.
of assistance, 826 *g*, 888 *f*.
of error, abolished, in actions, 636, 828.
when proper, 637 *a*.
of inquiry of damages. See, *Assessment of damages*.

Writings. See, *Admission*, *Discovery or Inspection of*, 735.

Written instrument, pleadings in action on, 71, 202 *b*.
costs in action for construction of, 607.

Wrongful act. See, *Death by wrongful act*.

ADDITIONAL NOTES.

ADDITIONAL NOTES

(THIRD EDITION)

OF THE DECISIONS PUBLISHED SINCE THE FIRST PUBLICATION OF THIS WORK, AND BRINGING DOWN THE NOTES OF REPORTED CASES TO 1868.

These additional notes contain the decisions reported in

Vols. 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, New York Reports.
" 41, 42, 43, 44, 45, 46, 47, Barbour's Reports.
" 8, 9, 10, Bosworth's Reports.
Vol. 1, Robertson's Reports.
Vol. 1, Daly's Reports.
Vols. 17, 18, 19, Abbott's Reports.
Vols. 1, 2, Abbott's Reports, New Series.
Vols. 27, 28, 29, 30, 31, 32, 33, Howard's Reports.

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§ **2**, p. **18** *a*. A proceeding by mandamus is an action. (*The People* v. *Lewis*, 28 How., 172.)

Same section, p. **19** *a*. A proceeding to vacate a local assessment in the city of New York, is not a special proceeding in the sense of the Code. (*Re Dodd*, 27 N. Y., 629.)

§ **9**, p. **21**. Where courts may be held in times of epidemic disease, Laws of 1866, p. 347, ch. 174.

§ **10**, p. **22** *c*. The courts of this State have no jurisdiction in *an action at law* against foreign executors or administrators, (*Metcalf* v. *Clark*, 41 Barb., 45,) nor of an action for injury to real estate out of the State, (*Mott* v. *Coddington*, 1 Abb., N. S., 290.)

As to jurisdiction by *habeas corpus* on a commitment by a court of the United States, see *Re Barrett*, 42 Barb., 479.

The courts of this State have jurisdiction of torts committed in foreign states, where the defendant is served with process in this State. (*Hull* v. *Vreeland*, 18 Abb., 182; *Latourette* v. *Clark*, 45 Barb., 327; *S. C.* is erroneously reported 30 How., 242); and so of an action for a breach of covenant to convey real property situate in a foreign state. (*Mott* v. *Coddington*, 1 Abb., N. S., 290.)

§ **10**, p. **23** *b*. Actions against the Mayor, &c., of New York, to be in Supreme Court. (Laws 1867, ch. 586, § 5.)

§ 11, p. 26 *a*. A judgment obtained in a court of common pleas in 1846 was not a suit or proceeding pending in that court on the first Monday of July, 1847 (*Wegman* v. *Childs*, 44 Barb., 403); proceedings in chancery prior to 1846 to appoint committee for habitual drunkard, and pending when the constitution of 1846 went into effect, became vested in the Supreme Court. (*Scribner* v. *Qualtrough*, 44 Barb., 431.)

§ 17, p. 29 *b*. The supreme court cannot entertain an action for leave to issue execution on a judgment of a county court. (*Niles* v. *Perry*, 29 How., 192.)

The State courts have no jurisdiction over lands ceded by the State to the United States. (*Dibble* v. *Clapp*, 31 How., 420.)

Same section, p. 30 *b*. Add, *Re Seventh Avenue*, 29 How., 180.

Same section, p. 30 *h*. Add, *Patrie* v. *Murray*, 29 How., 312; 43 Barb., 323; *Benjamin* v. *Murray*, 28 How., 193; *Jones* v. *Seward*, 41 Barb., 269; 17 Abb., 377; *Ayres* v. *West. R. R. Co.*, 32 How., 351; *N. Y. Piano Co.* v. *N. Haven Steamboat Co.*, 2 Abb. N. S. 357.

Removal of causes from courts of conciliation. Laws 1865, ch. 556.

§ 18, p. 33. Powers of general term. (*Brotherson* v. *Consalus*, 28 How., 117; *Opening Seventh Avenue*, 29 How., 180.)

§ 27, p. 36. A judge out of court cannot punish as for a contempt a disobedience of an order in a statutory proceeding, unless where authority so to punish is conferred by statute. (*The People* v. *Brennan*, 45 Barb., 344.)

When a judge is disqualified by reason of his affinity to one of the parties to the suit. (*N. Haven R. R.* v. *Schuyler*, 28 How., 187.)

§ 30, p. 40. County courts have jurisdiction of actions for the specific performance of contracts (*Williston* v. *Williston*, 41 Barb., 635), and of all issues in actions of foreclosure, and to review proceedings in actions after judgment, and to grant new trials. (*Hall* v. *Hall*, 30 How., 51.)

As to enforcing judgments of county court, after death of judgment creditor. (Laws 1864, ch. 543; *Niles* v. *Perry*, 29 How., 192.)

§ 33, p. 45 *a*. The New York Common Pleas has jurisdiction in actions for torts, committed out of the State (*Smith* v. *Butler*, 1 Daly, 508). In all actions except those mentioned in sections 123 and 124 of the Code, where there is only a single defendant, he must, to give the New York Superior Court or New York Common Pleas jurisdiction, reside in the city of New York, or be served with the summons therein. (*Kerr* v. *Mount*, 28 N. Y., 659.) See *Bennett* v. *Erving*, 32 How., 384; *Zeregal* v. *Benoist*, 33 How., 129.)

The justices of the Superior Court of New York City have jurisdiction to issue attachments to enforce liens on vessels. (*Delaney* v. *Brett*, 1 Abb., N. S., 421.) [The law under which they acted has since been held to be unconstitutional, at least so far as relates to sea-going vessels.]

§ 33. The Mayor's Court of Albany may grant new trials or set aside judgments on the merits. (*The People* v. *Austin*, 43 Barb., 313.)

§ 54, p. 55. Two towns contiguous at either of the corners thereof, are adjoining towns. (*Holmes* v. *Carley*, 31 N. Y., 289.)

A justice of the peace is not disqualified from trying a cause, by reason of his having been a juror in an action between the same parties for the same cause of action. (*Travis* v. *Jenkins*, 30 How., 152.)

Section 54—Continued.

A judgment rendered by a justice of the peace who is related to either of the parties, is void. (*Schoonmaker* v. *Clearwater*, 41 Barb., 200.)

Same section, p. **58.** To obtain an attachment in a justices' court against a non-resident, the affidavit is sufficient to give jurisdiction, and as against third parties, if it states "deponent (plaintiff) applies for an attachment on the ground that the defendants are not residents of that county, but are residents of another county." (*Bascom* v. *Smith*, 31 N. Y., 595); and as to approving bond and return, see *Id.* and *Williams* v. *Barnaman*, 19 Abb., 69; 18 Abb., 158; 28 How., 59.

An affidavit that defendant is justly indebted to plaintiff on a demand arising upon keeping horses, held sufficient. (*Williams* v. *Barnaman*, 19 Abb., 69.)

A bond with one surety sufficient on issuing an attachment under non-imprisonment act. (*Id.*)

Same section, p. **60.** Constable's return of personal service of a summons is conclusive, and cannot be impeached collaterally. (*Hubbard* v. *Chapin*, 28 How. 407.)

Same section, p. **61.** Defects in process cured by general appearance in the action. (*Sprague* v. *Irwin*, 27 How. 51; *Watson* v. *Morton*, 27 How. 294.)

Who may appear as attorney. (Laws 1864, ch. 421.)

A justice of the peace cannot amend a summons after service, by correcting the name of a defendant therein, when such defendant does not appear (*Hoffman* v. *Fish*, 18 Abb., 76); but he may where the parties appear and do not move to dismiss, amend the summons by correcting the date. (*Bradbury* v. *Van Nostrand*, 45 Barb. 194.)

Same section, p. **62** *a*. A justice has jurisdiction of *a cause* at the return of the summons and of the *person* one hour after the return, whether the defendant is present or not. (*Sagendorph* v. *Shult*, 41 Barb. 102.)

§ **55**, p. **64.** The introduction of a deed as evidence not of title to land, but to establish some other fact, does not raise a question of title. (*Nichols* v. *Bain*, 27 How. 286; and see *Heintz* v. *Dellinger*, 28 How. 39.)

A question of license to enter on land does not raise a question of title. (*Martin* v. *Houghton*, 31 How. 82.)

A right of way over land affects title, and the right cannot be tried before a justice of the peace. (*Little* v. *Denn*, 34 N. Y. 452.) In an action for a penalty for obstructing a highway, the defendant may interpose an answer of title. (*Id.*) Such an answer is a nullity unless accompanied with an undertaking pursuant to section 58 of the Code. (*Id.*)

§ **59**, p. **67.** Where title to land comes in question, the justice has no jurisdiction. (*Gage* v. *Hill*, 43 Barb. 44.)

§ **64**, p. **76.** A venire should not be delivered to a constable, by a justice, until the parties have had an opportunity to object. (*Rice* v. *Buchanan*, 41 Barb. 147.)

Same section, p. **76** *a*. A constable who serves the process, appearing as counsel, renders the judgment irregular, but not void. (*Wilkinson* v. *Force*, 41 Barb. 370.)

Same section, p. **77** *j*. An erroneous dismissal of a suit by a justice, against the wish of the plaintiff, puts an end to it as effectually as though it was dismissed upon the plaintiff's motion. (*Lord* v. *Ostrander*, 43 Barb. 337.)

Section 64—Continued.

Same section, p. 79 *d*. If a justice does not render his decision in four days after the cause is submitted, he loses jurisdiction (*Bloomer* v. *Merrill*, 29 How. 259); but the parties may by stipulation give the justice more than four days to render judgment. (*Barnes* v. *Badger*, 41 Barb. 98.)

Same section, p. 80 *d*. A justice cannot amend his judgment. (*Dauchy* v. *Brown*, 41 Barb. 555.)

Same section, p. 80 *i*. Fees of justices of the peace in civil cases are as follows: (Laws 1866, ch. 692, p. 1481, § 1.)

Summons	25
Warrant, attachment, or transcript of judgment	25
Adjournment	25
Subpœna, including all the names inserted therein	25
Administering an oath	10
Filing every paper necessary to be filed	05
Swearing a jury	25
Swearing a constable to attend a jury	10
Trial of an issue of fact, in case of no appearance by defendant	25
Trial of an issue of fact, where there is an appearance and answer	75
Entering judgment	25
Taking affidavit	10
Drawing any bond	25
Receiving and entering verdict of jury	25
Venire	25
Drawing affidavits, applications, and notices in cases required by law, 5 cents per folio.	
Execution	25
Renewal of execution	25
Making a return to an appeal	$2 00
Warrant for the apprehension of any person charged with the violation of the laws concerning the internal police of the State	25
Warrant for the apprehension of any person charged with being the father of a bastard	50
Indorsing any warrant issued in another county	25
Summons for any offense relating to the internal police of the State, or in case of any special proceedings to recover the possession of lands or otherwise	25
Drawing a record of conviction for a contempt and other special cases	50
Execution upon any such conviction	25
Warrant of commitment for any cause	25
For a precept to summon a jury in special cases	50
Swearing such jury	25
Hearing the matter concerning which such jury is summoned	50
Receiving and entering the verdict of such jury	25
For a view of premises alleged to be deserted	50
Hearing an application for a commission to examine witnesses	50
Order for such commission, and attending, settling, and certifying interrogatories	50
Taking depositions of witnesses upon an order or commission issued by some court of this or a foreign State or territory, 10 cents a folio.	
Making the necessary return and certificates thereto	50
Indorsement on affidavit in an action to recover personal property	25

Constable's Fees.

Serving a warrant or summons	25
Copy summons on request of defendant or left at defendant's dwelling in his absence	15

Section 64—Continued.

Serving an attachment	75
Copy attachment and of inventory of property seized, left at the last residence of defendant	75
Serving execution; for every dollar collected to amount of $50, 5 cents; over $50, 2½ cents.	
Every mile traveled, going only, to serve a summons, warrant, attachment, or execution, the distance to be computed from the place of the abode of defendant, or where he shall be found, to the place where the precept is returnable	10
Notifying plaintiff of service of a warrant	25
Going to plaintiff's residence or where he shall be found, to serve notice, for each mile traveled, going only	10
Subpœnaing witnesses, not exceeding four	25
Summoning a jury	75
Summoning a jury to assess damages in a proceeding relative to highways.	$2 00
Serving affidavit, notice, and summons, in an action to recover possession of personal property	50
Copy of such affidavit, notice, and summons, left with the defendant [or] his agent at the last place of abode of the defendant	50
Every mile traveled, going only, to serve such affidavit, notice and summons, the distance to be computed from the place where the precept is returnable to the place of abode of the defendant, or where he shall be found	10
Taking charge of jury during their deliberations	50

Constables' fees in special proceedings.

Serving a summons	25
Serving a warrant	50
Arresting and committing any person pursuant to process	$1 00
Every mile traveled, going only, in each case	10

Jurors' fees.

Attending to serve as juror, although not sworn	10
Attending and trying a cause	25

Witness' fees.

Attending in court, or before a commission, or to be examined on commission, for each day's actual attendance	25

Every judgment to be with costs of suit, but the whole amount of the items of such costs to be included in the entry of judgment, except charges for the attendance of witnesses from another county, shall not in any case exceed $5, unless such suit has been adjourned more than once at the request and on the motion of the losing party: and in such cases the costs of such additional *adjournment* may be included in the entry of judgment. And in all cases in which an issue is joined and trial had, and the damages recovered exceed $50, or where the plaintiff's claim in the complaint exceeded $50 and the defendant recovers judgment, the prevailing party shall be entitled to costs not exceeding $10, exclusive of witness' fees. (Laws 1866, ch. 692, § 2.)

Same section, p. **81.** Where a judgment recovered in a court of a justice of the peace is docketed with the county clerk, execution thereon must be issued by the county clerk. (*Brush* v. *Lee*, 18 Abb., 398.)

§ **71**, p. **86.** Where in an action against joint debtors only one defendant is served and judgment taken against him, an action to enforce that judgment against the defendant is not an action on a judgment within section 71 of the Code. (*Dean* v. *Eldridge*, 29 How., 218.)

§ **73**, p. **88.** When the statute begins to run against depositaries of moneys. (*Payne* v. *Gardiner*, 29 N. Y., 146.)

A condition in a policy of insurance that no suit shall be brought thereon, unless commenced within six months next after any loss, is binding. (*Roach* v. *N. Y. & Erie Ins. Co.*, 30 N. Y., 546.)

The *lex fori* governs all questions arising under the statute of limitations. (*Power* v. *Hathaway*, 43 Barb., 214.)

Statute of limitations apply to surrogate's courts. (*Smith* v. *Remington*, 42 Barb., 75.)

When the statute begins to run against a note payable on demand. (*Scovil* v. *Scovil*, 43 Barb., 246.)

When there is a legal and equitable remedy in respect to the same subject-matter, the latter is under the control of the same statute as the former. But where the legal remedy is imperfect, the statute applicable to equitable remedies will govern. (*Rundle* v. *Allison*, 34 N. Y., 180.)

§ **79**, p. **92**, § **81**, p. **93.** See *Tyler* v. *Heidorn*, 46 Barb., 463.

§ **85**, p. **94.** See *Munro* v. *Merchant*, 28 N. Y., 10; *Doolittle* v. *Tice*, 41 Barb., 181.

§ **88**, p. **95.** See *Fogal* v. *Pirro*, 10 Bosw., 100; *Tyler* v. *Heidorn*, 46 Barb., 441.

§ **90**, p. **96** *a*. See *Conger* v. *Vandewater*, 1 Abb., N. S., 126.

§ **91**, p. **97.** An action in the nature of a creditor's bill is limited to six years after the return of the execution unsatisfied. (*Eyre* v. *Beebe*, 28 How., 333.)

§ **92**, p. **98.** Action against sheriff for omitting to return an execution must be brought within three years. (*Peck* v. *Hurlburt*, 46 Barb., 559.)

§ **97**, p. **99** *e*. See *Peabody* v. *Roberts*, 47 Barb., 92.

§ **99**, p. **100.** The delivery of a summons to the sheriff to be served, with an intent to have it served, is the commencement of an action. (*Davis* v. *Duffie*, 18 Abb., 360.)

§ **100**, p. **101.** A defendant resident abroad cannot avail himself of the statute of limitations until he has been a resident of this State and subject to process six years. (*Powers* v. *Hathaway*, 43 Barb., 214; see *McCord* v. *Woodhull*, 27 How., 54.)

§ **102**, p. **102.** See *Scovil* v. *Scovil*, 45 Barb., 517.

§ **105**, p. **103.** See *McQueen* v. *Babcock*, 41 Barb., 337; *Sands* v. *Campbell*, 31 N. Y., 345.

§ **110**, p. **104.** What is a sufficient promise to take a debt out of the statute. See *Loomis* v. *Decker*, 1 Daly, 186; *McNamee* v. *Tenney*, 41 Barb., 495; *Stuart* v. *Foster*, 18 Abb., 305; 28 How., 273; *Creuse* v. *Defiganiere*, 10 Bosw., 123; *Com'l Ins. Co.* v. *Brett*, 44 Barb., 489.

This section is not retrospective. (*Coe* v. *Mason*, 41 Barb., 612; overruling *Van Allen* v. *Feltz*, 23 Barb., 139; 9 Abb., 227, and *Van Allen* v. *Feltz* was reversed in Court of Appeals—see 27 How., 601.)

Effect of part payment, *Miller* v. *Talcott*, 46 Barb., 167.

Part payment of a debt by the assignee of an insolvent, is not evidence of a new promise. (*Stuart* v. *Foster*, 18 Abb., 305; affirmed in Court of Appeals.—*Ed.*; *Pickett* v. *Leonard*, 34 N. Y., 175; and see *Creuse* v. *Defiganiere*, 10 Bosw 123.)

§ 111, p. 106. Semble, an action to recover lands conveyed while in adverse possession may, since the statute of 1862, be brought by the grantee in the name of his grantor, without his consent. (*Lowber* v. *Kelly*, 9 Bosw., 494.)

Same section, p. 106. An action may be brought by a party in the name by which he is known, although that is not his true name. (*Cooper* v. *Burr*, 45 Barb., 10.)

Same section, p. 106 *a*. See *Woods* v. *De Figaniere*, 1 Robertson, 607.

§ 111, p. 107. See *Hutchins* v. *Smith*, 46 Barb., 235; *Thompson* v. *Howe*, *id.*, 287.

§ 111, p. 109. Action to recover money paid as usurious interest, must be brought within one year. (*Palen* v. *Johnson*, 46 Barb., 22.) Where a policy of insurance is issued to A, loss if any payable to B, in case of a loss B may sue in his own name. (*Frink* v. *Hampden Ins. Co.*, 1 Abb., N. S., 343.)

§ 111, p. 109 *f*. It is no objection to a suit by the assignee of a foreign executor that the assignment was made to avoid the difficulty arising from the incapacity of such executor to sue (*Peterson* v. *Chemical B'k*, 32 N. Y., 10; 29 How., 240.) Can a sheriff assign his right of action against bail? (*Clapp* v. *Schutt*, 29 How., 255.) A cause of action against a carrier for lost baggage is assignable (*Merrill* v. *Grinnell*, 30 N. Y., 594); and so is a right of action for converting personal property (*Genet* v. *Howland*, 30 How., 360; *Ward* v. *Benson*, 31 How., 411; *Grocers B'k* v. *Clark*, 32 How., 160.) Where a bond and mortgage are given to secure a debt, an assignment of the bond alone is a nullity. (*Cooper* v. *Newland*, 17 Abb., 342.) One cannot transfer to another the right to prove a demand usurious (*Bullard* v. *Raynor*, 30 N. Y., 197). As to transfer of a demand for which a note has been given (*Armstrong* v. *Cushney*, 43 Barb., 340.) A grantee of land may maintain an action to set aside a previous invalid conveyance by his grantor. (*McMahon* v. *Allen*, 35 N. Y., 403; 3 Abb. N. S., 74.)

§ 111, p. 111. The right of an heir apparent is a mere possibility, and not the subject of a grant. (*Stover* v. *Eyclesheimer*, 46 Barb., 84.)

A corporation may assign a right of action for a fraudulent misapplication of its funds. (*Grocers' Nat. B'k* v. *Clarke*, 32 How., 160.)

Same section, p. 112 *q*. A demand may be assigned by parol. (*Hooker* v. *Eagle B'k*, 30 N. Y., 83; *Arnold* v. *Johnson*, 28 How., 249.)

A verbal pledge of a negotiable instrument, without a delivery or an absolute transfer, will not make the pledgee a *bona fide* holder. (*Russell* v. *Scudder*, 42 Barb. 31; and see *Taacks* v. *Schmidt*, 18 Abb. 308.)

§ 112, p. 115. Where a promissory note payable on demand with interest, was transferred to the plaintiff, a *bona fide* holder, nearly three months after its date, held that it was not to be deemed dishonored at the time of the transfer, so as to let in a defence existing in favor of the maker against the payee. (*Herrick* v. *Woolverton*, 42 Barb. 50; see *Pardo* v. *Osgood*, 2 Abb. N. S. 365.)

Same section, p. 116 *a*. See *Peck* v. *Yorks*, 47 Barb. 131.

§ 113, p. 116. Action on administrator's bond should be in the name of the people. (*Annett* v. *Kerr*, 28 How. 324; *Conner* v. *Such*, 9 Bosw. 321.)

For a cause of action against a county, the suit should be against the supervisors. (*Magee* v. *Cutler*, 43 Barb. 240.)

§ 113, p. 117 *b*. Actions by and against towns. (*Town of Duanesburgh* v. *Jenkins*, 46 Barb. 295.)

Same section, p. 117 *d*. Suits against a partnership or association consisting of seven or more persons, should be against the president or treasurer of such as

sociation. (*Robbins* v. *Wells*, 18 Abb. 191; 1 Robertson, 666.) As to suits for penalty for taking watered milk to cheese factory, under law 1865, ch. 361. (*Bridenbeker* v. *Hoard*, 32 How. 289.)

Same section, p. **120.** Suits against Commissioners of Pilots—see Laws 1865, ch. 712, p. 1424.

§ **114**, p. **121** *f.* Add, *Horton* v. *Payne*, 27 How. 374.

Same section, p. **121.** In an action by a wife concerning her separate estate, the husband is not a proper party. (*Palmer* v. *Davis*, 28 N. Y. 242; *Draper* v. *Slouvenel*, 35 N. Y. 507; *Rawson* v. *Penn. R. R. Co.* 2 Abb. N. S. 220; *Ackley* v. *Tarbox*, 31 N. Y. 564, reversing S. C. 29 Barb. 512; *Fox* v. *Duff*, 1 Daly 196.) But if the husband is joined and the defendant does not demur, the plaintiffs may recover. (*Ackley* v. *Tarbox*, 31 N. Y. 564.)

A married woman cannot sue her husband in ejectment (*Gould* v. *Gould*, 29 How. 441), nor for assault and battery. (*Longendyke* v. *Longendyke*, 44 Barb. 366.)

A married woman keeping a boarding-house on her own account, may sue for the seduction of her daughter. (*Badgley* v. *Decker*, 44 Barb. 577.)

To reach the property of a married woman she should be sued alone. (*Porter* v. *Mount*, 45 Barb. 423.)

A married woman engaged in business on her sole account, is liable for the negligence of her servant in such business. (*Gillies* v. *Lent*, 2 Abb. N. S. 455.)

§ **116**, p. **123.** The omission of an infant plaintiff to have a guardian appointed is an irregularity only; it may be waived and is cured by the plaintiff coming of age pending the action. (*Rucker* v. *Puckhofer*, 9 Bosw. 638.)

Where a defendant in an action of tort being an infant appears by attorney and answers, without the appointment of a guardian, all the proceedings are irregular. (*Boyley* v. *McAvoy*, 29 How. 278; see *Parks* v. *Parks*, 19 Abb. 161.)

§ **117**, p. **125.** The regularity of the service of an order appointing a guardian *ad litem*, cannot be questioned, after the guardian has appeared and answered and judgment has been entered. (*Barnard* v. *Heydrick*, 2 Abb. N. S. 48; *Brainard* v. *Heydrick*, 32 How. 97.)

§ **116**, p. **127** *d.* Where a vessel has several owners they should all join in an action for freight. (*Merritt* v. *Walsh*, 32 N. Y. 685; *Donnell* v. *Walsh*, 33 N. Y. 43.)

Limited partnerships—see Laws 1864, ch. 43.

§ **118**, p. **128.** In creditors' suits the judgment debtors must be made parties (*Lawrence* v. *B'k of the Republic*, 31 How. 502; 35 N. Y. 320), and served with process—naming them as parties merely is not sufficient. (*Monroe* v. *Galveston R. R. Co.*, 19 Abb. 90.) Where several are guilty of a tort, the party injured may sue them jointly or severally. (*Creed* v. *Hartmann*, 29 N. Y. 591; *Kasson* v. *The People*, 44 Barb. 347; *Phelps* v. *Wait*, 30 N. Y. 78.)

One of two executors may maintain an action to call his co-executor to an account. The creditors, legatees, and next of kin are not necessary parties, except in case of final accounting. (*Wood* v. *Brown*, 34 N. Y. 337.)

§ **118**, p. **130** *e.* See *McVean* v. *Scott*, 46 Barb. 384.

§ **119**, p. **131.** In an action for waste by a remainder-man in fee, it is not necessary to make the owner of any intervening estate a party. (*Van Deusen* v. *Young*, 29 N. Y. 9.)

In an action against partners all must be joined; that the statute of limitations is a defence as to one partner is no excuse for omitting to make him a defendant. (*Hyde* v. *Van Valkenburgh*, 1 Daly, 416; see *Eaton* v. *Balcomb*, 33 How. 80.)

In a suit by trustees they must all join. (*Thatcher* v. *Candee*, 33 How. 146.)

§ **120**, p. **133** *e*. Add, *Farmers' Bank* v. *Blair*, 44 Barb. 642.

§ **121**, p. **134**. This section does not apply to arbitrations. (*Manning* v. *Pratt*, 18 Abb. 344.) The cause of action in replevin survives the death of the plaintiff, but not the defendant. (*Lahey* v. *Brady*, 1 Daly, 443.)

See *McVean* v. *Scott*, 46 Barb. 379; *McGregor* v. *McGregor*, 35 N. Y. 218.

As to proceedings on death of parties to actions to recover real property, see Laws 1865, ch. 357.

Same section, p. **138** *f*. Add, *Re Borsdorff*, 41 Barb. 211; *Roach* v. *La Farge*, 19 Abb. 67.

The representatives of a deceased sole defendant, in an action after judgment, and pending an appeal thereon, have the right to have themselves made parties to the appeal. (*Schuchardt* v. *Remiers*, 28 How. 514; 1 Daly, 459.)

Where one of two joint defendants dies before judgment, the action cannot be revived as a joint one against the survivor and the personal representative of the deceased, but may, it seems, be revived as separate actions. (*Union Bank* v. *Mott*, 27 N. Y. 633.)

A defendant cannot compel an assignee of a cause of action pending the suit to become a plaintiff without his consent. (*Packard* v. *Wood*, 17 Abb. 318.)

§ **122**, p. **140**. As to the right of a stranger to be made a party, see *Hornby* v. *Gordon*, 9 Bosw. 656; *Scheidt* v. *Sturgis*, 10 Bosw. 606; *Kelsey* v. *Murray*, 28 How. 243; 18 Abb. 294; *McKay* v. *Draper*, 27 N. Y. 256.

When a party may interplead. (*Wakeman* v. *Dickey*, 19 Abb. 24; *Morgan* v. *Fillmore*, 18 Abb. 217; *McHenry* v. *Hazard*, 45 Barb. 657; *U. S. Trust Co.* v. *Wiley*, 41 Barb. 477; *Trigg* v. *Hitz*, 17 Abb. 436; *Schuyler* v. *Hargous*, 28 How. 243; *McKay* v. *Draper*, 27 N. Y. 256; *Wash. Ins. Co.* v. *Lawrence*, 28 How. 435.)

§ **126**, p. **145** *b*. See *The People* v. *Fredericks*, 33 How. 150.

§ **127**, p. **153** *e*. Add, *Oothout* v. *Ballard*, 41 Barb. 33; *Smith* v. *Aylesworth*, 40 Barb. 104.

§ **128**, p. **154** *a*. The copy summons served need not to state that the original is stamped. (*Watson* v. *Morton*, 18 Abb. 139; 27 How. 294; reversing S. C. 26 How. 383.)

Same section, p. **155** *d*. Misnomer, see *Cooper* v. *Burr*, 45 Barb. 10.

§ **128**, p. **156** *e*. See *Sprague* v. *Irwin*, 27 How. 51.

The name of an attorney printed on a summons, is a subscription by him. (*Barnard* v. *Heydrick*, 2 Abb. N. S. 47; *Brainerd* v. *Heydrick*, 32 How. 97.)

§ **129**, p. **157**. An action against sureties on an undertaking given pursuant to section 209 of the Code, is an action arising on contract within subd. 1 of section 129. (*Montegriffo* v. *Mustie*, 1 Daly, 77.)

In all cases when the action is not upon a money demand, or obligation for the payment of money, the case is within subd. 2 of section 129. (*Hemson* v. *Decker*, 29 How. 385; and see *McDougall* v. *Cooper*, 31 N. Y. 498; *Goff* v. *Edgerton*, 18 Abb. 381; *Willett* v. *Stewart*, 43 Barb. 98.)

§ **130**, p. **159**. Where the summons is in the form appropriate for serving the copy complaint together with the copy summons, the omission to serve a copy of the complaint, or to state in the summons the place of filing the complaint, although irregular, does not affect the validity of the judgment. (*Foster* v. *Wood*, 1 Abb. N. S. 150; 30 How. 284.)

§ 132, p. 161. The notice of *lis pendens* should include only the property actually to be affected by the judgment, and where an attachment issues the notice should include only the property attached. (*Fitzgerald* v. *Blake*, 28 How. 110.)

Same section, p. 161 *b*. See *Stern* v. *O'Connell*, 35 N. Y. 104.

Notices of *lis pendens* to be recorded and indexed.—Laws 1864, ch. 53. Laws 1867, ch. 538.

§ 134, p. 164 *f*. Where does a cause of action arise? (*Conn. Mutual Ins. Co.* v. *Cleveland R. R. Co.*, 41 Barb. 28; *Artisans' B'k* v. *Park B'k*, 41 Barb. 599; *Jewell* v. *Wright*, 30 N. Y. 259; *Bright* v. *Judson*, 47 Barb. 29.)

A convict in the State prison may be sued, and process served upon him personally. (*Davis* v. *Duffie*, 8 Bosw. 617.)

Same section, p. 167 *c*. *Fraud in service*, add *Metcalf* v. *Clark*, 41 Barb. 55.

§ 135, p. 170. Law of 1863, ch. 212, amends the law of 1853 as to service of process, and provide that except in partition cases or actions or proceedings where no personal claim is made against any persons in the classes thereafter described, none of the provisions of the law of 1853 should apply to officers, soldiers or musicians while "actually absent from home," and actually engaged in the military service of the United States, nor to any sailor or marine actually absent "from his home," and actually engaged in the naval service of the United States, and except in partition cases and cases where no personal claim is made as aforesaid, no order is to be granted under the law of 1858 unless it be first shown by affidavit to the satisfaction of the court or judge that the defendant against whom such an order is desired is not an officer, soldier, musician, sailor or marine actually absent and in service as aforesaid, or that the action is to partition real estate, or that no personal claim is made on the defendant against whom the order is sought.

Laws 1866, ch. 411, provide for service of process on express companies.

§ 135, p. 170 *b*. Add, at end, *Wells* v. *Thornton*, 45 Barb. 390.

The affidavit must not only show that the case falls within some one of the five subdivisions of this section, but also the jurisdictional fact, that the person on whom the service is to be made cannot, after due diligence, be found within the State. The circumstance that such person is a non-resident is of no importance, except as it tends to establish the fact, that he is not within the State at the time when the application is made. (*Peck* v. *Cook*, 41 Barb. 549.)

If the affidavit is insufficient the plaintiff will not be aided by the fact that after the order for publication was made, the summons and complaint were served upon the defendant personally out of the State. (*Id.*)

The affidavit on which the order was granted being entitled in another suit, is not such an irregularity as will invalidate the order for publication. (*Barnard* v. *Heydrick*, 2 Abb. N. S. 47.)

To entitle the plaintiff in a foreclosure suit to an order for service by publication, it is sufficient to show that the defendant on whom service is to be made, cannot, after due diligence, be found in the State; it need not be shown that he is a non-resident. (*Barnard* v. *Heydrick*, 2 Abb. N. S. 47; *Brainerd* v. *Heydrick*, 32 How. 97.)

The order for publication need not recite the facts which entitle the plaintiff thereto. (*Id.*)

The order should properly be filed, before the papers are deposited in the mail, but an omission to file the order may be rectified at any time by filing the order *nunc pro tunc*. (*Barnard* v. *Heydrick*, 2 Abb. N. S. 48; *Silleck* v. *Heydrick*, id. 57; *Brainerd* v. *Heydrick*, 32 How. 97.)

§ 136, p. 174. A judgment entered against several joint debtors, upon service of the summons upon only a part of them, is a judgment in form only, against those not served. (*Foster* v. *Wood*, 1 Abb. N. S. 150; 30 How. 284.)

§ 136, p. 174 *g*. Where a judgment has been obtained against two joint debtors, upon a service on one only, a second action may be brought against both defendants, alleging the recovery of the judgment, serving process on the defendant not before served and a judgment taken against him. (*Dean* v. *Eldridge*, 29 How. 218.)

§ 137, p. 175 *a*. *Dykers* v. *Woodward*, 7 How. 313, approved *Sherman* v. *Strakosh*, *Transcript*, 3 March, 1865.

§ 138, p. 176 *c*. An admission of service of the summons and complaint, not stating the mode in which the service was made, is not sufficient. The admission must state that the service was personal, by the delivery of a copy thereof to him. (*Read* v. *French*, 28 N. Y. 285.)

§ 139, p. 177 *a*. The mere issuing of a summons is not the commencement of an action for general purposes. (*Kerr* v. *Mount*, 28 N. Y. 659.)

§ 140, p. 179, *foot-note*. For "In suits brought by" read "In suits brought by or against," and add at end, Laws 1864, ch. 422.

§ 140, p. 180. An infant who obtains credit upon the representation that he is of full age, is liable in an action for the false representation, or to recover any property obtained thereby. (*Eckstein* v. *Frank*, 1 Daly, 334.)

§ 140, p. 182 *b*. See *Hopf* v. *Myers*, 42 Barb. 270.

§ 142, p. 189 *b*. Add, *Grantman* v. *Thrall*, 44 Barb. 173.

§ 142, p. 190 *e*. See *Coope* v. *Bowles*, 28 How. 10; 18 Abb. 442; 42 Barb. 87.

§ 142, p. 189 *c*. As to suits as Loan Commissioners, *Plumtree* v. *Dratt*, 41 Barb. 333.

§ 142, p. 192 *c*. It is too late at the trial to object that the complaint and summons vary as to the cause of action. (*Willet* v. *Stewart*, 43 Barb. 98.)
It seems, that in all cases where the notice in the summons is under subd. 2 of section 129, the plaintiff is at liberty to declare for any cause of action. (*Hemson* v. *Decker*, 29 How. 385.)

§ 142, p. 195 *v*. That "plaintiff was compelled to and did pay under protest and by compulsion" is a conclusion of law. (*Com'l B'k* v. *City of Rochester*, 41 Barb. 341.)

§ 142, p. 197 *a*. Add, at end of paragraph, *Cahill* v. *Palmer*, 17 Abb. 200.

§ 142, p. 203 *f*. The people of the State to maintain an action must show an interest in the subject-matter. (*The People* v. *Booth*, 32 N. Y. 397.)

§ 142, p. 207. *Bail*, complaint against. (*Clapp* v. *Schutt*, 44 Barb. 9.)

§ 142, p. 208 *b*. Executor's bonds, add, *Behrle* v. *Sherman*, 10 Bosw. 292.

§ 142, p. 209 *a*. See *Spencer* v. *Rogers' Locomotive Works*, 8 Bosw. 612; *Bedell* v. *Carll*, 33 Barb. 581.

§ 142, p. 212 *i*. Surplus money.—*Bevier* v. *Schoonmaker*, 29 How., 411.

§ 142, p. 212 *k*. See *Phœnix B'k* v. *Donnell*, 41 Barb. 571; Laws 1864, ch. 422.

§ **142**, p. **215** *i*. Creditor's suit cannot be brought until legal remedy is exhausted. (*Dunlevy* v. *Tallmadge*, 29 How., 397; see *Mechanics' B'k* v. *Dakin*, 32 N. Y., 457; 28 How., 502; *Shaw* v. *Dwight*, 27 N. Y., 244; *McCartney* v. *Bostwick*, 32 N. Y., 53; *Meyer* v. *Mohr*, 19 Abb., 299, and see 31 How., 502; see *Renaud* v. *O'Brien*, 35 N. Y. 99.

Allegations in complaint held sufficient. (*Simmons* v. *Eldridge*, 19 Abb., 296.) Denial of intent to defraud. (*Read* v. *Worthington*, 9 Bosw., 618.)

§ **142**, p. **218** *e*. Foreclosure, complaint. (*Troy B'k* v. *Bowman*, 43 Barb., 639.)

§ **142**, p. **219** *a*. Assignees of foreign executor may sue in the courts of this State (*Peterson* v. *Chemical B'k*, 32 N. Y., 21; 29 How., 240), although foreign executors may not. (*Middlebrook* v. *Merchants' B'k*, 41 Barb., 481.) Nor can foreign executors be sued at law (*Metcalf* v. *Clark*, 41 Barb., 45, *ante* p. 22, 188 b); and see *Robbins* v. Wells, 18 Abb., 191.

§ **142**, p. **220** *e*. Complaint for goods sold, alleging that between specified days plaintiff sold and delivered to defendant, at his request, a large quantity of boots and shoes of a specified value, and that there is due and unpaid therefor a designated sum which he promised to pay, but, though often requested, he has wholly refused to pay, held sufficient on demurrer. (*Phillips* v. *Bartlett*, 9 Bosw., 678.) In an action by partners to recover for goods sold, an allegation of partnership is not necessary, and the allegation of sale and delivery sufficiently implies that the goods belonged to plaintiffs. (*Id.*)

§ **142**, p. **222**. Surrender of notes at trial. (*White* v. *Dodds*, 18 Abb. 250; *Hathorn* v. *Hodges*, 28 N. Y. 486; *Armstrong* v. *Cushney*, 43 Barb. 350.)

§ **142**, p. **222** *h*. Injury causing death. (*Mahler* v. *Norwich Transportation Co.*, 45 Barb. 226; 30 How. 237; 35 N. Y. 352; *McMahon* v. *The Mayor*, 33 N. Y. 642; *Benson* v. *Suarez*, 28 How. 511; *McIntyre* v. *N. Y. Central R. R.*, 47 Barb. 515.)

§ **142**, p. **225**. Complaint for libel need not aver malice. (*Opdyke* v. *Weed*, 18 Abb. 223, *note*.) Incorporated companies may maintain actions for libel. (*Shoe and Leather Bank* v. *Thompson*, 18 Abb. 413.) A wife cannot maintain an action for slander against her husband. (*Freethy* v. *Freethy*, 42 Barb. 641.) Mode of setting forth the words spoken in a complaint for slander. (*Hull* v. *Vreeland*, 42 Barb. 543.)

§ **142**, p. **228**. Malicious prosecution, complaint for must allege absence of probable cause. (*Hull* v. *Vreeland*, 18 Abb. 182.)

§ **142**, p. **229** *e*. Add *Terwilliger* v. *Wand*, 17 N. Y. 54; *Wilson* v. *Goit*, *id.* 442.

§ **142**, p. **229** *b*. An action for breach of contract of marriage, cannot be maintained when one of the parties was, by law, at the time of the alleged contract, incapable of entering into the marriage relation. (*Haviland* v. *Halstead*, 34 N. Y. 643.)

To maintain an action or defence for deceit, the pleading must aver that the representations complained of were made "falsely," "fraudulently," or "deceitfully," and that the person to whom they were made relied upon them, or was deceived by them. (*Star Steamship Co.* v. *Mitchell*, 1 Abb., N. S., 396.)

Form of complaint in action against stockholders in manufacturing corporation. (*Lindsley* v. *Simonds*, 2 Abb., N. S., 69.)

§ **142**, p. **229** *f*. A married woman may purchase real or personal estate on credit, and manage by the agency of her husband. (*Knapp* v. *Smith*, 27 N. Y. 277.)

What is necessary to charge separate estate of wife. (*White* v. *McNett*, 33 N. Y. 371; *Owen* v. *Cawley*, 42 Barb. 105; *Woodbeck* v. *Havens*, *id.* 66; *Savage* v.

Section **142**—*Continued.*

O'Neil, id. 374; *Ledlie* v. *Vrooman*, 41 Barb. 109; *Kolls* v. *De Leyer*, 41 Barb. 208; and see *Ackley* v. *Turbox*, 31 N. Y. 564; *Manchester* v. *Sahler*, 47 Barb. 155.) A married woman is subject to the laws against usury. (*Porter* v. *Mount*, 41 Barb. 562.)

Liability of husband for goods supplied to his wife. (*Cromwell* v. *Benjamin*, 41 Barb. 558.) As to actions against husband and wife, see *Palmer* v. *Davis*, 28 N. Y. 242.

§ **142**, p. **234** *f.* Complaint for money lost by gaming. (*Langworthy* v. *Broomley*, 29 How. 92; *Moran* v. *Morissey*, 18 Abb. 131; 28 How. 100; *Betts* v. *Bache*, 9 Bosw. 614; *Arrietta* v. *Morrissey*, 1 Abb., N. S., 439; *Stannard* v. *Eytinge*, 33 How. 262; 3 Abb., N. S., 42.)

§ **142**, p. **235** *e.* Complaint against Mayor, &c., of New York. (*Russell* v. *The Mayor*, 1 Daly, 263.)

§ **142**, p. **242** *a.* See *Lindsley* v. *Simonds*, 2 Abb.. N. S., 69.

§ **142**, p. **242** *k.* Complaint on undertaking on arrest. (*Willett* v. *Lasalle*, 19 Abb. 272; 1 Robertson, 618; *Gauntley* v. *Wheeler*, 31 How. 137.) On injunction. (*DeForest* v. *Baker*, 1 Abb., N. S., 34.)

§ **143**, p. **255** *a.* An order staying proceedings pending an appeal from an order denying a motion to vacate the order of arrest, extends the time to answer only until the decision of such appeal. (*Petrie* v. *Fitzgerald*, 2 Abb., N. S., 354.)

§ **144**, p. **258** *b.* No demurrer because pleading hypothetical. (*Taylor* v. *Richards*, 9 Bosw. 678.)

§ **144**, p. **260** *b.* Objection that plaintiff, a foreign executor, should be taken by demurrer, that plaintiff has not capacity to sue. (*Robbins* v. *Wells*, 18 Abb. 191;) and so of defect of parties. (*Eaton* v. *Balcom*, 33 How. 80.)

§ **148**, p. **265** *a.* What objections are waived by not demurring. (*Tremper* v. *Conklin*, 44 Barb. 456; *Loeschigk* v. *Addison*, 19 Abb. 169; *Palmer* v. *Davis*, 28 N. Y. 242; *Hosley* v. *Black*, 28 N. Y. 438; *Merritt* v. *Walsh*, 32 N. Y. 685; *Donnell* v. *Walsh*, 33 N. Y. 43; *Lee* v. *Wilkes*, 27 How. 336; 19 Abb. 355; *Secor* v. *Law*, 9 Bosw. 165; *Stannard* v. *Eytinge*, 3 Abb., N. S., 42; 33 How. 262.)

§ **148**, p. **266** *b.* Add, *Morton* v. *Pickering*, 8 Bosw. 135.

§ **149**, p. **268** *a.* An answer in terms merely denying "each and every *material* allegation of the complaint," is evasive, and obnoxious to a motion that it be made more definite and certain. (*Mattison* v. *Smith*, 19 Abb. 288; 1 Rob. 706.)

§ **149**, p. **268** *c.* What amounts to a denial. An answer containing a different version of the transaction to that contained in the complaint, is not a denial. (*West* v. *Amer. Ex. B'k*, 44 Barb. 176.)

§ **149**, p. **268** *d.* See *Beebe* v. *Marvin*, 17 Abb. 194; *Heye* v. *Bolles*, 33 How. 267.

§ **149**, p. **273**. What may be shown under a general denial. (*Raynor* v. *Timerson*, 46 Barb. 518.)

§ **149**, p. **274** *e.* See *Morford* v. *Davis*, 28 N. Y. 481.

§ **149**, p. **276** *b.* New matter must be pleaded. (*Morrell* v. *Irving Fire Ins. Co.*, 33 N. Y. 429; *Dingeldein* v. *Third Ave. R. R. Co.*, 9 Bosw. 79; *Simmons* v. *Law*, 8 Bosw. 214; *Mechanics' B'k* v. *Foster*, 44 Barb. 87; *Rapalle* v. *Stewart*, 27 N. Y. 330; *Fry* v. *Bennett*, 28 N. Y. 325; *Tilson* v. *Clark*, 45 Barb. 178; *Taylor* v. *Richards*, 9 Bosw. 680; *Allen* v. *Merch. Ins. Co.*, 46 Barb. 643.)

§ **149**, p. **276** *c*. A defendant in order to avoid need not confess. (*Taylor* v. *Richards*, 9 Bosw. 679.)

§ **149**, p. **277** *e*. Partial defence. (*Sawyer* v. *Chambers*, 44 Barb. 42.)

§ **149**, p. **278** *c*. The answer need not ask relief, further than to state whether the matter is set up as a defence or a counterclaim. (*Clough* v. *Murray*, 19 Abb. 97; *Bendit* v. *Annesley*, 42 Barb. 192.)

§ **149**, p. **278** *e*. Is the ordinary verification to an answer equivalent to an affidavit denying notice of protest. (*Union Bank of Rochester* v. *Gregory*, 46 Barb. 99.)

§ **149**, p. **279**. Plea in abatement for non-joinder of parties. (*Wigand* v. *Sichel*, 33 How. 174.)

§ **149**, p. **280** *j*. See *Reed* v. *Randall*, 29 N. Y. 358; *Delano* v. *Rawson*, 10 Bosw. 286.

§ **149**, p. **281** *b*. See *Dean* v. *Eldridge*, 29 How. 218; *Demarest* v. *Darg*, 29 How. 266; *Siemon* v. *Schurck*, 29 N. Y. 598; *Bancroft* v. *Winspear*, 44 Barb. 209.

§ **149**, p. **281** *g*. See *Smith* v. *Reeves*, 33 How. 183.

§ **149**, p. **282** *a*. If the answer of non-joinder states the residence of the party not joined, his being alive will be inferred. (*Taylor* v. *Richards*, 9 Bosw. 679.) See *Wigand* v. *Sichel*, 33 How. 174; *Eaton* v. *Balcom*, *id*. 80; *Carpenter* v. *Bell*, 1 Robertson, 711.

§ **149**, p. **282** *e*. See *Gurney* v. *Sharp*, 17 Abb. 411.

§ **149**, p. **283** *g*. See *Moffat* v. *Strong*, 9 Bosw. 57.

§ **149**, p. **284** *g*. See *Hosley* v. *Black*, 28 N. Y. 438; *O'Reilly* v. *Mut. Ins. Co.*, 2 Abb. N. S. 167.

§ **149**, p. **285** *d*. See *Roosevelt* v. *N. Y. and Harlem R. R. Co.*, 45 Barb. 554; 30 How. 226; *Kortright* v. *Cady*, 21 N. Y. 343; *Roosevelt* v. *Bull's Head B'k*, 45 Barb. 579.

§ **149**, p. **285** *h*. See *Mechanics' B'k* v. *Foster*, 44 Barb. 87; *Rosa* v. *Butterfield*, 33 N. Y. 665; *Prouty* v. *Eaton*, 41 Barb. 409.

§ **149**, p. **287** *g*. See *Lewis* v. *Palmer*, 28 N. Y. 271.

§ **150**, p. **287**. The defence of usury is not a counterclaim. (*Prouty* v. *Eaton*, 41 Barb. 409.) Nor is matter which shows plaintiff never had any cause of action (*id*.) or which discharges the cause of action, as payment. (*Burke* v. *Thorne*, 44 Barb. 363.) Where an answer is equally susceptible of being construed either as a defence or counterclaim, it should be construed as a defence merely (*id*.), and see p. **290** *b. c. ante*. A demand not set up as a counterclaim in the answer, cannot be recovered upon as such upon the trial. (*Beers* v. *Waterbury*, 8 Bosw. 396.)

In an action to compel the delivery of goods, a claim by defendants for the price of those goods, is a good cause of counterclaim. (*Thompson* v. *Kessel*, 30 N. Y. 383; and see *McDonald* v. *Christie*, 42 Barb. 36.)

What amounts to a counterclaim. (*Thompson* v. *Sickles*, 46 Barb. 49.)

§ **150**, p. **289** *h*. See *Colyer* v. *Collins*, 17 Abb. 467; *Siemon* v. *Schurk*, 29 N. Y. 598.

§ **150**, p. **290** *c*. See *Clough* v. *Murray*, 19 Abb. 97; *Burke* v. *Thorne*, 44 Barb. 363.

§ **150**, p. **290** *g*. A demand which has been assigned to assignees for the benefit of creditors is not subject to have set off against it, in their hands, a demand against the assignors, which was purchased by their debtors, but had not become payable at the time of the assignment. (*Martin* v. *Kunzmuller*, 10 Bosw. 16.)

A demand against the members of a corporation cannot be set off against a claim by the corporation. (*N. Y. Ice Co.* v. *Ransom*, 8 Bosw. 688.)

As to counterclaiming the liability of a plaintiff as a stockholder under the general manufacturing act. (*Chambers* v. *Lewis*, 28 N. Y. 454.) As to counterclaim between trustees. (*Vose* v. *Galpen*, 18 Abb. 96.)

Where the answer sets up a counterclaim arising since the commencement of the action, and it is not demurred to, and the counterclaim is proved without objection on the trial, the answer cannot be objected to on appeal from the judgment. (*Ashley* v. *Marshall*, 29 N. Y. 494.) As to set off between principal and agent, see *White* v *Jaudon*, 9 Bosw. 416.

§ **150**, p. **294** *b*. See *Henry* v. *Henry*, 17 Abb. 411.

§ **150**, p. **296** *c*. See 44 Barb. 118 *note*; and *Simmons* v. *Fairchild*, 42 Barb. 404.

§ **151**, p. **293** *a*. The court will not ordinarily allow a defendant to withdraw his answer and demur after his time to amend, of course, has expired. (*Finch* v. *Pindon*, 19 Abb. 96.)

§ **152**, p. **298**. Sham pleading is the setting up of a defence which has not only no foundation in fact, but which it is manifest was introduced for vexation or delay. (*Haddon* v. *N. Y. Silk Manuf. Co.*, 1 Daly, 388.)

An answer should not be struck out as sham except in a clear case. (*Lockwood* v. *Salhenger*, 18 Abb. 136.)

In an action against the acceptor of a draft, an answer that the name subscribed to the draft was not the true name of the subscriber, held sham. (*Claflin* v. *Griffin*, 8 Bosw. 689)

An answer denying the making of a note held sham. (See *Fairchild* v. *Rushmore*, 8 Bosw. 698.) And in an action by a corporation as indorsee of a note, an answer merely denying the plaintiff's corporate character and the partnership of the indorsers, held sham. (*Agawam B'k* v. *Egerton*, 10 Bosw. 669; and see *Beebe* v. *Marvin*, 17 Abb. 194; *De Forest* v. *Baker*, 1 Abb. N. S. 34.)

§ **152**, p. **300** *d*. Noticing the cause for trial is not the waiver of a previous notice of motion to strike out the answer as sham. (*Beebe* v. *Marvin*, 17 Abb. 194.)

§ **152**, p. **301** *h*. Judgment after the answer has been stricken out as sham. (*De Forest* v. *Baker*, 1 Abb. N. S. 35.)

§ **153**, p. **302**. A defence consisting of denials only is not demurrable. (*Maretzek* v. *Cauldwell*, 19 Abb. N. S. 35.) A plaintiff who replies to a counterclaim waives the right to object for matter of form, or to the introduction of evidence to prove such counterclaim. (*Ayres* v. *O'Farrell*, 10 Bosw. 143; and see *Smith* v. *Countryman*, 30 N. Y. 655.)

An answer interposing the statute of limitations presents a proper case for requiring, on defendant's motion, that the plaintiff reply. It is not generally essential that on such a motion the defendant should state that he does not know the grounds on which the plaintiff intends to rely to defeat the statute bar. (*Hubbell* v. *Fowler*, 1 Abb. N. S. 1.)

§ **157**, p. **310** *h*. Vice-consuls have authority to administer oaths and affirmations to be read in evidence and used in any of the courts of this State. (Laws 1863, p. 449.) Under this law, a jurat in the usual form and stating that the deposition was subscribed and sworn to in the presence of the vice-consul, and be so certified, was held sufficient. So far as the Law of 1854 provides to the contrary, it must be regarded as abrogated. (*City B'k* v. *Lumley*, 28 How. 401.)

§ **157**, p. **314** *e*. In an action against a husband and wife, where damages are claimed against both jointly, the answer may properly be verified by the husband only, even though the contract sued on relates to the estate of the wife. (*Hartely* v. *James*, 18 Abb. 299.)

§ **158**, p. **315**. A party is not entitled to a bill of particulars, where the claim is for violating a special contract. (*Ives* v. *Shaw*, 31 How. 54.) Assuming that the court has power to order a bill of particulars after an order of reference, it will not exercise such power to interrupt the progress of a trial proceeding before a referee. (*Cadwell* v. *Goodenough*, 28 How. 479.) A bill of particulars should state how the items claimed become due. And stating the items as "amount advanced" is not sufficient. (*Moran* v. *Morrisey*, 18 Abb. 131; 28 How. 100.)

In an action on a policy of insurance, the defendant's remedy to compel a disclosure of the particulars of plaintiff's loss, is by requiring a bill of particulars. He is entitled to this, although the usual preliminary proofs of loss have been furnished. (*Cockroft* v. *Atlantic Mut. Ins. Co.*, 9 Bosw. 681; and see *Mason* v. *Ring*, 10 Bosw. 598; *Goings* v. *Ludlow*, 9 Bosw. 681.)

§ **159**, p. **319**. An allegation that a deed was procured by "false and fraudulent representations and practices, and by undue and improper influences," is not an allegation of fraud. (*Butler* v. *Viele*, 44 Barb. 169.)

§ **160**, p. **320** *c*. Allegations which can in no aspect of the case be material are irrelevant (*Cahill* v. *Palmer*, 17 Abb. 196). A defence is not to be struck out as irrelevant, merely because the matter of it arose after suit brought (*Carpenter* v. *Bell*, 19 Abb. 258). A complaint is not to be dismissed on the trial because it contains irrelevant or redundant matter. (*Simmons* v. *Eldridge*, 19 Abb. 296; *Smith* v. *Countryman*, 30 N. Y. 655.) An answer alleging that a judgment relied on by plaintiff was obtained by fraud between parties named, is sufficiently definite and certain. (*Culver* v. *Hollister*, 17 Abb. 405.)

§ **160**, p. **325** *e*. Scandalous affidavit, suppression of, see *Oydyke* v. *Marble*, 18 Abb. 266, 375.

§ **160**, p. **326** *a*. The plaintiff has twenty days after the service of an amended answer within which to move to make it definite. (*Walker* v. *Granite B'k*, 1 Abb. N. S. 406.)

An appeal lies from an order requiring a pleading to be made definite and certain. (*Arrieta* v. *Morrisey*, 1 Abb. N. S. 439.) The proper method of suspending the operation of the order pending the appeal is by a stay of proceedings, not by an extension of the time for an amendment. (*Culver* v. *Hollister*, 17 Abb. 405.)

§ **162**, p. **327** *c*. See *Hosley* v. *Black*, 28 N. Y. 438.

§ **165**, p. **329** *a*. See *Van Wyck* v. *Guthrie*, 17 N. Y. 190; *Maretzek* v. *Cauldwell*, 19 Abb. 38; *Tilson* v. *Clark*, 45 Barb. 178; *Billings* v. *Waller*, 28 How. 97; *Wachter* v. *Quenzer*, 29 N. Y. 547; *Hagar* v. *Tibbets*, 2 Abb. N. S. 97.

§ **167**, p. **333** *e*. Causes of action for slander and malicious prosecution may be joined. (*Hull* v. *Vreeland*, 18 Abb. 182; 42 Barb. 543.) A cause of action for an absolute divorce cannot be united with a cause of action for a limited divorce (*Henry* v. *Henry*, 17 Abb. 411), nor can a cause of action against the defendant as trustee be joined with one against him individually. (*Worth* v. *Radde*, 18 Abb. 396; 28 How. 230.) And see *Palen* v. *Bushnell*, 46 Barb. 24.

§ **168**, p. **339** *c*. Add *Stewart* v. *Binnse*, 10 Bosw. 436.

§ **169**, p. **340** *d*. An amended answer takes the place of the original answer. (*Sands* v. *Calkins*, 30 How. 1; *Walker* v. *Granite B'k*, 1 Abb. N. S. 406.)

§ **169**, p. **341** *f.* Where the complaint described the note in suit as made by Orrin North, and it appeared to have been made by two persons trading under the name of Orrin North, held an immaterial variance. (*Bank of Cooperstown* v. *Woods*, 28 N. Y. 545;) so where the allegation is the non-joinder of several persons, proof of the non-joinder of some only is an immaterial variance. (*Fowler* v. *Atlantic Mut. Ins. Co.*, 8 Bosw. 332.) In an action against the acceptor of a draft, a variance as to the initial letter of the first name of the drawer is immaterial. (*Claflin* v. *Griffin*, 8 Bosw. 689.) Where the claim is for compensation for services at a sum agreed upon, proof of agreement to pay what the services were reasonably worth is an immaterial variance. (*Scott* v. *Lilienthal*, 9 Bosw. 224. See *Patterson* v. *Patterson*, 1 Abb. N. S. 262; *Curtis* v. *Marshall*, 8 Bosw. 22; *Poirer* v. *Fisher*, 8 Bosw. 258.)

§ **171**, p. **343.** See *Whitcomb* v. *Hungerford*, 42 Barb. 178; *Patterson* v. *Patterson*, 1 Robertson, 184; *Lobdell* v. *Lobdell*, 33 How. 347.

§ **172**, p. **346** *d.* Where a demurrer has been interposed to an answer and the defendant amends of course, to which amended answer the plaintiff demurs, the plaintiff cannot amend again without leave of the court. (*Sands* v. *Calkins*, 30 How. 1.)

§ **172**, p. **348** *g.* A plaintiff may, by an amendment of course, change the place of trial (*Stryker* v. *N. Y. Exchange Bank*, 28 How. 20; 42 Barb. 511; and so held at General Term, 1st District, in *Root* v. *Spring*). A summons cannot be amended of course. (*Walkenshaw* v. *Perzell*, 32 How. 310.)

§ **173**, p. **349** *c.* The Court will not ordinarily allow a defendant, after having interposed an answer, to withdraw it and demur. (*Finch* v. *Pindon*, 19 Abb. 96.)

In an action for divorce on the ground of adultery, the defendant was allowed to amend or file a supplemental answer, by setting up the fact of adultery by the plaintiff, occurring after issue joined. (*Strong* v. *Strong*, 28 How. 432. It is supposed that this decision was reversed at General Term, 27 May, 1865. *Ed.*)

On a complaint for use and occupation it appearing there was a lease, plaintiff was allowed to amend. (*Bedford* v. *Terhune*, 30 N. Y. 453; 27 How. 422. See *Woodruff* v. *Dickie*, 31 How. 164.)

A judge has no power to grant an amendment on the trial which changes the cause of action. (*Whitcomb* v. *Hungerford*, 42 Barb. 177, and see *Woodruff* v. *Dickie*, 31 How. 164.)

§ **173**, p. **352** *f.* A general verdict for the plaintiff, rendered under instructions from the court, cannot be corrected on motion by making it a verdict for defendant. (*Brush* v. *Kohn*, 9 Bosw. 589.)

§ **173**, p. **353** *d.* See *Walsh* v. *Kelly*, 27 How. 361; *Butler* v. *Niles*, 28 How. 181.

§ **173**, p. **353** *i.* Amendment after judgment, see *Tracy* v. *N. Y. and Harlem R. R.*, 9 Bosw. 615; *Harriot* v. *Wells*, 9 Bosw. 631; *Ackley* v. *Tarbox*, 31 N. Y. 564; *Star Steamship Co.* v. *Mitchell*, 1 Abb. N. S. 396.

§ **173**, p. **354** *b. c. d. e.* See *Bedford* v. *Terhune*, 30 N. Y. 453; 27 How. 422; *Thompson* v. *Kessel*, 30 N. Y. 383; *Ackley* v. *Tarbox*, 31 N. Y. 564; *Willard* v. *Bunting*, 34 N. Y. 153.

§ **173**, p. **355** *f.* An order allowing a complaint to be amended by inserting an additional cause of action is appealable to the general term. (*Sheldon* v. *Adams*, 41 Barb. 54; 18 Abb. 405.) Contra, allowing a substitution of parties plaintiff. (*Sayre* v. *Frazer*, 47 Barb. 26.) No appeal from an order allowing amendment on the trial (*Bailey* v. *Johnson*, 1 Daly, 62; *Barnard* v. *Spring*, 42 Barb. 470), nor as to the terms on which an amendment is ordered. (*Schermerhorn* v. *Wood*, 30 How. 316.)

Section **173**—*Continued.*

Appeal to Court of Appeals from order for amendment, see *Thompson* v. *Kessel*, 30 N. Y. 383.

It is too late after the trial to object that the evidence was not warranted by the pleadings. (*Com. B'k of Rochester* v. *Stuart*, 46 Barb. 371.)

A neglect to allege *deceit* in a pleading, cannot be cured by amendment after verdict. (*Star Steamship Co.* v. *Mitchell*, 1 Abb. N. S. 396.)

After return made to the Court of Appeals the Court below cannot amend the record, unless it be sent back for the purpose of amendment. (*Adams* v. *Bush*, 2 Abb. N. S. 118.)

§ **177**, p. **358** *b*. The filing a supplemental complaint to revive an action is a matter of right. No motion for leave to file such a complaint is necessary or proper. (*Roach* v. *La Farge*, 43 Barb. 616; 19 Abb. 67.) Such leave if granted decides nothing as to the plaintiff's rights. The judgment in the supplemental suit that the plaintiff is to have leave to prosecute the original action and succeed to all the rights of the first plaintiff, is a different matter. In a supplemental complaint, where the original complaint alleges the facts on which the action is based, the reiteration of those facts is entirely unnecessary. At all events it is necessary to try both actions before it can be determined whether there was originally a cause of action. Where the court can see on the face of the supplemental complaint that the former action is fatally defective, it will refuse a judgment allowing plaintiff to prosecute the original action. (*Robbins* v. *Wells*, 18 Abb. 191; 1 Robertson, 666.)

When leave to file a supplemental complaint will not be granted. (*Cheeseman* v. *Sturges*, 19 Abb. 293.)

An order giving leave to file a supplemental complaint, is appealable to the General Term. (*Id.*)

A defendant is not allowed in a supplementary answer, to contradict the statements in his original answer. (*Slauson* v. *Englehart*, 34 Barb. 198.)

§ **178**, p. **361** *a*. It is not a ground for setting aside an order of arrest that the party had been arrested previously in the same suit, and on the same process, on a day of general election. The exemption from arrest expires with the day of election, and the parties afterwards stand toward each other as if no previous arrest had been made. The exemption from arrest is a personal privilege which can be waived, and which is so waived by failing to claim it at once, or by taking a step in the action, as giving bail. (*Petrie* v. *Fitzgerald*, 1 Daly, 401.)

An attorney not the attorney in the cause, is not privileged from arrest while attending with his client, who is about to become bail. (*Jones* v. *Marshall*, 40 Eng. Law and Eq. R. 421). A plaintiff attending before an arbitrator is privileged from arrest. (*Re McIntosh*, 92 Eng. Com. Law Rep. 1094.) As to privilege from arrest after discharge from criminal process, see *Montague* v. *Harrison*, 36 Law Jour. C. P. 24.

§ **179**, p. **364** *a*. In an action for a wilful injury to plaintiff's property, and for wrongfully depriving her of the use of certain parts thereof, the defendant is liable to arrest. (*Niver* v. *Niver*, 43 Barb. 411.)

§ **179**, p. **364** *g*. The residence of a seaman, if married, is where his family dwells; or if unmarried, the place where his domicil was fixed when he first went to sea. (*Re Scott*, 1 Daly, 534, and see *Re Hawley*, 1 Daly, 531.)

§ **179**, p. **367**. Arrest for money received in a fiduciary capacity. See *Chaine* v. *Coffin*, 17 Abb. 441; *Wheelock* v. *Stewart*, 28 How. 89; *Gross* v. *Graves*, 19 Abb. 95.

Commission merchants do not act in a fiduciary capacity within § 179, subd. 2. (*Duguid* v. *Edwards*, 32 How. 254.)

A second arrest for same cause not allowed. (*Wright* v. *Ritterman*, 1 Abb. N. S. 428; *The People* v. *Kelly*, *id.* 432.)

§ **179, p. 368.** Arrest for conversion of property, (*Person* v. *Civer*, 29 How. 432; reversing S. C. 28 How. 139; *Jananique* v. *DeLuc*, 1 Abb. N. S. 419.)

§ **179, p. 369** *f.* In an action to recover damages for false representations, the defendant is liable to arrest upon proof of the cause of action, merely, without proof of his non-residence or intent to depart. (*Hazlett* v. *Gill*, 19 Abb. 353. See p. 371 *a*, *ante*.) A deceit practiced by one of several joint debtors in inducing the creditor to accept his check, post-dated, and indorsed by the others, is not a ground for authorizing his arrest in an action on the check against both. (*Woodruff* v. *Valentine*, 19 Abb. 93.)

§ **179, p. 371** *k*, **372** *a*. The acceptance of a debtor's draft, held not to preclude the plaintiff from obtaining an order of arrest. (*Murphy* v. *Fernandez*, 10 Bosw. 665; and see *Hancock* v. *Palmer*, 17 Abb. 335.)

§ **179, p. 372** *c. d.* See *Flour B'k* v. *Hall*, 33 How. 1.

§ **181, p. 374** *e.* Entitling affidavit, see *City B'k* v. *Lumley*, 28 How. 397.

§ **182, p. 375** *b.* Affidavits on information and belief not sufficient. (*City B'k* v. *Lumley*, 28 How. 397; *Flour B'k* v. *Hall*, 33 How. 1.)

§ **183, p. 376.** In an action to recover the possession of specific personal property, an order of arrest which recites that the cause of action is for a detainer or conversion, and requiring the sheriff to hold the defendant to bail in a specified sum, is unauthorized. In such an action, the ground of arrest is a concealment, &c., of the property, and the order must require an undertaking to pay the amount which may be recovered. (*Elston* v. *Potter*, 9 Bosw. 636.)

The order may be made returnable within a certain specified number of days after the arrest of the defendant. It need not name a day certain. (*Continental B'k* v. *De Mott*, 8 Bosw. 696.)

§ **185, p. 377.** Where the sheriff is a party, and the order is directed to the coroner, he may call to his aid the power of the county. (*Slater* v. *Wood*, 9 Bosw. 16.)

§ **186, p. 378.** The release of a defendant from arrest by the consent of the plaintiff's attorney, does not, *per se*, operate as a discharge of the order of arrest, and the defendant is therefore liable to arrest on final process where the judgment warrants it. It seems that if the order of arrest had been vacated, the defendant could not again be arrested upon final process. (*Meech* v. *Loomis*, 28 How. 209.)

§ **187, p. 378.** Who is a householder for the purposes of bail? (*Somerset B'k* v. *Huyck*, 33 How. 323.)

§ **190, p. 379.** Bail who have been excepted to by a party to an action, and have failed to justify, are not liable to such party on the undertaking. It seems, that the sheriff may assign his rights against bail who have failed to justify, and that the assignee may recover thereon for damages actually accrued to the sheriff. (*Clapp* v. *Schutt*, 19 Abb. 121; 29 How. 255; 44 Barb. 9.) Special bail who have become fixed, cannot, in an action against them as such, show that before the recovery of judgment against their principal, he was and ever since had been utterly insolvent, and had no property liable to be applied toward payment of such judgment. (*Levy* v. *Nicholas*, 19 Abb. 282; 1 Robertson, 614; see *Willet* v. *Lassalle*, 19 Abb. 272; 1 Robertson, 618.)

§ **191, p. 380.** Sureties are not bound to surrender the defendant unless the plaintiff takes such steps as authorize the sheriff to hold the defendant. (*Allen* v. *Breslauer*, 8 Cal. 552.)

If, upon the recovery of judgment against the defendant, his bail, instead of surrendering his body, elect to pay, and do, while an appeal is pending, pay the

Section **191**—*Continued.*

amount of the judgment, such payment will not discharge their liability as bail. (*Appleby* v. *Robinson*, 44 Barb. 316.) While the action is pending, the defendant must be deemed to remain in custody of his bail, and they are liable to be sued for his neglect to render himself in execution whenever his body is legally required, and as often as they fail to produce his body upon process against his body, there is a breach of the undertaking until they have paid the amount stated in such undertaking, or the defendant is in fact surrendered or charged in execution. (*Id.*)

§ **191**, p. **380**. Liability of bail. (*McArthur* v. *Pease*, 46 Barb. 423.)

§ **203**, p. **385**. The sheriff has no right of action under this section against bail who fail to justify until he has sustained damage by reason of the liability as bail which the law imposes upon him, as a consequence of a failure to justify or put in other bail. (*Clapp* v. *Schutt*, 44 Barb. 9; 19 Abb. 121; 29 How. 255.)

§ **205**, p. **386** *a*. Where the defendant moves on the plaintiff's affidavits, and affidavits in response thereto, he so far adopts the plaintiff's affidavits as to waive the right to object to them for being erroneously entitled in the cause. (*City B'k* v. *Lumley*, 28 How. 397.)

§ **205**, p. **386** *f*. Where the cause of action is in tort and is positively sworn to, an order of arrest will not be vacated on conflicting affidavits as to the right of action. (*Jaroslauski* v. *Saunderson*, 1 Daly, 282.) See *Ely* v. *Mumford*, 47 Barb. 629. Where the action was for the wrongful conversion of stocks left with defendant for safe keeping, the court refused to try the question of the wrongful conversion on affidavits. (*Butler* v. *McIlvaine*, 31 How. 379; see *Janauique* v. *De Luc*, 1 Abb. N. S. 419.)

§ **205**, p. **387** *h*. In an action brought to recover the value of chattels, converted by defendant, it is not ground for discharging the order of arrest, that the defendant has a claim for a larger amount against plaintiff. (*Huelet* v. *Reyns*, 1 Abb. N. S. 27.)

The practice of referring motions to vacate orders of arrest to referees, said to be inexpedient. (*Id.*)

§ **206**, p. **390** *e*; p. **391** *a*. The remedy given by this chapter is applicable to every case in which the action of replevin, as given by the Revised Statutes, would lie. The remedy may be had notwithstanding the defendant has wrongfully parted with the possession of the property before the action was commenced. (*Ross* v. *Cassidy*, 27 How. 416; *Knapp* v. *Smith*, 27 N. Y. 277.)

Semble, the spirit of section 207, subd. 4 of the Code, seems to forbid a resort to the remedy provided by this chapter against a sheriff who has taken goods upon an attachment. (*Smith* v. *Orser*, 43 Barb. 187.)

Property taken from the owner for a tax assessed on him under a law of the United States cannot be replevied by him. (*O'Reilly* v. *Good*, 42 Barb. 521; 18 Abb. 106.)

A requisition in proceedings of claim and delivery, against one who purchased the property at a wrongful sale, justifies the sheriff in taking it, although the defendant acted merely as agent in making the purchase, if the papers are served and the seizure made while the goods remain in his actual possession. (*Haskins* v. *Kelly*, 1 Abb. N. S. 63; 1 Robertson, 160.)

§ **212**, p. **396** *a*. The judgment in replevin having been for damages only, and not for the delivery of the property, the sheriff is not liable for such damages by reason of the failure to justify of sureties who, on the arrest of the defendant in replevin, had given an undertaking for the delivery of the property if adjudged, and for the payment of such sum as for any other cause might be recovered against such defendant. To render him liable, there must be a judgment; under the execution on which the property might be sought and delivered. (*Gallarati* v. *Orser*, 27 N. Y. 324.)

§ 215, p. 396 *b*. Add *Moore* v. *Westervelt*, 27 N. Y. 234; 9 Bosw. 558.

§ 218, p. 398 *a*. A judge related by affinity to one of the defendants in an action cannot grant an injunction in such action. (*New Haven R. R. Co.* v. *Schuyler*, 28 How. 187.)

§ 219, p. 399 *e*. Injunction dissolved because order not served on defendant personally. (*Johnson* v. *Casey*, 28 How. 492.)

Injunction to restrain a municipal corporation. (*Pullman* v. *Mayor of N. Y.*, 2 Abb. N. S. 29.)

§ 219, p. 399 *g*. Order must be obeyed. (*McCardel* v. *Peck*, 28 How. 120.)

§ 219, p. 401 *f*. Trade marks. (*McCardel* v. *Peck*, 28 How. 120; *Bininger* v. *Wattles*, 28 How. 206; *Gillott* v. *Esterbrook*, 47 Barb. 455; *Matsell* v. *Flanagan*, 2 Abb. N. S. 459.)

§ 219, p. 403 *h*. Nuisance. (*McKeon* v. *Lee*, 28 How. 238; *Milhau* v. *Sharp*, 27 N. Y. 612.)

§ 219, p. 403. To restrain sale by sheriff on execution against partnership assets. (*Turner* v. *Smith*, 1 Abb. N. S. 304.)

§ 219, p. 404 *d*. *Nessle* v. *Reese*, 19 Abb. 240; 29 How. 382; *Hammer* v. *Barnes*, 26 How. 174.

§ 219, p. 404 *u*. *Mut. Ben. Life Ins. Co.* v. *B'd of Supervisors*, 8 Bosw. 683; *Mages* v. *Cutler*, 43 Barb. 289.

§ 219, p. 405 *e*. *Sixth Ave. R. R.* v. *Kerr*, 28 How. 382; *Taylor* v. *Brookman*, 1 Abb. N. S. 169.

§ 219, p. 405 *g*. *Griffith* v. *Brown*, 28 How. 4; *Roberts* v. *Matthews*, 18 Abb. 199; *Bean* v. *Pettengill*, 2 Abb. N. S. 58.

§ 220, p. 406 *a*. A complaint verified in the ordinary form, containing statements upon information and belief, is alone not sufficient to sustain an injunction. (*Hecker* v. *The Mayor, &c., of N. Y.*, 18 Abb. 369; 28 How. 211.)

§ 222, p. 407 *d*. Injunction order vacated on the ground, among others, that the undertaking had not been filed. (*Johnson* v. *Casey*, 28 How. 492.)

§ 222, p. 408 *g*. A referee's report assessing damages to be ascertained by future proceedings in another cause is premature, and the confirmation of such a report should be deferred. (*Taacks* v. *Schmidt*, 18 Abb. 308.) On the termination of such future proceedings, the report may be confirmed and can be reviewed only by appeal. (*Id.*)

In computing damages, the fees of counsel should not be included, but the costs of the suit as adjusted may be. (*Taacks* v. *Schmidt*, 18 Abb. 308.) In that case the costs of two actions were allowed. See the report, and see 30 N. Y. 166.

§ 225, p. 410 *a*. A supreme court judge or a county judge may vacate or modify *ex parte* an injunction order made by himself, but it is a power which should be exercised with caution. (*Peck* v. *Yorks*, 41 Barb. 547.)

§ 225, p. 411. Where a temporary injunction has been granted on notice before answer, it does not preclude a motion to vacate after the answer is put in. (*Hazard* v. *Hudson River Bridge Co.*, 27 How. 296.)

§ 226, p. 413. On a motion to continue an injunction, where defendant has read affidavits in opposition, plaintiff may be permitted to introduce affidavits additional to those on which the injunction issued; and where this permission is granted as a matter of right, it may be reviewed on appeal at general term. (*Childs* v. *Fox*, 18 Abb. 112.)

§ **227**, p. **414** *a*. By the issuing of an attachment the plaintiff obtains such a lien upon the property attached as entitles him to the intervention of equity to set aside any fraudulent obstacles to the enforcement of his lien. (*Greenleaf* v. *Mumford*, 19 Abb. 469; 30 How. 30; *Hall* v. *Stryker*, 27 N. Y. 596; *Renchey* v. *Stryker*, 28 N. Y. 45; 26 How. 140; 31 N. Y. 140; *B'k of Mut. Redemp.* v. *Sturgis*, 9 Bosw. 601; *Kelly* v. *Lane*, 42 Barb. 594; *Frost* v. *Mott*, 34 N. Y. 253; *Clapp* v. *Mott*, *ib.*) The decisions to the contrary are overruled; but an attaching creditor cannot move to set aside a prior attachment against the same defendant. (*Ketchum* v. *Ketchum*, 1 Abb. N. S. 157; *Isham* v. *Ketchum*, 46 Barb. 43.)

§ **227**, p. **415** *a*. In case of a non-resident, until a summons is served, so as to give the court jurisdiction of the person of the defendant, no attachment against his person can issue. (*Kerr* v. *Mount*, 28 N. Y. 659.) An attachment can issue against a non-resident of the State only when an action for the recovery of money is depending. (*Id.*) An attachment cannot issue in an action of trespass for taking personal property. (*Shaffer* v. *Mason*, 18 Abb. 455, 286; 29 How. 55; 43 Barb. 501; *Saddlesvene* v. *Arms*, 32 How. 280.) Nor in an action between partners for a dissolution of the partnership, an accounting and payment of an alleged balance. (*Ketchum* v. *Ketchum*, 1 Abb. N. S. 157.)

§ **229**, p. **417** *d*. Where a debtor threatens, "if he is sued, to turn over all his property, and that the creditor will not get a cent," his property may be attached. (*Livermore* v. *Rhodes*, 27 How. 506.)

The mere circumstance that a merchant makes a disposition of his property when he becomes insolvent and is pressed by creditors, not conclusive proof of fraud. (*Loeschigh* v. *Bridge*, 42 Barb. 171.)

§ **229**, p. **418** *e*. A defendant may move to set aside an attachment without putting in a general appearance in the action. (*Manice* v. *Gould*, 1 Abb. N. S. 255.) A subsequent attaching creditor cannot move to set aside prior attachment. (*Ketchum* v. *Ketchum*, 1 Abb. N. S. 157.)

§ **231**, p. **420** *b*. Although an attachment must be signed by the judge granting it, it is not essential that the copy served should have a copy of the judge's signature subscribed to it. (*Greenleaf* v. *Mumford*, 19 Abb. 469; 30 How. 30.)

§ **232**, p. **420** *c*. To render a seizure of property under process effectual, it must be accompanied by possession. The sheriff must not only seize but take the attached property into his custody. In case of neglect of duty in this respect, the sheriff is personally responsible. (*Smith* v. *Orser*, 43 Barb. 187.) A levy on bills of lading is not a levy on the goods. (*Taacks* v. *Schmidt*, 18 Abb. 308.) And as to levy on goods on board a vessel where the master makes himself receiptor. (*Id.*) A sheriff cannot execute an attachment out of his own county. (*Re Tilton*, 19 Abb. 50.) After a levy, and after judgment and execution and levy on the execution, when the property is taken out of the possession of the sheriff, he may, on being indemnified by the plaintiff, return the execution *nulla bona*. (*Lummis* v. *Kasson*, 43 Barb. 373.)

§ **232**, p. **422** *c*. On an attachment against one or more members of a firm the sheriff must serve it upon the interest of the defendants in the joint property of the firm. (*Id.*) The amount of property to be seized is within the discretion of the sheriff, and he is responsible to both parties for its proper exercise. Neither party can dictate the extent of the levy. The plaintiff may point out the property and require a levy on so much as will be sufficient. (*Fitzgerald* v. *Blake*, 42 Barb. 513.) A levy upon the interest of a special partner in the property of a firm does not deprive such partner of his interest or the right to an account, or prevent him from collecting any surplus remaining over and above such claims as the sheriff has upon it. (*Harris* v. *Murray*, 28 N. Y. 574.) The sheriff may seize property which a defendant has disposed of to defraud his creditor. (*Rinchey* v. *Stryker*, 31 N. Y. 140; 26 How. 75.)

§ **232**, p. **422** *g*. A sheriff acquires a lien upon property levied on by him under attachment, which constitutes a qualified or special title. He is thereby authorized to hold possession until the demands for which the attachment issued are paid, or until judgment and sale thereunder of the property seized. (*Rhoades* v. *Wood*, 41 Barb. 471.)

§ **232**, p. **423** *b. c.* See *Kelly* v. *Lane*, 28 How. 128; 18 Abb. 229; *Rinchey* v. *Stryker*, 28 N. Y. 45; *Lawrence* v. *B'k of Republic*, 31 How. 502.

§ **233**, p. **423** *d.* See *Re Felton*, 19 Abb. 50.

§ **235**, p. **424** *e*. The notice may describe the property in general terms. (*Greenleaf* v. *Mumford*, 19 Abb. 469; 30 How. 30.) But see *Harman* v. *Remsen*, 2 Abb. N. S. 272.

§ **236**, p. **425**. A bailee of goods having a lien thereon for an amount exceeding their value, who certifies that he holds no goods of the defendant, does not thereby forfeit his lien. (*B'k of Mut. Redemp.* v. *Sturgis*, 9 Bosw. 660.)

§ **237**, p. **426** *a*. It seems that where books are in the custody of the sheriff under attachment, he is not bound to permit an examination of them. (*McCartan* v. *Van Syckel*, 10 Bosw. 694.) Where a sheriff is in receipt of rents from a defendant's real estate he may be ordered to apply them on encumbrances. (*Fitzgerald* v. *Blake*, 28 How. 109.)

§ **241**, p. **429**. An order appointing an appraiser to ascertain the value of property attached for the purpose of an undertaking to procure a discharge of the attachment is not appealable. (*Lupton* v. *Jewett*, 19 Abb. 320.)

§ **243**, p. **430**. A sheriff cannot be allowed an additional compensation for executing an attachment over and above his prescribed fees, unless he is put to trouble or incurs expense in taking possession or in preserving the attached property. (*Calhoun* v. *Lee*, 29 How. 1.) Where the sheriff attached an interest in a mining company, and the parties compromised the action, held, the sheriff was not entitled to poundage, because he had not attached any property he could sell under the attachment. (*Id.*) In that case the sheriff was allowed, for serving attachment, 50 cents; for copy, 19 cents; returning, 12½ cents. As to sheriff's right to poundage on a compromise or settlement prior to the amendment in 1865, see *Muller* v. *Sautler*, 28 How. 87; 18 Abb. 450; *Bartlett* v. *Jessup*, 18 Abb. 448; *Jellinghaus* v. *Scheidt*, id. 452.

§ **244**, p. **433**. No receiver can be appointed in proceedings in the nature of *quo warranto* to dissolve a corporation. (*The People* v. *Washington Ice Co.*, 18 Abb. 382.)

§ **244**, p. **434** *c*. *Smith* v. *N. Y. Consol. Stage Co.*, 28 How. 208.

§ **244**, p. **434** *e*. *Smith* v. *N. Y. Consol. Stage Co.*, 28 How. 377.

§ **244**, p. **435** *a*. *Cummings* v. *Edgerton*, 9 Bosw. 684.

§ **244**, p. **436** *f*. *Cummings* v. *Edgerton*, 9 Bosw. 684.

§ **244**, p. **437** *j*. *Rigney* v. *Tallmadge*, 19 Abb. 16.

§ **244**, p. **438** *a*. *Sands* v. *Birch*, 29 How. 305.

§ **244**, p. **440** *h*. An order revoking the appointment of a receiver and appointing another, is not appealable. (*Siney* v. *N. Y. Consol. Stage Co.*, 18 Abb. 435; 28 How. 481.)

§ **246**, p. **445** *e*. In an action for infringement of a trade mark, the damages on a judgment for want of an answer cannot be assessed by a sheriff's jury, but by the court or a referee. (*Guilhon* v. *Lindo*, 9 Bosw. 605.)

§ **246**, p. **448** *e*. A default will not be opened to allow a defence of usury (*Farish* v. *Corlies*, 1 Daly, 274.)

§ **246**, p. **450**. Judgment against New York City. Judge G. G. Barnard made the following order:

Ordered, that in all applications for judgments against the Mayor, &c., of New York, to be made at special term or chambers, for want of an answer or other cause, under the statute of 1865, the same will not be signed by the Judge unless proof is furnished of five days' previous notice of such application having been served on the Comptroller and Mayor, and an affidavit produced at the time to the Court, made by the plaintiff, showing the facts upon which he relies for recovery, and that the amount claimed by him is actually due at the time of the application.

See *Laws* 1867, ch. 586, § 6, as to judgments against Mayor, &c., of N. Y.

§ **247**, p. **451** *a*. An answer held not to be frivolous. (*B'k of Cooperstown* v. *Corlies*, 1 Abb. N. S. 412.)

Where judgment has been given on a joint answer as frivolous, all the defendants may unite in an appeal. (*Id.*)

§ **247**, p. **453** *d*. *Guilhon* v. *Lindo*, 9 Bosw. 605.

§ **252**, p. **455**. What is a trial? (*Place* v. *Butternut's Woolen Co.*, 28 How. 184.)

§ **253**, p. **455**. Where the plaintiff united in one complaint a claim for damages for the improper sale of a pledge, with a claim to redeem said pledge, and the facts disclosed on the trial did not entitle plaintiff to redeem, the court ordered the issue on the claim for damages to be tried by a jury. (*Genet* v. *Howland*, 30 How. 360.)

§ **256**, p. **458**. Justices of the Supreme Court in the Second District may appoint a stenographer. (*Laws* 1866, p. 923.)

§ **256**, p. **457**. Where, in the first judicial district, a cause is noticed for trial for a particular term, it must be put on the calendar for that term, otherwise the party cannot regularly take a default at a subsequent term upon that notice. (*Culver* v. *Felt*, 30 How. 442.)

The provision that in the first district there need be but one notice of trial by either party, does not apply to notice of argument at general term. (*Walsh* v. *Gregory*, 19 Abb. 363.)

§ **258**, p. **464** *e*. An inquest will not be opened to allow a defence of usury. (*Farish* v. *Corlies*, 1 Daly, 274.) Nor after a delay of two years. (*Hendricks* v. *Carpenter*, 1 Abb. N. S. 213.)

§ **258**, p. **464** *g*. An order granting or denying a motion to open an inquest is not appealable to the general term. (*Farish* v. *Corlies*, 1 Daly, 274.)

§ **258**, p. **470** *f*. As to receiving affidavits of jurors, see 45 Barb. 98, and 1 Daly, 515.

§ **258**, p. **471**. Exceptions on trial. (43 Barb. 622; 29 N. Y. 616; 9 Bosw. 425; 10 Bosw. 83, 148; 33 N. Y. 83.)

§ **261**, p. **473** *a*. On a verdict for plaintiff the jury may find the value of the property and assess the damages, although the plaintiff has obtained a delivery of the property before the trial. (*Tracy* v. *N. Y. and Harlem R. R.*, 9 Bosw. 396.)

§ **261**, p. **474** *b*. Interest against a *del credere* factor (*Blakeley* v. *Jacobson*, 9 Bosw. 140), on note payable on demand (*Herrick* v. *Woolverton*, 42 Barb. 50), on a bond (*Howard* v. *Farley*, 19 Abb. 126), on claim for services as an attorney. (*Graham* v. *Chrystal*, 1 Abb. N. S. 121.)

§ **262**, p. **476** *b, c, d.* The court may correct a verdict. (*Wells* v. *Cox*, 1 Daly, 515; *Moss* v. *Priest*, 19 Abb. 314.)

§ **265**, p. **478** *a.* Does the entry of judgment on the verdict form a bar to a motion at special term for a new trial. (*Tucker* v. *White*, 28 How. 78.)

Where, after an appeal from the judgment, a case is made and the parties appear to argue the appeal upon the case, without objection, leave will be given, to enter *nunc pro tunc* an order refusing a new trial. (*Gurney* v. *Sharp*, 17 Abb. 410.)

On motion for a new trial the court at general term may examine the evidence at large, overrule the conclusions of fact at which the jury arrived, and order a new trial upon the whole case. (*Macy* v. *Wheeler*, 18 Abb. 73.) But the court of appeals on appeal from their decision must affirm the order, unless the conclusions of fact arrived at by the general term are wholly unsupported by the evidence. (*Id.*)

§ **265**, p. **479** *l.* New trial for verdict against evidence. (*Cothran* v. *Collins*, 29 How. 155; *Lewis* v. *Blake*, 10 Bosw. 198; *Fleming* v. *Smith*, 44 Barb. 554; *Overing* v. *Russell*, 28 How. 151; *Sheldon* v. *Stryker*, 27 How. 387.)

§ **265**, p. **479** *m.* New trial for newly-discovered evidence. (*Powell* v. *Jones*, 42 Barb. 24; *Sheldon* v. *Stryker*, 42 Barb. 284; *Parshall* v. *Klinck*, 43 Barb. 203.)

§ **265**, p. **480**. New trial refused, to allow a technical correction. (*Devendorf* v. *Wert*, 42 Barb. 228), where party is not prejudiced. (*Woodruff* v. *McGrath*, 32 N. Y. 255.)

§ **265**, p. **480** *u.* Appeal from order denying a new trial, on judge's minutes, may be taken before or after judgment entered (*Lane* v. *Bailey*, 45 Barb. 119; 1 Abb. N. S. 407, *contra* see *Magnus* v. *Trischet*, 2 Abb. N. S. 175); where there is an appeal from an order denying a new trial and an appeal from the judgment, both appeals should be argued together. (*Lane* v. *Bailey*, *supra.*)

§ **265**, p. **481** *g.* A verdict subject to the opinion of the court is proper only when the facts are undisputed. (*Purchase* v. *N. Y. Exchange B'k*, 10 Bosw. 564.)

Exceptions to be heard at general term in first instance. See *Lake* v. *Artisans' B'k*, 17 Abb. 232; *Ely* v. *McKnight*, 30 How. 97.

§ **267**, p. **484** *c.* The judgment entered upon the decision must not contain any provisions not embraced in the decision. The conclusions of law found by the court must contain all that goes into the judgment. If anything is inserted in the judgment which is not in the decision, the judgment is not merely irregular, but erroneous, and may be reversed on appeal. (*Loeschigk* v. *Addison*, 19 Abb. 169.)

§ **267**, p. **485**. Where the case contains no statement of the facts found on the trial, but only a statement of facts signed by the presiding justice at general term, the appeal to the court of appeals will be dismissed. (*Essex Co. B'k* v. *Russell*, 29 N. Y. 673.)

An appeal alone does not bring up the question whether all the material facts necessary to sustain the legal conclusion are contained in the finding of the judge. If the plaintiff desires a finding of controverted facts stated in the decision of the judge, he should apply to the court to have the facts found in respect to those questions stated in the decision. He may apply to have the findings inserted and stated as the findings of fact, if there be no statement of the facts found, or that the facts which are found shall be stated in the decision. He cannot lie by and avail himself on appeal to the Court of Appeals of the mere omission to make a statement of all the facts which he may regard as necessary. The presumption is that the judge found all the facts necessary to sustain the conclusion. (*Smith* v. *Coe*, 29 N. Y. 666; *Ashley* v. *Marshall*, 29 N. Y. 494.)

Section **267**—*Continued.*

A refusal of the court to pass upon a question of fact not presented by the pleadings is not the subject of an exception reviewable on an appeal from the judgment, if the court is not requested to pass upon it before the trial has been concluded and the decision filed. The omission of the court to specify in its statement of facts found a decision of every material question of fact will not justify a reversal of the judgment where the case on the appeal fails to show affirmatively any erroneous decision of a matter of fact or law. Every intendment will be in favor of the accuracy of the decision upon questions of fact, when there is nothing in the case opposed to the justice of such intendment. (*Heroy* v. *Kerr*, 8 Bosw. 194.)

In a judgment it is sufficient to refer to the decision without reciting its particulars, and recitals of particulars in which the judgment is erroneous may be struck out on appeal from the judgment where the error may be cured by reducing the amount of the recovery. (*Bunten* v. *Orient. Mut. Ins. Co.*, 8 Bosw. 448.)

§ **268**, p. **487** *b*. There cannot be a review unless upon exceptions (*Enos* v. *Eigenbrodt*, 32 N. Y. 444; *Weed* v. *New York and Harlem R. R.*, 29 N. Y. 616) and a statement of facts. (*Bridger* v. *Weeks*, 30 N. Y. 328; *Leland* v. *Cameron*, 31 N. Y. 115; *Doty* v. *Carolus*, 31 N. Y. 547; *Essex B'k* v. *Russell*, 29 N. Y. 673.)

§ **273**, p. **492**. A claim against a decedent's estate for a conversion of personal property by the decedent is referable under the statute. (*Brockett* v. *Bush*, 18 Abb. 337.)

A reference cannot be ordered compulsorily, unless the examination of long account is involved. (*Dickinson* v. *Mitchell*, 19 Abb. 286.) Five items do not constitute a long account. (*Id.*) An action for breach of a covenant to keep premises in repair is referable if the examination of a long account is involved. (*Hatch* v. *Wolfe*, 30 How. 65; 1 Abb. N. S. 77.)

Where the pleadings verified show that the examination of a long account is involved in the case, a reference will be ordered, without any affidavit that a long account is involved. (*Holmes* v. *Bennett*, 28 How. 289.)

There cannot be a compulsory reference of an action on a claim for damage by rioters. (*Ross* v. *Mayor of N. Y.*, 32 How. 164; 2 Abb. N. S. 266; and see *Goodyear* v. *Brooks*, *id.* 296; *Bushnell* v. *Eastman*, *id.* 411.)

§ **273**, p. **493** *f*. The Statute of 1862 authorizing references of disputed claim by receivers of insurance companies is constitutional (27 N. Y. 147); it applies not only to actions pending when the law took effect, but to actions commenced subsequently. (*Sands* v. *Harvey*, 19 Abb. 248; *contra*, *Sands* v. *Birch*, 19 Abb. 255.)

§ **273**, p. **494** *d*. An order for a reference must be made by the court; an order by a judge is not sufficient. (*Scudder* v. *Snow*, 29 How. 96.)

§ **273**, p. **495** *b*. An order of reference on the ground that a long account is involved is not appealable. (*Hatch* v. *Wolfe*, 30 How. 65; 1 Abb. N. S. 77; see, however, *Dickinson* v. *Mitchell*, 19 Abb. 286.) An order granting a reference in a claim by a receiver of an insolvent insurance company is not appealable. (*Sands* v. *Harvey*, 19 Abb. 248.)

§ **273**, p. **498** *i*. A referee may permit an allegation that an assignment was in writing and for a certain sum, to be amended to allege that the assignment was by parol and as security for an uncertain sum. (*Hoyt* v. *Hoyt*, 8 Bosw. 511.) Whether he may permit an amendment by adding a new cause of action or defence. (See *Secor* v. *Law*, 9 Bosw. 165; *Woodruff* v. *Dickie*, 31 How. 164; *Dunnigan* v. *Crummey*, 44 Barb. 528.)

§ **273**, p. **499** *d*. Where a referee's report omits to state any finding of facts, the report and the judgment entered thereon are irregular. (*Wright* v. *Sanders*, 28 How. 394; *Tilman* v. *Keane*, 1 Abb. N. S. 23.)

§ 273, p. 499 *h*. See *Coope* v. *Bowles*, 42 Barb. 88

§ 273, p. 500 *a*. The law providing that referees should make a report within sixty days or forfeit their fees does not apply to references pending when that law took effect. (*Trist* v. *Cabenas*, 18 Abb. 143.)

Where a report is made more than sixty days after the action is submitted and no extension of time has been had the report is invalid. (*Niles* v. *Maynard*, 28 How. 390.) See *Thiesselin* v. *Rossett*, 3 Abb. N. S. 54.

§ 273, p. 501 *a*. A referee is not entitled to process for contempt against a receiver who refuses to pay his fees. (*Perkins* v. *Taylor*, 19 Abb. 147.)

When parties agree *orally* that a referee may charge over $3 a day, they cannot afterward object to his charge in excess of $3. (*Thurman* v. *Fiske*, 30 How. 397.)

§ 273, p. 502 *d*. Where the referee settles the form of the judgment and directs the entry, and it is entered without the direction of a judge, this is an irregularity to be remedied by motion, and not by appeal from the judgment. (*Coope* v. *Bowles*, 18 Abb. 442.)

§ 274, p. 507 *a*. The provision allowing a recovery against one of several joint debtors does not apply to actions pending when the code took effect. (*Fielden* v. *Lahens*, 9 Bosw. 436.)

In actions commenced since the code took effect, the plaintiff may recover against one or some of the defendants. (*McIntosh* v. *Ensign*, 28 N. Y. 169; see *Niles* v. *Battershall*, 27 How. 381; 18 Abb. 161; and *Sager* v. *Nicholls*, 1 Daly, 1.)

§ 274, p. 511 *c*. Where the defendant stays the plaintiff's proceedings until the costs of a former suit are paid, he cannot, pending such stay, move to dismiss for want of prosecution. (*Unger* v. *Forty-second Street R. R. Co.*, 30 How. 443.) The fact that a defendant has had the cause reserved generally does not make it his duty to keep it upon the calendar, and if the plaintiff suffers the case to go off the calendar, the defendant may move to dismiss for want of prosecution. (*Corbett* v. *Claflin*, 17 Abb. 418.) Where a defendant places a cause on the calendar, and, when it is reached, neglects to move to dismiss the complaint, he thereby waives his right to move at a Special Term to dismiss the complaint for neglect to prosecute. (*Miller* v. *Ring*, 18 Abb. 244.)

§ 275, p. 513. Where the complaint alleges a partnership and asks for an accounting, if the plaintiff fails to establish the partnership, he cannot have an accounting. (*Salter* v. *Ham*, 31 N. Y. 321; but see *Emery* v. *Pierce*, 20 N. Y. 62.) In an action for relief from a usurious contract, the complaint is not to be dismissed at the trial because it does not contain an offer to pay what is equitably due, but the plaintiff may have judgment conditioned on his paying what is equitably due. (*Beecher* v. *Ackerman*, 1 Abb. N. S. 141; and see *Beach* v. *Cooke*, 28 N. Y. 508.) If a complaint contains allegations which, under any reasonable view of them, constitute a cause of action, although informal, it should not be dismissed. (*Simmons* v. *Eldridge*, 29 How. 309.)

Law and equity being now administered by the same tribunal, a complaint should not be dismissed which shows the plaintiff entitled to either kind of relief. (*Weatherby* v. *Wood*, 29 How. 404; see *Beach* v. *Cooke*, 28 N. Y. 508.) But *semble* where the action is to obtain legal relief only, the recovery of money, and the plaintiff on the trial fails to establish a right to recover on legal grounds, he cannot have equitable relief. (*Towle* v. *Jones*, 19 Abb. 449; 1 Rob. 87.) Under a complaint framed to set aside an assignment on the ground of fraud, the plaintiff failing to obtain that relief cannot have a judgment settling the construction of the instrument. (*Hotop* v. *Neidig*, 17 Abb. 332.)

Where a complaint was inartificially framed, but contained a prayer for general relief, and the facts showed it was a case for an accounting, an accounting was adjudged upon the prayer for general relief. (*Wood* v. *Brown*, 34 N. Y. 337.)

§ **277**, p. **514**. In an action to recover possession of personal property, or the value thereof, &c., and for damages, plaintiff may recover damages from the depreciation of the goods during the detention, although the complaint contains no allegation of special damage. (*Young* v. *Willet*, 8 Bosw. 486.)

In such an action, the jury, on finding for the plaintiff, should assess the value of the property as well as the damages (*Gallarati* v. *Orser*, 27 N. Y. 326), although the plaintiff has obtained a delivery of the property pending the action. (*Tracy* v. *N. Y. and Harlem R. R.*, 9 Bosw. 396.)

§ **278**, p. **516** *a*. In an action on an official bond, the judgment should not be for the penalty, but only for the amount of damages and costs. (*O'Conner* v. *Suh*, 9 Bosw. 318; *Howard* v. *Farley*, 18 Abb. 260.)

§ **278**, p. **516** *b*. A judgment in an action by an executor as such, dismissing the complaint with costs, without any direction that the plaintiff should pay the costs personally, can be collected only of the assets in plaintiff's hands as executor. (*Dodge* v. *Crandall*, 30 N. Y. 294, and see *B'k of Cooperstown* v. *Corlies*, 1 Abb. N. S. 412.)

§ **281**, p. **517** *f*. The original summons not a necessary part of the judgment roll. (*Hoffnung* v. *Grove*, 18 Abb. 14.) Where there have been two trials the judgment record upon the second trial should not embrace the case made upon the first trial. (*Wilcox* v. *Hawley*, 31 N. Y. 648.)

§ **282**, p. **519** *o*. As to lien of judgment against lands contracted to be sold. (*Smith* v. *Gage*, 41 Barb. 60.)

Where the lien of a judgment is suspended by an order vacating the judgment if such order is reversed, the lien of the judgment revives, as though it had never been suspended. (*King* v. *Harris*, 34 N. Y. 330.)

§ **282**, p. **519** *q*. The court may direct an entry on the docket "secured on appeal" on such terms as it may deem fit. (*Bergen* v. *Stewart*, 28 How. 6.)

§ **282**, p. **520**. The courts will enforce agreements to stay entry of judgment. (*Jay* v. *DeGroot*, 28 How. 107.)

§ **283**, p. **521**. The remedy by execution for enforcing a judgment recovered in the Supreme Court, upon an appeal from a Justice's Court, is the same as on a judgment in an action in the Supreme Court. (*Keeler* v. *Clark*, 18 Abb. 155.)

§ **283**, p. **522** *a*. The law of 1865, ch. 646, s. 1, restraining an execution on judgments against the city of New York until moneys necessary for the payment of such judgment have been raised by taxation, does not apply to judgments on contracts made before the act took effect. (*Hadfield* v. *Mayor, &c., of N. Y.*, 2 Abb. N. S. 95.)

§ **283**, p. **522** *b*. A surrogate has the same power to direct an execution on a judgment recovered against an administrator for liabilities incurred by him in the administration of the estate, as he has to order such process to issue on a judgment for a debt owing by the deceased, and it is his duty so to order, on the request of the creditor. (*Re Thompson's Estate*, 41 Barb. 237.) An order by a surrogate, granting leave to issue execution against an executor, cannot be reviewed on appeal unless the appellant gives security for the payment of the full amount directed to be levied and with interest and the costs of appeal. (*Mitchell* v. *Mount*, 19 Abb. 1; *rev'g S. C.*, 17 Abb. 265.) But it seems such an order cannot be reviewed in respect to the sufficiency of the assets. (*Id.*) See *St. John* v. *Voorhies*, 19 Abb. 53.

§ **283**, p. **523** *a*, *b*. On the death of the plaintiff, after final judgment in his favor, his personal representatives may bring an action on the judgment to obtain the same relief as was formerly obtained by *scire facias*. (*Ireland* v. *Lichfield*, 8 Bosw. 634.) An action does not lie in the Supreme Court to obtain leave to issue execution on a judgment of a County Court. (*Niles* v. *Perry*, 29 How. 192.)

§ 283, p. 523 *c*. Execution after discharge under insolvent debtors' act. (*Elsworth* v. *Caldwell*, 18 Abb. 20.)

§ 288, p. 528. When execution may issue against the person. (*Niver* v. *Niver*, 19 Abb. 14; 29 How. 6; *The People* v. *Carpenter*, 46 Barb. 619.) On judgment for female servants' wages not exceeding $15 (Laws 1867, ch. 516.) A defendant who recovers a judgment for costs, in an action to recover the possession of specific personal property, in which no order for his arrest has been made, cannot issue execution against the person of the plaintiff upon such judgment. (*Purchase* v. *Bellows*, 19 Abb. 306.) A defendant may be arrested on a judgment against him in an action for damages for negligently injuring property in his, defendant's, possession. (*Keeler* v. *Clark*, 18 Abb. 154.) The release of a defendant from arrest by consent of plaintiff's attorney, does not, *per se*, operate as a discharge of the order of arrest. And on a judgment against him in the action the defendant may be arrested on final process. (*Meech* v. *Loomis*, 28 How. 209.) It seems that if the order of arrest is vacated, the defendant cannot be arrested on final process. (*Id.*) Execution against the person of a defendant may issue in every case where he has been arrested in the action and the order has not been vacated (*Smith* v. *Knapp*, 30 N. Y. 581); but where the order of arrest was obtained on one only of several causes of action, and judgment was not recovered on that cause of action, but on a cause of action for which the defendant was not liable to arrest, if he be taken on an execution against his person, he may move to be discharged, and if he does not, his imprisonment is regular as between the plaintiff and the sheriff. (*Id.*)

§ 288, p. 529 *a*. A married woman plaintiff who has a judgment against her for costs is not subject to an execution against her person for such costs. (*Hovey* v. *Starr*, 42 Barb. 435.)

§ 288, p. 541 *a*. A delay of more than three months in issuing an execution against the person, when the defendant at the time of rendering the judgment is in custody in the cause, entitles him to a supersedeas. (*Smith* v. *Knapp*, 30 N. Y. 581; see *Haviland* v. *Kane*, 1 Abb. N. S. 409.)

§ 288, p. 531 *d*. Action for escape. See *Smith* v. *Knapp*, 30 N. Y. 581; *Carpenter* v. *Willett*, 31 N. Y. 90; *Metcalf* v. *Stryker*, 31 N. Y. 255; *French* v. *Willett*, 10 Bosw. 566.

§ 289, p. 531 *f*. A surrogate may, in his discretion, order an execution to issue, and no appeal lies from his decision. (*Mount v. Mitchell*, 31 N. Y. 356.)

§ 291, p. 536 *b*. Suit on official bond of sheriff. *Chamberlain's Case*, 18 Abb. 103; 42 Barb. 281; 28 How. 1.

§ 291, p. 536 *c*. Goods are bound from the time of the delivery of the execution to the sheriff to be executed; and the lien of the execution attaches to all goods acquired by the execution debtor within the jurisdiction during the life of the execution. (*Roth* v. *Wells*, 29 N. Y. 472, affirming S. C. 41 Barb. 194.)

§ 291, p. 536 *f*. The interest of a special partner is not the subject of levy and sale upon execution. (*Harris* v. *Murray*, 28 N. Y. 574.)

§ 291, p. 537 *f*. The party in whose favor process issues may give such directions to the sheriff as will not only excuse him from his general duty, but bind him to the performance of what is required of him. (*Root* v. *Wagner*, 30 N. Y. 9.)

§ 291, p. 538 *c*. Levy, how made, on personal property. (*Roth* v. *Wells*, 29 N. Y. 472; *Bond* v. *Willett*, 29 How. 47; 31 N. Y. 102.)

§ 291, p. 547 *h*. The statute mode of redemption must be strictly followed. (*Gilchrist* v. *Comfort*, 34 N. Y. 235.) See, as to deeds on sale of real estate on execution, Laws 1867, ch. 116.

§ 291, p. 548 *b*. The Exemption Law of 1842, as amended by Laws 1866, p. 1686, exempts household furniture, working tools, and team, professional instruments, furniture, and library owned by any householder, or one having a family for which he provides, not exceeding the value of $250; and, in addition, the necessary food for said team for not exceeding ninety days, and a sewing machine; but the exemption is not to extend to an execution on a demand for purchase-money of exempt property. No exemption under execution for judgment for female servants' wages, when the amount exclusive of costs is less than $15. (Laws 1867, ch. 516.)

§ 291, p. 550 *c*. A team may be composed of one or more animals, and whatever number may compose it, if within the limit as to value fixed by statute, it will be exempt. (*Wilcox* v. *Hawley*, 31 N. Y. 648.)

§ 291, p. 553 *d*. Setting off judgments. (*Pignolet* v. *Geer*, 19 Abb. 264; *Mackey* v. *Mackey*, 43 Barb. 58.)

§ 292, p. 557 *b*. A county judge has jurisdiction of supplementary proceedings. (*The People* v. *Mead*, 29 How. 360.)

If the affidavit shows that the execution was issued to the sheriff of a county in which the defendant then resided and had a place of business, it need not state where the debtor resides or has a place of business at the time of applying for the order. (*Jesup* v. *Jones*, 32 How. 191.)

§ 292, p. 561 *b*. A notice to a judgment debtor to appear before a referee which omits to state the place at which he is to attend, is fatally defective. (*Kelty* v. *Yerby*, 31 How. 95.)

§ 292, p. 561 *l*. An order regular on its face must be obeyed, and objections to such an order must be taken on motion to set aside the order; they cannot be urged on a motion to commit for disobeying the order. (*Hilton* v. *Patterson*, 18 Abb. 245.)

§ 292, p. 562 *b*. The issuing and serving an order for examination in a proceeding supplementary to the execution creates no lien as against other creditors who in the meantime discover property subject to execution and levy upon the same. (*Becker* v. *Torrance*, 31 N. Y. 631.)

§ 294, p. 567 *b*. The affidavit to procure the examination of a third person need not state that the property of a judgment debtor in his hands exceeds ten dollars; the limitation of ten dollars applies only where the affidavit states that such person is indebted to the judgment debtor. (*Brett* v. *Browne*, 1 Abb. N. S. 155.)

§ 297, p. 569 *e*. An order for payment of money in the hand of a third person does not affect the right of an assignee in good faith, not a party to the supplementary proceeding. (*Roy* v. *Baucus*, 43 Barb. 310.)

§ 297, p. 570 *f*. Future earnings cannot be reached. (*Woodman* v. *Goodenough*, 18 Abb. 265.)

Property in the hands of a third party can be summarily reached only by proceedings under section 294. (*Woodman* v. *Goodenough*, 18 Abb. 265.)

§ 298, p. 572 *a*. A creditor is entitled to have a receiver appointed, although the only property discovered on the examination is such as might be sold on execution, and is sufficient in value to satisfy such execution. (*Heroy* v. *Gibson*, 10 Bosw. 591.) An order refusing to appoint a receiver in such a case is appealable. (*Id.*) By the appointment of a receiver pending the examination of the execution debtor, the judge does not lose jurisdiction. (*The People* v. *Mead*, 29 How. 360.) The title of the receiver relates back to the date of the order appointing him. (*Becker* v. *Torrance*, 31 N. Y. 631; *Rogers* v. *Corning*, 44 Barb. 229; and

Section **298**—*Continued.*
see *Field* v. *Sands*, 8 Bosw. 685), and no further. (*Fillmore* v. *Horton*, 31 How. 424.) Requisites of a complaint by a receiver in supplementary proceedings. (*Coope* v. *Bowles*, 42 Barb. 88; *Wegman* v. *Childs*, 44 Barb. 403.)

§ **302**, p. **578**. An attachment to bring a party before the court to answer for alleged disobedience of an order of the court or a judge cannot be granted without proof by affidavit both of the service of such order and of the failure to appear. (*Ward* v. *Arenson*, 10 Bosw. 589.) An affidavit by the attorney that the order was personally served by the sheriff is not sufficient. Nor is it sufficient to state in the affidavit that some of several orders have been duly served. (*De Witt* v. *Dennis*, 30 How. 131.) The attachment should be made returnable before the judge by whom it was issued, and not before one of the judges of the court at chambers. (*Kelly* v. *McCormick*, 28 N. Y. 318.) A copy of the affidavits on which the attachment issued should be served a reasonable time before the return of the attachment, to enable the party to prepare his defence. (*Ward* v. *Arenson*, 10 Bosw. 589.) If on the return of the attachment or order to show cause why an attachment should not issue, the party submits himself to examination, the court will ordinarily proceed no further for the contempt. (*Hilton* v. *Patterson*, 18 Abb. 245.) If on being brought into court, the party does not admit the contempt, interrogatories must be filed, copies furnished to the party, and time given him to answer them. Refusing to answer the interrogatories is a contempt. (*De Witt* v. *Dennis*, 30 How. 131.)

The order of commitment should designate the particular misconduct of which the defendant is convicted. (*Id.*)

As to committing a witness for refusing to answer. See *The People* v. *Marston*, 18 Abb. 257.

§ **303**, p. **581** *d*. Upon an appeal from the surrogate to the Supreme Court, the successful party is entitled only to the costs of a trial of an issue of law. (*Morgan* v. *Morgan*, 1 Abb. N. S. 40.)

§ **303**, p. **582** *f*. Attorney's lien. (*McGregor* v. *Comstock*, 28 N. Y. 237; *Ely* v. *Cooke*, 28 N. Y. 365; *Cock* v. *Palmer*, 19 Abb. 372; *Adams* v. *Fox*, 27 How. 409.)

§ **303**, p. **585** *a*. Double costs. (*Carpentier* v. *Willett*, 28 How. 376; *Jackson* v. *Lynch*, 32 How. 93; *Stewart* v. *Schultz*, 33 How. 4; *Cooper* v. *Schultz*, id. 5.)

§ **303**, p. **587** *e*. A plaintiff in an action in the Superior Court of New York City, not residing in said city, though residing in the State, may be required to give security for costs. (*Bolton* v. *Taylor*, 18 Abb. 385.)

§ **303**, p. **587** *k*. An infant suing by guardian does not necessarily entitle the defendant to security for costs. (*Grantman* v. *Theall*, 19 Abb. 308; 29 How. 344.)

§ **303**, p. **589** *i*. The bond for costs should be conditioned to pay on demand made upon the obligors and not upon the plaintiff. (*Montague* v. *Bassett*, 18 Abb. 13.)

§ **303**, p. **590** *c*. If the plaintiff neglects for an unreasonable time to file security for costs, after an order upon him to do so, the defendant may move to dismiss the complaint. (*Hinds* v. *Douglass*, 19 Abb. 11, S. C.; 29 How. 379.)

§ **304**, p. **593** *f*. Where an action has been removed from a justice's court on the ground of title coming in question, if the plaintiff recovers he is entitled to costs. (*Hall* v. *Hodskins*, 30 How. 15.)

§ **306**, p. **598** *e*. Several defendants not united in interest, who make separate defences and recover separate judgments on counterclaims, and who succeed on appeals from those judgments, are each entitled to a separate bill of costs. (*N.*

Section **306**—*Continued.*
Y. & New Haven R. R. v. *Schuyler*, 29 How. 89.) In an action to enforce a mechanic's lien against several defendants, who appeared by the same attorney, the defendants were not allowed separate bills of costs. (*Bailey* v. *Johnson*, 1 Daly, 62.) See *Stewart* v. *Schultz*, 33 How. 3.

§ **307**, p. **602** *e*. Where a jury are discharged without rendering a verdict and the cause is set down for a re-trial, the second trial is not within the provision allowing costs of subsequent proceedings before a new trial, where a new trial has been granted. (*Hamilton* v. *Butler*, 19 Abb. 446; 30 How. 36.)

§ **307**, p. **602** *f*. A trial fee is taxable, whether the trial results in a verdict or not. (*Hamilton* v. *Butler*, 19 Abb. 446; 30 How. 36.)

§ **307**, p. **603** *g*. The costs on an appeal from an inferior court to the supreme court are those specified in sect. 307, subd. 5, and follow as of course, to the party succeeding on the appeal. (*Williams* v. *Murray*, 32 How. 187; 2 Abb. N. S. 292.)

Term fees are taxable in the city court of Brooklyn, but not exceeding five in number. (*Bird* v. *City of Brooklyn*, 2 Abb. N. S. 132.)

§ **307**, p. **603** *h*. On an order denying a motion on a case for a new trial, "*with costs*," only $10 costs are taxable. (*Lawrence* v. *Smith*, 18 Abb. 196; contra, see *Scudder* v. *Gori*, 18 Abb. 207; 28 How. 155.) See *Pennell* v. *Wilson*, 2 Abb. N. S. 466.

§ **307**, p. **603** *k*. Ten per cent. allowed as penalty on an appeal in a foreclosure suit. (*Warner* v. *Lessler*, 33 N. Y. 296.)

§ **307**, p. **603**. *Note to subd.* 7. No more than five term fees can be allowed in any action (*Hamilton* v. *Butler*, 30 How. 36; 19 Abb. 446), and no term fee can be allowed for the term in which the cause is tried (*Place* v. *Butternut's Woolen Factory*, 28 How. 184), nor for terms during which the cause was reserved generally, not by order of the court, but by consent. (*Crawford* v. *Kelly*, 10 Bosw. 697.)

§ **307**, p. **606** *b*. Number of term fees not limited in Court of Appeals. (*Hakes* v. *Peck*, 30 How. 104; *contra*, *Richmond* v. *Sherman*, 28 How. 491; *Fullerton* v. *Viall*, 28 How. 224.) Where, pending an appeal in the Court of Appeals, the respondent died in February, and the cause was revived in March following, the term fees for the March and June terms were allowed. (*Carpentier* v. *Willett*, 28 How. 376.)

§ **309**, p. **610** *a*. A trial has been had if on the cause being reached on the calendar it is called and the complaint dismissed for non-appearance of the plaintiff. (*Mora* v. *Gt. West. Ins. Co.*, 10 Bosw. 622.)

§ **309**, p. **610** *g*. The amount of the recovery or claim is not the measure but the limit of the allowance. (*The People* v. *N. Y. Cent. R. R.*, 30 How. 148.)

§ **309**, p. **611** *a*. The application for an allowance must be made before judgment. (*Clark* v. *City of Rochester*, 29 How. 97; *The People* v. *N. Y. Cent. R. R.*, 30 How. 148; *contra*, *Beals* v. *Benjamin*, 29 How. 101.) And upon motion papers. (*Gori* v. *Smith*, 13 Abb. N. S. 51.)

§ **309**, p. **612** *g*. Order for allowance is appealable to General Term (*Clark* v. *City of Rochester*, 29 How. 97) and to the Court of Appeals. (*The People* v. *N. Y. Cent. R. R.*, 29 N. Y. 418; and see 30 How. 148.)

§ **311**, p. **613** *d*. Costs are to be taxed pursuant to the fee bill in force at the time of the verdict or dismissal of the complaint (*Scudder* v. *Gori*, 28 How. 155; 18 How. 207), and in the Court of Appeals according to the law in force at the

Section **311**—*Continued.*

time of the decision in that court, or when the judgment of the Court of Appeals is made the judgment of the Supreme Court. (*Ackley* v. *Tarbox*, 19 Abb. 119.) As to taxing costs in actions for damages by mobs, see *McClure* v. *Supervisors of Niagara*, 33 How. 202.

§ **311**, p. **614** *f.* Omitting notice of taxation does not make judgment irregular. (*Hoffnung* v. *Grove*, 18 Abb. 14; *Champion* v. *Congregational Soc.*, 42 Barb. 441; and see *Cotes* v. *Smith*, 29 How. 326; *Petrie* v. *Fitzgerald*, 2 Abb. N. S. 354.)

§ **311**, p. **615** *f.* The only disbursements are those mentioned in section 311 of the Code. The expense of exemplified copies of foreign documents are not taxable, especially where it is not shown that they were necessary. (*Hanel* v. *Buare*, 9 Bosw. 682.) Nor is the cost of copies of stenographer's notes taxable. (*Hamilton* v. *Butler*, 19 Abb. 446; 30 How. 36; contra, see *Sebley* v. *Nichols*, 32 How. 182.)

§ **311**, p. **617** *f.* A party to the action, examined as a witness, is not entitled to insert in his bill of costs the fee for his attendance as a witness. (*Steere* v. *Miller*, 30 How. 7; affirming, S. C., 28 How. 266; and overruling, *Van Dusen* v. *Bissell*, 29 How. 481.)

§ **311**, p. **617** *i.* Motions to readjust costs must be made promptly. An objection to the whole bill of costs as illegal is not available on a motion to review the taxation. (*The People* v. *Lewis*, 28 How. 159; see *Webb* v. *Crosby*, 11 Paige, 193.)

§ **316**, p. **622**. The word *may* in this section is to be read *must* or *shall*, and if the action by the guardian fails, he is liable to be attached for the non-payment of the costs. His poverty will be no excuse. (*Grantman* v. *Thrall*, 31 How. 464.)

§ **317**, p. **622**. There is no authority in the courts of this State for allowing what are termed "trustee costs." (*Rose* v. *Rose Bene. Soc.*, 28 N. Y. 184.)

The provisions of the Revised Statutes forbidding the recovery of costs against executors or administrators except in certain cases, and referred to in section 317 of the Code, apply only to the general costs in the action and have no reference to interlocutory costs or the costs of an appeal. (*Hunt* v. *Connor*, 17 Abb. 466.)

§ **317**, p. **623** *f.* The provisions of the Revised Statutes directing that costs shall not be awarded in actions brought against executors or administrators in their representative capacity, except for unreasonable resistance, neglect or refusal to refer the claim, do not affect actions brought against the deceased in his life time and revived by his executors or administrators. (*Merritt* v. *Thompson*, 27 N. Y. 225; *Mitchell* v. *Mount*, 17 Abb. 213.) Nor do such provisions exempt the estate from costs. (*Murray* v. *Smith*, 9 Bosw. 689.) Revised Statutes as to accounts of executors, &c., amended, Laws 1859, ch. 261.

§ **317**, p. **625** *a.* Both legal and equitable claims against the estate of a deceased person may be referred under the statute (*White* v. *Story*, 28 How. 173); but only those claims are referable which accrued against the testator during his life, or which would have accrued against him if he had continued in life. (*Godding* v. *Porter*, 17 Abb. 374.) A claim against a decedent's estate for a tort of the decedent, the conversion of personal property, is referable under the statute. (*Brocket* v. *Bush*, 18 Abb. 337.) A consent to refer "claims" against a decedent's estate gives jurisdiction to decree payment of costs, even though the claim be not properly referable under the statute. (*Id.*)

Where, on a motion for costs against executors for refusing to refer, it is found as a question of fact that they did so refuse, the general term will not review that finding. An extra allowance to executors is governed by the same rules as the allowance of costs to them. (*Niblo* v. *Binsse*, 31 How. 476; 47 Barb. 435.) Where

Section **317**—*Continued.*

an order for costs and allowance to executors is made after judgment, the order should be entered as of the day of entering the judgment. (*Id.*)

§ **317**, p. **626** *h.* A receiver without funds to pay costs, who brings an action in which he fails, held guilty of bad faith. (*Cumming* v. *Egerton*, 9 Bosw. 684.)

Where a receiver in supplementary proceedings, by direction or leave of the court, brings a suit to set aside conveyances made by the judgment debtor and fails, the judgment creditor on whose application the receiver was appointed is not liable for the costs. (*Cutter* v. *Reilly*, 31 How. 472.)

§ **317**, p. **627** *j.* An *ex parte* order giving a receiver leave to sue is not a bar to a motion to require such receiver to file security for costs. (*Bolles* v. *Duff*, 17 Abb. 448.)

An order requiring a plaintiff, acting in a representative capacity, to give security for costs, is not appealable, but, like every other order, may be attacked for irregularity. (*Id.*)

§ **321**, p. **629.** An assignment of an interest in a demand as collateral to a debt, the assignor continuing the prosecution of the suit and remaining liable for the debt until paid, does not render such assignee liable for costs. (*Wolcott* v. *Holcomb*, 31 N. Y. 125.)

On a motion to charge an assignee not a party to the suit with costs, the moving party holds the affirmative, and is bound to make out a satisfactory case. (*Id.*)

§ **322**, p. **630** *h.* A creditor's suit, by plaintiffs, on behalf of themselves and others, may be discontinued by plaintiffs, of course, on payment of costs. (*Mattison* v. *Demarest*, 19 Abb. 356.)

§ **322**, p. **631** *e.* Plaintiff not allowed to discontinue without costs, because the defence is the statute of limitations. (*Houseman* v. *Rosenfield*, 18 Abb. 379; and see *Pennell* v. *Wilson*, 2 Abb. N. S. 466.)

§ **323**, p. **637** *f.* Accepting costs under an order waives the right to appeal from it (*Lupton* v. *Jewett*, 19 Abb. 320), but a plaintiff does not waive his right to appeal from a judgment by accepting the amount thereof. (*Benkard* v. *Babcock*, 27 How. 391; 17 Abb. 421; see, however, *Kelly* v. *Bloom*, 17 Abb. 229.) The prosecution to judgment and execution of a limit bond and collecting a portion of the judgment, does not prevent an appeal from the judgment rendered against the sheriff for the escape from the limits for which such bond was given. (*Lawrence* v. *Campbell*, 32 N. Y. 455.)

§ **324**, p. **638** *a.* This section applies to injunction orders. The provision made by section 225 is in addition to the powers conferred by this section, and not a substitute for them. (*Peck* v. *Yorks*, 41 Barb. 547.)

§ **324**, p. **639** *a.* Add *Culver* v. *Hollister*, 17 Abb. 405.

§ **324**, p. **639** *d.* A purchaser at a foreclosure sale was allowed to appeal from an order setting aside the sale. (*Mortimer* v. *Nash*, 17 Abb. 229 *n.*)

§ **325**, p. **639.** All the defendants may join in an appeal from a judgment against them on their joint answer, as frivolous. (*B'k of Cooperstown* v. *Corlies*, 1 Abb. N. S. 413.)

§ **327**, p. **640** *c.* In an action by executors for the construction of a will, and judgment in favor of some of the defendants, on an appeal by the defendants as to whom the decision was adverse, notice of appeal must be served on the defendants who succeeded. (*Cotes* v. *Carroll*, 28 How. 436.)

§ **327**, p. **641** *a*. Amendment can be allowed only where notice of appeal has been duly served. (*Cotes* v. *Carroll*, 23 How. 436.) As to amendments, see 27 How. 378.

§ **330**, p. **643** *a*. A general term may on appeal "modify the judgment according to the justice of the case, without regard to technical errors," and the Court of Appeals has the same power. (*Brownell* v. *Winnie*, 29 N. Y. 400, and see *The People* v. *Super. of Richmond*, 28 N. Y. 112; *Beach* v. *Cooke*, 28 N. Y. 509.)

§ **330**, p. **643** *e*. Where restitution is directed by the Court of Appeals, it is irregular to enter judgment of restitution *ex parte*. (*Young* v. *Brush*, 18 Abb. 171.)

In general, restitution will not be directed unless the remittitur contain such direction. (*Id.*)

A judgment of the Court of Appeals ordering a new trial, is not a final judgment in the cause. (*Id.*)

§ **332**, p. **645** *h*. *Semble*, a motion to dismiss an appeal, as not brought in time, may be waived by laches in moving. (*Stevenson* v. *McNitt*, 27 How. 335.)

§ **332**, p. **645** *i*. Time to appeal cannot be extended. (*Cotes* v. *Carroll*, 28 How. 436.) An order refusing leave to appeal, after the time to appeal has expired, is not appealable to the Court of Appeals. (*Salles* v. *Butler*, 27 N. Y. 638.)

§ **332**, p. **646** *b*. Notice to limit the time to appeal cannot be given till judgment complete. (*Sherman* v. *Postley*, 45 Barb. 348; *Champion* v. *Plymouth Congregational Soc.*, 42 Barb. 441.)

§ **333**, p. **649**. Where the only exceptions taken at special term were to the refusal of the court to nonsuit the plaintiff, on appeal, the only question before the court is, whether there was sufficient evidence to send the case to the jury. (*Magee* v. *Osborn*, 32 N. Y. 669.)

An appeal from a judgment entered after a second trial, brings up for review only the judgment appealed from. If the record transmitted to the Court of Appeals contains, in addition to the case and exceptions made upon the second trial, the case made upon the first trial, on a motion to set aside a nonsuit, the latter proceedings may be and should be stricken out on motion. (*Wilcox* v. *Hawley*, 31 N. Y. 648.) The court only reviews the questions *of law* presented by the exceptions stated in the case. (*Id.*)

Where there are no exceptions contained in the case as settled, nor any allusion to any as having been taken at any time, there is nothing for the Court of Appeals to review. Where the only exceptions taken relate exclusively to the finding of the referee upon matters of fact, no exception being taken to the decision upon the law, they present no question which the Court of Appeals can review. (*Weed* v. *N. Y. & Harlem Railroad*, 29 N. Y. 616; and see *Enos* v. *Eigenbrodt*, 32 N. Y. 444.)

The Court of Appeals has no power to review a judgment where the judge, on a trial without a jury, after hearing the evidence on both sides, orders judgment for the defendant on the ground that the plaintiff has misconceived his remedy, and is not entitled to the relief claimed, even if his allegations were all true; but there is no finding of facts by the judge. (*Bridger* v. *Weeks*, 30 N. Y. 328.)

An objection that the verdict was against evidence not presented at the circuit or general term, cannot be raised in the Court of Appeals (*Buck* v. *Remsen*, 34 N. Y. 383), nor can an objection that the judgment is erroneous in form. (*Id.*)

The refusal of a new trial on the ground of surprise, is not subject to review in the Court of Appeals. (*Bedell* v. *Chase*, 34 N. Y. 386.)

Appeal from order granting new trial. (*Adams* v. *Bush*, 2 Abb. N. S. 104.) Where the judgment of the referee is reversed at general term, on a question of

Section **333**—*Continued.*

fact, the whole case is presented to the Court of Appeals for review, as well upon the facts as the law. (*Peterson* v. *Rawson*, 34 N. Y. 370.)

Where a case is sent back by the Court of Appeals for a new trial, the practice requires a new judgment by the court below, and a new formal appeal to the general term, before an appeal can be taken to the Court of Appeals. (*New Haven R. R. Co.* v. *Schuyler*, 34 N. Y. 30.)

Appeals in matters concerning the rights of the Northern Railroad, see Laws 1864, p. 319, § 7; Laws 1865, ch. 511.

§ **333**, p. **650** *g*. Having no power to review any questions of fact determined in the subordinate courts, when a new trial is granted, the Court of Appeals is obliged to affirm the order, if it can stand consistently with any view to be taken of the evidence given at the trial, where the trial has been by jury. (*Macy* v. *Wheeler*, 30 N. Y., 231; and see *Reed* v. *Board of Education*, 33 How. 237.)

§ **333**, p. **651** *g*. No appeal lies to the Court of Appeals in the following cases:

Orders granting new trials, on the ground that the verdict is against evidence or against the weight of evidence. (*Young* v. *Davis*, 30 N. Y. 134; *Clark* v. *Brooks*, 2 Abb. N. S. 385; *Adams* v. *Bush*, *id.* 104.)

To review a referee's finding of fact. (*Thompson* v. *Kessel*, 30 N. Y. 383; and see *Macy* v. *Wheeler*, 30 N. Y. 231.)

From an order refusing permission to appeal from a judgment, after the time for appealing had expired. (*Salles v. Butler*, 27 N. Y. 638.)

From an order for judgment on demurrer, unless plaintiff should amend. (*Adams* v. *Fox*, 27 N. Y. 640.)

From an order setting aside a sale of mortgaged premises, and for other purposes, see *Dows* v. *Congdon*, 28 N. Y. 122.

From an order at General Term upon questions of the adjustment of costs. (*The People* v. *Lewis*, 28 How. 470.)

From an order of General Term, affirming an order at Special Term, awarding an extra allowance of costs, it not appearing that any judgment had been entered. (*McGregor* v. *McGregor*, 32 N. Y. 479.)

From an order of General Term, striking a cause from the calendar on motion of adverse defendants, against whom no appeal from the judgment at Special Term had been taken. (*Cotes* v. *Smith*, 31 How. 146.)

From an order granting or refusing an extra allowance of costs, it is only reviewable, if at all, as an intermediate order, on an appeal from the judgment. It is not a "final order affecting a substantial right." (*Clark* v. *City of Rochester*, 34 N. Y. 355.)

From an order made on the petition of a receiver of an insurance company, for leave to commence an action. (*Re Reeves*, 34 N. Y. 359.)

§ **333**, p. **656** *f*. See *Benkard* v. *Babcock*, 17 Abb. 421; 27 How. 391.

§ **333**, p. **658** *a*. After a notice of appeal is served and an undertaking perfected, the Court of Appeals is so far possessed of the case as to be competent to make any necessary order, *e. g.*, to dismiss the appeal, although no return has been filed. (*Adams* v. *Fox*, 27 N. Y. 640.)

The jurisdiction of the Court of Appeals extends only to the examination of the legal conclusions of the judge or referee before whom a cause is tried, from the facts found by him. The court has no power to look into the evidence to review questions of fact. (*Bergin v. Wemple*, 30 N. Y. 319; *Marco* v. *Liverpool Ins. Co.*, 35 N. Y. 664.)

The Court of Appeals will not, on an appeal against the plaintiffs in an action, review the judgment below, so far as it affects adverse defendants against whom no appeal was taken from the special to the general term. (*Cotes* v. *Smith*, 31 How. 146.)

§ **334**, p. **661** *f*. Form of undertaking. (*Doolittle* v. *Diming*, 31 N. Y. 350; *Roberts* v. *O'Donnel*, 31 N. Y. 446.)

§ **335**, p. **663** *j*. Action on undertaking. (*Levi* v. *Dorn*, 28 How. 217; *Dyckman* v. *Valiente*, 19 Abb. 130.)

§ **339**, p. **666** *h*. Where proceedings are stayed on appeal, the stay continues until judgment on the appeal is perfected. And where proceedings have been stayed on appeal, the issue of execution on the judgment below before the entry of the judgment on the appeal, is irregular. (*Bowman* v. *Tallman*, 19 Abb. 84; 28 How. 482.)

§ **344**, p. **670**. An appeal to the Supreme Court from a judgment of the county court does not authorize the Supreme Court to reverse the judgment and grant a new trial upon exceptions taken upon the trial in the county court. A new trial must be moved for in the county court before an appeal can be taken on a case or bill of exceptions in that court to the Supreme Court. (*Carter* v. *Werner*, 27 How. 385; *contra*, see *Monroe* v. *Monroe*, *id.* 208; *Dixon* v. *Buck*, 42 Barb. 70; and see *Whitney* v. *Wells*, 28 How. 150; *Boughton* v. *Mitchell*, 19 Abb. 163; 29 How. 68; *Simmons* v. *Sherman*, 30 How. 4.)

An order of a county court dismissing an appeal taken from a judgment of a justice of the peace in summary proceedings to recover the possession of lands is appealable to the Supreme Court. (*Hammond* v. *Carpenter*, 29 How. 43.)

§ **344**, p. **670** *g*. An order of the city court of Brooklyn denying a motion for a new trial is reviewable on appeal to the Supreme Court. (*Suydam* v. *Grand Street R. R.*, 17 Abb. 304.)

§ **348**, p. **674**. When an appeal is taken from a judgment and there has been an appeal also from an order denying a motion for a new trial on the judge's minutes, the better course is to hear both appeals on the argument of the appeal from the judgment. (*Lane* v. *Bailey*, 45 Barb. 119; 30 How. 76; 1 Abb. N. S. 407.)

§ **348**, p. **674** *d*. On appeal to general term no security is necessary, unless a stay of proceedings is required. (*Davis* v. *Duffie*, 8 Bosw. 601; *Niles* v. *Battershall*, 18 Abb. 161; *Kitchen* v. *Diehl*, 40 Barb. 161.)

A defendant having served notice of appeal, the mere service of a notice of argument by plaintiff does not preclude him from inforcing the judgment, no stay having been ordered. (*Arnoux* v. *Homans*, 32 How. 382.)

§ **348**, p. **676** *e*. The Supreme Court may, on an appeal, examine the evidence at large and upon the whole case, including the law and the facts, set aside the verdict, and grant a new trial. (*Macy* v. *Wheeler*, 30 N. Y. 231.) A reversal on a question of fact must be consistent with the rules of law. (*Ball* v. *Loomis*, 29 N. Y. 412.)

§ **348**, p. **678**. Action on undertaking on appeal. See *Poppenhusen* v. *Seely*, 41 Barb. 450; *Ford* v. *Townsend*, 1 Abb. N. S. 150.

§ **348**, p. **678** *g*. Reargument. *Newell* v. *Wheeler*, 2 Abb. N. S. 134.

§ **349**, p. **679** *a*. Appeal in summary proceedings from order on motion to vacate assessment for fraud. (*Pinckney's Case*, 18 Abb. 356; *Re Thayer*, 30 How. 276; *Re Dodd*, 27 N. Y. 629,) in cases of prohibition. (*The People* v. *N. Y. Com. Pleas*, 43 Barb. 280.) Removal of trustee, (*Re Livingston*, 2 Abb. N. S. 1.)

§ **349**, p. **680** *e*. No appeal from an order appointing an appraiser to ascertain value of property attached (*Lupton* v. *Jewett*, 19 Abb. 320), or appointing a receiver (*Siney* v. *N. Y. Consol. Stage Co.*, 28 How. 481), or to *show cause* (*Watt* v. *Watt*, 30 How. 345), or a decision at the trial on an application to amend (*Bailey* v. *Johnson*, 1 Daly, 62), or for a reference (*Dickinson* v. *Mitchell*, 19 Abb. 286), or

Section **349**—*Continued.*

requiring plaintiff to give security for costs (*Bolles* v. *Duff*, 17 Abb. 448), or, denying a motion for an attachment for contempt. (*Ackroyd* v. *Ackroyd*, 2 Abb. N. S. 380.)

§ **349**, p. **682** *h*. Appeal lies from an order allowing amendments by adding a cause of action or defence. (*Sheldon* v. *Adams*, 27 How. 179; 18 Abb. 405.) And from an order denying a motion to make a pleading definite. (*Arrieta* v. *Morrissey*, 1 Abb. N. S. 439.)

§ **349**, p. **683** *f*. Add, *Re Seventh Av.*, 29 How. 180.

§ **349**, p. **684** *d*. Orders denying motions to set aside a verdict and for a new trial on the ground of surprise, &c., are not intermediate orders involving *the merits*. (*Seldon* v. *Delaware Canal Co.*, 29 N. Y. 634.)

§ **349**, p. **685** *a*. An order for an extra allowance affects a substantial right. (*The People* v. *N. Y. Central R. R.*, 29 N. Y. 418.) So does an order for a discovery, or in default that the complaint be dismissed. (*Broderick* v. *Shelton*, 18 Abb. 213.)

§ **349**, p. **685** *b*. Appeal from order denying a new trial may be taken after judgment entered. (*Lane* v. *Bailey*, 30 How. 76; 45 Barb. 119; 1 Abb. N. S. 407.)

§ **352**, p. **690** *a*. The provision for re-trial of cases tried in justices' courts does not apply to the city of New York. (*McIlhenny* v. *Wasson*, 1 Daly, 285.)
It is the amount claimed in the pleadings and not the amount of the recovery which gives the right to a re-trial. (*Ovenshire* v. *Adee*, 27 How. 368.)

§ **353**, p. **690**. Judgment entered 14th November, notice of appeal served 5th December, held too late. (*Young* v. *Whitcomb*, 46 Barb. 615.)

§ **354**, p. **692** *i*. An order of the general term of the Marine Court dismissing an appeal thereto for want of prosecution is not appealable to the Common Pleas. (*Harper* v. *Hall*, 1 Daly, 498.) An order at general term of the Marine Court reversing a judgment and ordering a new trial is appealable to the Common Pleas. (*Williams* v. *Tradesman's Fire Ins. Co.*, 1 Daly, 437.) The Common Pleas may, at special term, dismiss an appeal from the Marine Court for *irregularity*, but every other question as to the appeal must be decided at general term. (*Williams* v. *Tradesman's Ins. Co.*, 1 Daly, 322.) When a notice of appeal has been served, the court may permit an amendment of the proceedings to perfect the appeal. (*Id.*) The notice of appeal must be served on the respondent, if a resident, personally, and the undertaking for costs be executed by the appellant himself. But where an appeal has been taken in good faith, and the notice served on the clerk of the court below, the Court of Common Pleas may allow the notice to be served on the respondent and the appellant to execute the undertaking *nunc pro tunc*. (*Id.*)

§ **354**, p. **693** *a*. Notice of appeal should clearly point out the error complained of. (*Gray* v. *Hannah*, 1 Abb. N. S. 43; 30 How. 155; *Saunders* v. *Keough*, 27 How. 477; and see § 371.) Any one authorized by the appellant may sign it. (*Hall* v. *Sawyer*, 47 Barb. 116.)

§ **356**, p. **696**. The undertaking under this section need not embrace the undertaking required by § 354. (*Sperling* v. *Levy*, 1 Daly, 95; *contra*, see *Brush* v. *Lee*, 18 Abb. 399.) Action on undertaking, see 31 N. Y. 350; 1 Daly, 95.

§ **360**, p. **697** *c*. A justice in making his return acts ministerially. (*MacDonell* v. *Buffum*, 31 How. 154.) To correct errors in a return, an amended return should be moved for. (*Smith* v. *Johnston*, 30 How. 374.)

§ **366**, subd. **6**, p. **702**. See additional note to § 344, p. 670, *ante*, p. 1037. On a new trial under this provision the parties are restricted to the issues raised in the justice's court; the county court cannot allow an amendment of the pleadings. (*Savage* v. *Cock*, 17 Abb. 403.)

§ **366**, p. **708** *f*. On reversal, the court may order a proper judgment. (*Brownell* v. *Winnie*, 29 N. Y. 400.)

§ **368**, p. **713** *a*. See *Champion* v. *Plymouth Cong. Soc.*, 42 Barb. 441; and *ante*, p. 656 *f*, and additional note thereto.

§ **371**, p. **714**. When the appeal is brought for the sole purpose of reversing the judgment, the notice of appeal need not state in what particular the judgment should have been more favorable. (*Wallace* v. *Patterson*, 29 How. 170.)

The offer to allow the judgment to be amended as claimed in the notice of appeal, should be served on the appellant and on the justice. (*Smith* v. *Hinds*, 30 How. 187.) The offer cannot be given in evidence on the argument of the appeal. (*Finney* v. *Veeder*, 45 Barb. 388; 1 Abb. N. S. 366; 31 How. 14.)

A notice of appeal which stated the judgment should have been in favor of defendant and against the plaintiff for costs, is not sufficient to entitle the appellant to costs on recovering a more favorable judgment in the county court. (*Loomis* v. *Higbie*, 29 How. 232; *Reed* v. *Moore*, 31 How. 264, 369;) otherwise of a statement "That the judgment should have been for a less amount of damages against the defendant" (*Id.*), see amendment to section in 1865, and note 29 How. 288. On a trial before a justice, plaintiff recovered judgment for $140 damages and costs. Defendant appealed, and stated in his notice that the judgment should have been in his favor for no cause of action and for costs. The respondent did not make any offer. On the re-trial plaintiff recovered a verdict for $58; held, that the respondents were entitled to the costs of the appeal. (*Wynkoop* v. *Halbut*, 43 Barb. 266.) Interest is not to be added to the judgment appealed, in determining if judgment on appeal more favorable. (*Smith* v. *May*, 2 Abb. N. S. 227; 32 How. 222.) Where the notice of appeal stated "The judgment is for too much," held not a compliance with the requirement of the statute, so as to give costs to the appellant. (*Barnard* v. *Pierce*, 28 How. 232.)

Notice of appeal held insufficient to require any offer. (*Loveland* v. *Atwood*, 31 How. 467.)

§ **375**, p. **719**. Where judgment has been obtained against two defendants on a joint contract, the process being served on one of the defendants only, and the judgment to be collected of the joint property of both, or of the separate property of the defendant served, a second action may be brought against both defendants, alleging the former recovery, the joint obligation, the proofs being served on the defendant not previously served, and a like judgment taken as in the first action. (*Dean* v. *Eldridge*, 29 How. 218.)

§ **376**, p. **720**. Where a joint debtor has not been served with process, but judgment in form is entered against him pursuant to section 136 of the Code, he is not to be considered a "judgment debtor" within the meaning of section 376. (*Foster* v. *Wood*, 1 Abb. N. S. 150; 30 How. 284.)

§ **382**, p. **723** *f*. See *Palmer* v. *Davis*, 28 N. Y. 242.

§ **383**, p. **723** *a*. Statements held sufficient:

That "the indebtedness arose on the sale and conveyance by plaintiff to defendant of his interest" in certain partnership property, but not showing how the plaintiff was connected with the firm, nor his interest. (*Thompson* v. *Van Vechten*, 27 N. Y. 568.)

The sum of $1,500 for cash borrowed of plaintiff from time to time, for which he held the note of defendant, dated, &c. That plaintiff had assumed for defendant payment of $2,000, for which the latter had given the former his two notes for $1,000 each, payable, &c. (*Ely* v. *Cooke*, 28 N. Y. 365.)

Section **383**—*Continued.*

"1852, December 1. Money lent by plaintiff to defendant to aid in purchasing a lot at, &c., to the amount of $200. 1853, August 1. A balance was due plaintiff by defendants on purchase of lot at, &c., $800. 1854, May 1. Money was lent by plaintiff to defendant to aid in purchase of lot, &c., $300; and cash was lent by plaintiff to defendant at different times since the above, to $175." The last item was not sufficient. (*Frost* v. *Koon*, 30 N. Y. 428.)

That plaintiff had purchased of defendant a certain indebtedness (describing it) due plaintiff, for which he had given plaintiff the promissory notes (describing them), upon which and for the amount of which he confessed judgment. (*Kirby* v. *Fitzgerald*, 31 N. Y. 417.)

"For a debt justly to become due from me to plaintiff on, &c. And the following are the facts upon which such indebtedness arises: Plaintiff had been in employ of defendant several years on salary. From year to year defendant settled with plaintiff, allowing him interest on amount remaining unpaid. On 15th December, 1857, plaintiff and defendants settled, and there was then due plaintiff $4,300, for which defendant then gave his note payable, &c., that the amount of said note on, &c. (the day it would become due), will be $4,902, and no payments have been made thereon." (*Kellogg* v. *Cowing*, 33 N. Y. 408.)

Defendants "are indebted to plaintiff in the sum of $3,300, which indebtedness arose on account of goods purchased in 1853; the whole amount of the purchases was $3,500, and the amount remaining due $3.300; that the goods consisted of cloths, &c., were purchased at P., where plaintiff resides." (*Read* v. *French*, 28 N. Y. 285).

A confession of a judgment by a married woman is not void, but voidable only. (*Roraback* v. *Stebbins*, 33 How. 278.)

§ **383**, p. **727** *j*. See *Frost* v. *Koon*, 30 N. Y. 428.

Same section, p. **727** *k*. See *Read* v. *French*, 28 N. Y. 285; and *Kirby* v. *Fitzgerald*, 31 N. Y. 417.

Same section, p. **728** *b*. As to facts within the knowledge of the party confessing a judgment, he must affirm them to be true. When he only swears he "believes the above statement of confession is true," it is not sufficient. (*Ingram* v. *Robbins*, 33 N. Y. 409.) A verification in terms that "the facts stated in the above confession are true," is sufficient. (*Mosher* v. *Heydrick*, 1 Abb. N. S. 258; 45 Barb. 459; 30 How. 161.) And see *Williams* v. *Hernon*, 33 How. 241.

Same section, p. **728** *c*. The parties' subscription to the affidavit verifying the statement is a sufficient signing of the statement. (*Mosher* v. *Heydrick*, 1 Abb. N. S. 258; 45 Barb. 459; 30 How. 161.)

Same section, p. **728** *d*. The judgment may be entered in any county. (*Mosher* v. *Heydrick*, 1 Abb. N. S. 258; 45 Barb. 459; 30 How. 161.)

Same section, p. **728** *g*. Where a judgment is confessed directly to a third party who takes the same in good faith and for value, it cannot be impeached for fraud existing between the other parties; but otherwise, if after the judgment is confessed a third party takes the judgment as collateral security. (*Kirby* v. *Fitzgerald*, 31 N. Y. 417.)

§ **384**, p. **730** *a*. Upon motion by a subsequent judgment creditor to set aside a judgment by confession, the court may allow a statement on which the judgment was entered to be amended. (*Mitchell* v. *Van Buren*, 27 N. Y. 300.)

§ **385**, p. **732** *b*. If the defendant has appeared by an attorney, the offer should be made and subscribed by such attorney. (*Webb* v. *Dill*, 18 Abb. 264.) If in such a case an offer is made by the defendant in person, judgment should not be entered upon it without leave of the court. (*Id.*)

§ **385**, p. **733** *b*. Where the amount offered, with interest, to the date of the judgment would exceed the amount recovered, the judgment is not "more favora-

Section **383**—*Continued.*

ble" and the defendant is entitled to costs. (*Tilman* v. *Keane*, 1 Abb. N. S. 23.) When the amount recovered, added to any amount of counterclaim extinguished by the judgment, exceeds the amount offered, the judgment is "more favorable," the plaintiff is entitled to costs. (*Tompkins* v. *Ives*, 30 How. 13; *Turner* v. *Honsinger*, 31 How. 66.) The amount of the judgment is not the only test of its favorableness. (*Howard* v. *Farley*, 18 Abb. 367; 29 How. 4.) Thus, in an action on a bond secured by mortgage to recover an installment, an offer of the whole amount secured by the bond but not due, will not prevent a judgment for the installment due, with interest, from being a more favorable judgment. (*Id.*)

As to offer in foreclosure action, see *Bettis* v. *Goodwill*, 32 How. 137.

§ **388**, p. **735**. In actions pending in a county court, the county judge may order the discovery. (*Broderick* v. *Shelton*, 18 Abb. 213.)

Where the order for the discovery is made by *the court*, it may, in addition to ordering production, order that in default, the document should not be given in evidence, and that the complaint be dismissed; but where the order is made by *a judge* it should not go beyond ordering the production. (*Broderick* v. *Shelton*, 18 Abb. 213.)

Where the defendant's demurrer has been overruled and defendant has appealed from the order overruling his demurrer, a motion for discovery of defendant's books, &c., and to enable plaintiff to prepare for trial, is premature until the decision of such appeal. (*Palen* v. *Johnson*, 18 Abb. 304.)

The court has no power to compel a party to an action to submit articles the subject of the action, and which are neither books nor documents, nor evidence of themselves, to be inspected by third persons to enable them to testify as to the quality of such articles. (*Ansen* v. *Tuska*, 19 Abb. 391; 1 Robertson, 663.)

§ **388**, p. **738** *i*. The court will not grant a discovery to ascertain the names of persons proper to be made parties to the action, but only to help the plaintiff in stating his cause of action. (*Opdyke* v. *Marble*, 18 Abb. 266; 44 Barb. 64.) The agents of a corporation cannot, in their individual capacities, be compelled to discover the books of the corporation. (*Id.*)

Section **388** of the Code enlarges the remedy for obtaining discovery, &c., and if a party establishes satisfactorily that any document is in the possession or control of his adversary, containing evidence relating to the merits of the action or defence, its inspection may be ordered. (*Case* v. *Banta*, 9 Bosw. 595.) But the statute does not sanction an order requiring either party to disclose evidence which he intends to introduce against his adversary. (*Strong* v. *Strong*, 1 Abb. N. S. 233.)

An order directing the deposit of certain books, "and all other books of defendants containing any entries showing," &c., was reversed on appeal. (*Walker* v. *Granite Bank*, 44 Barb. 39; 19 Abb. 111, and see *Julio* v. *Ingalls*, 17 Abb. 448, *note*.)

An application for discovery of books, &c., must specially state what information is wanted, and that the books, &c., referred to, contain such entries, and this must be stated positively, and not on information and belief. Absence of party will not excuse the requirement. (*Walker* v. *Granite Bank*, 44 Barb. 39; 19 Abb. 111) A statement of advice of counsel and belief of deponent is not sufficient. (*Strong* v. *Strong*, 1 Abb. N. S. 233.)

§ **388**, p. **743** *c*. Appeal from order for discovery allowed. (*Ansen* v. *Tuska*, 19 Abb. 391; *Julio* v. *Ingalls*, 17 Abb. 448, *note*; *Walker* v. *Granite Bank*, 44 Barb. 39; 19 Abb. 111; *Strong* v. *Strong*, 1 Abb. N. S. 233; *Broderick* v. *Shelton*, 18 Abb. 231.)

§ **389**, p **744**. The provisions of the Code making a party a witness in his own behalf, apply only to civil actions, and not to criminal prosecutions. (*Williams* v. *The People*, 33 N. Y. 688, affirming S. C. 45 Barb. 201.)

§ **389**, p. **744** *f*. Husband and wife can be examined for or against each other (Laws 1867, ch. 887); but not in actions for divorce or criminal conversation, except in actions for divorce to prove marriage (*id.*); but not compellable to disclose confidential communications. (*id.*)

§ **390**, p. **746**. The right to examine the adverse party as a witness, arises immediately on the commencement of the action. (*McVickar* v. *Greenleaf*, 30 How. 61; 19 Abb. 241.)

§ **391**, p. **748** *f*. An order to examine an adverse party is allowed as a matter of right, on proof that the action is at issue, and that the applicant desires such examination as to matters material to the issue. (*Cook* v. *Bidwell*, 29 How. 483.) An order is necessary; a notice to attend on a subpœna is not sufficient. (*Norton* v. *Abbott*, 28 How. 388; see *Greene* v. *Herder*, 30 How. 210.) A summons must be served on the party to be examined, and notice served on the attorney of such party. (*Van Rensselaer* v. *Tubbs*, 31 How. 193.)

The examination may be had before issue joined. (*McVicar* v. *Ketchum*, 1 Abb. N. S. 452.)

In an action for tort, tried in 1854, each defendant was a competent witness for his co-defendant, as to any matter as to which he was not jointly interested or liable, and as to which a separate and not a joint verdict or judgment could be rendered. (*Wilson* v. *Elwood*, 28 N. Y. 117.)

§ **399**, p. **756**. The word transaction in this section does not embrace all the occurrences which go to make up a cause of action, but only such as must have been communicated to the deceased to give them effect. (*Franklin* v. *Pinkney*, 18 Abb. 186); and the section does not exclude the testimony of the living party, as to an occurrence at which the deceased need not have been present, or as to a fact he need not have known, to make evidence of it admissible. (*Id.*) The plaintiff in an action against next of kin to establish a lost will, is not a competent witness in his own behalf to prove conversations had between himself and the deceased, on the subject of the alleged will. (*Timon* v. *Claffy*, 45 Barb. 438, and see *Van Alstyne* v. *Van Alstyne*, 28 N. Y. 378; *Williston* v. *Williston*, 41 Barb. 635.)

A legatee is not an assignee, executor or administrator, within this section. (*Hight* v. *Sackett*, 34 N. Y. 447.)

What testimony not admissible. (*Clark* v. *Smith*, 46 Barb. 30.)

Books as evidence. (*Id.*)

As to taking testimony in this State in actions in the courts of other States, see Laws 1867, ch. 68.

§ **399**, p. **758** *a*. See *Wilson* v. *Elwood*, 28 N. Y. 117.

§ **399**, p. **761** *d*. A commission may, in a special case demanding it, issue to take the testimony of such witnesses (not naming them) as shall be produced before the commissioners. (*McMahon* v. *Allen*, 18 Abb. 292.)

A deposition is not to be excluded on the ground that the witness was incompetent by reason of interest, if his oral testimony would be competent at the time of the trial. (*Fielden* v. *Lahens*, 9 Bosw. 436.)

A deposition taken on commission may be read on the trial by either party. (*Weber* v. *Kingsland*, 8 Bosw. 416.)

§ **400**, p. **772** *f*. Motions on the ground of irregularity must be made promptly. (*Bowman* v. *Tallman*, 28 How. 482; 19 Abb. 84; *Cotes* v. *Smith*, 29 How. 327.)

§ **400**, p. **773** *d*. Papers to be legibly written. (*Johnson* v. *Casey*, 28 How. 492.)

§ **400**, p. **775** *a*. Renewing motion. (*Smith* v. *Spalding*, 30 How. 339; *Adams* v. *Bush*, 2 Abb. N. S. 112.)

§ **400**, p. **781**. Order extending time till decision of an appeal. (*Petrie* v. *Fitzgerald*, 2 Abb. N. S. 354.)

§ **406**, p. **785** *d*. See *City Bank* v. *Lumley*, 28 How. 397.

§ **408, p. 787.** The notices mentioned in this section refer only to notices required by the Code; it does not forbid an oral notice to produce given in the presence of the court pending a trial. (*Kerr* v. *McGuire*, 28 N. Y. 453.)

Service on non-resident attorney. (Laws 1866, ch. 173.)

§ **419, p. 792.** The coroner may call to his aid the power of the county, in a proper case, in executing an order of arrest, in an action in which the sheriff is a party. (*Slater* v. *Wood*, 9 Bosw. 16.)

§ **425, p. 795.** Publication of notices of sales, &c., in Hamilton County. (Laws 1867, ch. 162.)

§ **428, p 802** *a*. Upon the death after final judgment in his favor, his personal representatives may sue on the judgment to obtain the same relief as was formerly obtained in such a case by *scire facias*. (*Ireland* v. *Litchfield*, 8 Bosw. 634, and see *Connor* v. *Such*, 9 Bosw. 321.)

In such an action costs are in the discretion of the court. (*Id.*)

§ **448, p. 810.** Partition of lands in which the people are interested. (2 R. S. 331, p. 92.)

Appointment of receiver (*Pignolet* v. *Bushe*, 28 How. 9).

§ **448, p. 812** *e*. It is not absolutely necessary that a *guardian ad litem* for an infant defendant should put in an answer. (*Bogert* v. *Bogert*, 45 Barb. 121.)

§ **448, p. 813** *h*. See *Noble* v. *Cromwell*, 27 How. 289.

§ **448, p. 815** *j*. Court will not compel a purchaser to take a doubtful title. (*O'Reilly* v. *King*, 28 How. 408.)

Irregularities in the proceedings may be amended *nunc pro tunc*. (*Bogert* v. *Bogert*, 45 Barb. 121; *Noble* v. *Cromwell*, 27 How. 289; *Rogers* v. *McLean*, 31 How. 279; 34 N. Y. 536.)

Judgment-roll in partition. (*Lynch* v. *Rome Gaslight Co.*, 42 Barb. 591.) And see Laws 1851, ch. 277, as to recording decrees.

§ **449, p. 817.** The proceeding to determine adverse claims to real property may be by notice under the statute. (*Barnard* v. *Simms*, 42 Barb. 304.) A corporation may have the remedy (Laws 1854, p. 276). When the remedy is sought by action the same rules apply as in other actions. (*Hager* v. *Hager*, 38 Barb. 94. See Laws 1860, ch. 173.)

§ **455, p. 820.** To maintain ejectment plaintiff must have the legal title. (*Murray* v. *Walker*, 31 N. Y. 399; *Lowber* v. *Kelly*, 17 Abb. 452; *Peck* v. *Newton*, 46 Barb. 173.) A wife cannot maintain ejectment against her husband. (*Gould* v. *Gould*, 29 How. 441.) Ejectment by tenants in common. (*Sparks* v. *Leavy*, 19 Abb. 364; 2 R. S. 341, § 11.) The action cannot be maintained against a party out of possession. (*Allen* v. *Dunlap*, 42 Barb. 585.) The provision of the Revised Statutes (2 R. S. 307, § 29), which provides that when the action is against several defendants, if it appear on the trial that they occupy distinct parcels in severalty, plaintiff must elect against which party he will proceed, and a verdict be rendered in favor of the other party, is not repealed by the Code. (*Dillaye* v. *Wilson*, 43 Barb. 261.) When the people sue they must show a title in them. (*The People* v. *Booth*, 32 N. Y. 397.) In ejectment the defendant may set up an equitable defence. (*Corkhill* v. *Landers*, 44 Barb. 218.) When the court will not grant a third new trial in ejectment. (*Wright* v. *Milbank*, 9 Bosw. 672.) Effect of the death of parties pending the action. (Laws 1865, ch. 357.)

Ejectment for lands ceded to the United States. (*Dibble* v. *Clapp*, 31 How. 420.)

Ejectment against lessee. (*Tyler* v. *Heidorn*, 46 Barb. 440.)

Defence under a general denial. (*Raynor* v. *Timerson*, 46 Barb. 518.)

§ **455, p. 827** *f*. Admeasurement of dower. (*Wood* v. *Seely*, 32 N. Y. 105; *Brown* v. *Brown*, 31 How. 481.)

RULES.

COURT OF APPEALS.

Rule II, p. 840. The court has jurisdiction to dismiss an appeal, although no return has been filed. (*Adams* v. *Fox*, 27 N. Y. 640.)

Rule IX. *Eight* substituted for *six*.

Rule XIII, p. 844. "Actions in which executors or administrators are sole plaintiffs or sole defendants, and in which the appeal prevents the issuing of letters testamentary or of general administration, shall have preference in the Court of Appeals and in the Supreme Court, at the General Term thereof, over all actions, except in criminal cases in which the people are a party, and may on notice be moved out of their order on the calendar. (Laws 1865, ch. 218, § 1.) Construction of this law see 32 N. Y. 604.

Rule XX. *Fifteen* substituted for *ten*.

Rule XXI. Substitute "16 copies" for "14 copies."

Rule XXV, p. 846. Substitute "16 copies" for "14 copies." Appellant failing to appear or to submit points, the judgment is affirmed of course. (*Kelly* v. *McCormick*, 28 N. Y. 318.) The court will not postpone the argument on account of the inability of a party to attend. (*Bank of Salina* v. *Alvord*, 32 N. Y. 684.)

Rule XXIX, p. 847. See this rule 27 N. Y. 8.

Court of Appeals Practice, p. 848. Where it appears by affidavit on moving the cause that the suit has abated by the death of respondent, the cause should stand over till the next term, without prejudice, and with leave to move to substitute the parties in interest. (*Shaler Quarry Co.* v. *Brewster*, 32 N. Y. 472.)

SUPREME COURT.

Rule 2, p. 850. The appearance of an attorney without authority is a nullity. (*Bean* v. *Mather*, 1 Daly, 440.) Where an attorney has appeared in an action, all subsequent proceedings must be conducted through him. (*Webb* v. *Dill*, 18 Abb. 264.) The client cannot interfere with his attorney as to the conduct of the action. The attorney may, even against the wishes of his client, open or vacate a judgment obtained by default. (*Read* v. *French*, 28 N. Y. 285.) An attorney employed merely to sue the maker of a note cannot release the indorser. (*East River Bank* v. *Kennedy*, 9 Bosw. 544.) The corporation of New York may, with the consent of *the* Corporation Counsel, appear by other attorney and counsel. (*The Mayor of N. Y.* v. *Exchange Fire Ins. Co.*, 9 Bosw. 424; *Mayor of N Y.* v. *Hamilton Fire Ins. Co.*, 10 Bosw. 537.) One attorney cannot act for plaintiff and defendant. (*Herrick* v. *Cutley*, 1 Daly, 512; 30 How. 208.) The law of 1862 authorizing non-resident attorneys to practice in this State was repealed, and other provisions substituted. (Laws 1866, ch. 175.)

Rule 13, p. 854. An oral stipulation by counsel on the trial of a cause in the presence of the court relative to the action, and entered in the minutes, is binding on the parties. (*Staples* v. *Parker*, 41 Barb. 648.)

Rule 13, p. 855. The portion of this rule which requires orders for discovery to declare the consequences of an omission to comply with them, is void. (*Broderick* v. *Shelton*, 18 Abb. 213.)

Rule 33, p. 862. An issue whether the plaintiff was guilty of adultery at any time before the commencement of the action with a person named is not permissible. (*Strong* v. *Strong*, 1 Abb. N. S. 233.)

When alimony refused. (*Kock* v. *Kock*, 42 Barb. 515.)

Relief from payment of alimony. (*Graley* v. *Graley*, 31 How. 475.)

New trial. (*Amory* v. *Amory*, 3 Abb. N. S. 16.)

Rule 34, p. 865. What the case should contain. (*Hoffman* v. *Ætna Fire Ins. Co.*, 19 Abb. 326; *Magnus* v. *Trischett*, 2 Abb. N. S. 175; and see *Hoffman* v. *Ætna Fire Ins. Co.*, 1 Robertson, 524.)

Rule 36, p. 866. Exceptions neither noticed in points, nor argued, deemed waived. (*Sutherland* v. *Rose*, 47 Barb. 145; and see *Mayor of New York* v. *Hamilton Fire Ins. Co.*, 10 Bosw. 538.)

On appeal to general term from an order on a motion, copies of all papers used below must be served with notice of appeal. (*Smith* v. *Chapman*, 38 How. 308.)

Rule 44, p. 873 *k*. An appeal from a surrogate decree of distribution must be taken in three months therefrom. (*Anthony* v. *Brouwer*, 31 How. 128.)

Rule 44, p. 874 *f*. In most, if not in all, cases of appeals from decisions of surrogates, the whole case is to be examined by the Appellate Court, as well upon the facts as upon the law, so far as questions are presented by the appeal, and this rule applies as well to the Court of Appeals as to the Supreme Court. (*Robinson* v. *Raynor*, 28 N. Y. 494.)

An appeal to the Supreme Court from a decree of a surrogate denying probate of an alleged will, the Court, if it deems the decree against the evidence, is not bound to award a feigned issue to try the questions of fact, but may direct such judgment and decree to be entered as the surrogate should have made. (*Pilling* v. *Pilling*, 42 Barb. 86.)

Costs on appeal. (*Morgan* v. *Morgan*, 1 Abb. N. S. 40.)

Rule 56. See *Barnard* v. *Heydrick*, 2 Abb. N. S. 48.

Rule 65, p. 880. General guardian has the same power as a testamentary guardian. Can receive moneys secured to their wards by mortgage, and discharge the mortgage before it becomes due. (*Chapman* v. *Tibbetts*, 33 N. Y. 289.)

Rule 71, p. 886 *d*. The recital of the bond on the mortgage is evidence of the execution of the bond. (*Cooper* v. *Newland*, 17 Abb. 342.) An assignee of a mortgage merely, not being assignee of the bond, cannot foreclose. (*Id.*)

Rule 71, p. 886 *m*. Reference to ascertain amount due on decree, after assignment of decree, does not call for change of parties. On such a reference, husband and wife may testify for or against each other. (*Laing* v. *Titus*, 18 Abb. 388.)

Rule 71, p. 887. Re-sale. (*Marsh* v. *Ridgway*, 18 Abb. 262; *Griffin* v. *Hadley*, 10 Bosw. 587; *McCotter* v. *Jay*, 30 N. Y. 80; *Stryker* v. *Storm*, 1 Abb. N. S. 424.)

Rule 72, p. 890. See *Matthews* v. *Duryee*, 45 Barb. 69; 17 Abb. 257; *Frost* v. *Koon*, 30 N. Y. 428.

Rule 73, p. 890. For "Merchants' Exchange," read "Merchants' Exchange Sales Room, No. 111 Broadway."

Rule 76, p. 892. Disposition of surplus moneys on foreclosure by advertisement. See *Kirby* v. *Fitzpatrick*, 31 N. Y. 417; *Bevier* v. *Schoonmaker*, 29 How. 411. Priorities of liens on surplus moneys. (*Freeman* v. *Schroeder*, 43 Barb. 618.)

Rule 86, p. 898 *d.* An allegation in the complaint that five years had not elapsed since the plaintiff discovered the fact that such adultery had been committed without his consent, connivance, or procurement, held not in compliance with this rule. (*Myers* v. *Myers*, 41 Barb. 114.) The case of *Walton* v. *Walton*, in the text, said to have been reversed in the Court of Appeals, and judgment ordered for the plaintiff. See 27 How. 600.

Rule 86, p. 898. When alimony allowed. (*Strong* v. *Strong*, 1 Abb. N. S. 358; *Solomon* v. *Solomon*, 28 How. 218; *Palmer* v. *Palmer*, 29 How. 391; *Forrest* v. *Forrest*, 8 Bosw. 640.)

Condonation. (*Betz* v. *Betz*, 29 How. 90.)

Proceedings on appeal from judgment for divorce. (*Forrest* v. *Forrest*, 8 Bosw. 641; 9 Bosw. 686.)

Vacating judgment for divorce. (*Singer* v. *Singer*, 41 Barb. 139.)

Proof of decree for divorce. (*Re Laurence*, 18 Abb. 347.)

Rule 86, p. 909. Power of Supreme Court over the real estate of religious corporations. (*Mad. Av. Bapt. Ch.* v. *Bapt. Ch. in Oliver St.*, 19 Abb. 105; *St. James' Ch.* v. *Ch. of Redeemer*, 45 Barb. 356.)

SUPERIOR COURT.

Rule 7, p. 915. Amended 8th January, 1866, by substituting Monday for Saturday, in second line.

Rule 10, p. 916 *add.* The printed case must contain the certificate of the clerk that the case as settled has been filed.

APPENDIX.

AMENDMENTS

TO THE

CODE OF PROCEDURE,

1865—'66—'67.

§ **11,** Subd. **2** (amended 1867 *to read as follows:*)

2. In an order affecting a substantial right made in such action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial; but no appeal to the Court of Appeals from an order granting a new trial, on a case made or bill of exceptions, shall be effectual for any purpose, unless the notice of appeal contain an assent on the part of the appellant, that if the order be affirmed, judgment absolute shall be rendered against the appellant. Upon every appeal from an order granting a new trial on a case made or on exceptions taken, if the Court of Appeals shall determine that no error was committed in granting the new trial, they shall render judgment absolute upon the right of the appellant; and after the proceedings are remitted to the court from which the appeal was taken, an assessment of damages or other proceedings to render judgment effectual, may be then and there had in cases where such subsequent proceedings are requisite.

Subd. **3** (amended 1865–1866 *to read as follows:*)

In a final order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, and upon such appeal to review any intermediate order involving the merits and necessarily affecting the order appealed from. But such appeal shall not be allowed in an action originally commenced in a court of a justice of the peace, or in a marine court of the city of New York, or in an assistant justice's court of that city, or in a justice's court in any of the cities of this State, unless any such general term shall by order duly entered allow such appeal before the end of the next term after which such judgment was entered. The foregoing prohibition shall not extend to actions discontinued before a justice of

the peace and prosecuted in another court, pursuant to sections sixty and sixty-eight of this Code.

§ **11,** Subd. **4** (added 1865–1867.)

Whenever the decision of any motion heretofore made, or of any motion hereafter to be made in the Supreme Court of this State, at a special term thereof, involves the constitutionality of any law of this State, or has been or shall be placed, in the opinion, or reasons for such decision, of the justice making such decision, upon the unconstitutionality of such law, then an appeal shall lie and may be made from such decision, or from the order entered, or to be entered upon such decision, to the general term of said court, and an appeal shall also lie and may be made from the decision of such general term, and from any order entered or to be entered thereon to the Court of Appeals; provided, however, that the time for appealing from such decision, or from such order, shall not be extended hereby.

And such appeal at the general term, and at the Court of Appeals, shall be heard as a non-enumerated motion.

An appeal from any order to the Court of Appeals affecting a substantial right, arising upon any interlocutory proceeding, or upon any question of practice in the action, may be heard as a motion, and noticed for hearing for any regular motion day of the court.

§ **13** (amended 1865 *to read as follows:*)

There shall be four terms of the Court of Appeals in each year, to be held at the Capitol, in the city of Albany, on the first Tuesday of January, the fourth Tuesday of March, the third Tuesday of June, and the last Tuesday of September, and continued for as long a period as the public interests may require. But the judges of said court may, in their discretion, appoint one of said terms in each year to be held in the city of New York. Additional terms shall be appointed and held at the same place by the court when the public interest requires it. The court may, by general rules, provide what causes shall have a preference on the calendar. On a second and each subsequent appeal to the Court of Appeals, or when an appeal has once been dismissed for defect or irregularity, the cause shall be placed upon the calendar as of the time of filing the first appeal, and may be noticed and put on the calendar for any succeeding term; and whenever, in any action or proceeding in which the people of this State, or any State Officer, or any board of State Officers, is or are sole plaintiff or defendant, an appeal has been or shall be brought from any judgment or order for or against him or them, in any court, such appeal shall have a preference in the Supreme Court and in the Court of Appeals, and may be moved by either party out of the order on the calendar.

§ **14** (amended 1867 *to read as follows:*)

The concurrence of five judges is necessary to pronounce a judgment. If five do not concur, the case must be reheard. But no more than two rehearings shall be had; and if on the second rehearing five judges do not concur, the judgment shall be affirmed.

When five of the judges do not concur, and a rehearing of the case is ordered, the judges shall file the opinions read by them with the reporter of the court, but such opinions shall not be published. No person other than the judges of the court, the reporter of the court, or the counsel or attorney of either of the parties to the action shall have access to, or a copy of, the said opinions, but such counsel or attorney may have access to and a copy thereof.

§ **53,** Subd. **10** (amended 1865, Ch. 616, *by inserting the following, between lines* 3 *and* 4 *from the bottom of page* 53, *ante:*)

The judgment for the plaintiff may be for the possession, or for the recovery of the possession, or the value thereof, in case a delivery cannot be had, and of damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. An execution shall be issued thereon, and if the judgment be for the delivery of the possession of personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs or damages recovered by the same judgment out of the personal property of the party against whom it was rendered, to be specified therein, if a delivery thereof cannot be had. The execution shall be returnable within sixty days after its receipt by the officer, to the justice who issued the same.

§ **64,** Subd. **4** (amended 1867 *to read as follows:*)

The answer may contain a denial of the complaint, or of any part thereof, and also notice in a plain and direct manner of any facts constituting a defence or counter-claim.

§ **99** (amended 1867 *to read as follows:*)

An action is commenced as to each defendant when the summons is served on him, or on a co-defendant, who is a joint contractor, or otherwise united in interest with him. An attempt to commence an action is deemed equivalent to the commencement thereof within the meaning of this title, when the summons is delivered with the intent

that it shall be actually served to the sheriff or other officer of the county in which the defendants or one of them usually or last resided; or, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business.

§ **100** (amended 1867 *to read as follows:*)

If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited, after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

§ **111** (amended 1866 *to read as follows:*)

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section one hundred and thirteen; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. But an action may be maintained by a grantee of land in the name of a grantor, or his or her heirs or legal representatives, when the grant or grants are void by reason of the actual possession of a person claiming under a title adverse to that of the grantor at the time of the delivery of the grant, and the plaintiff shall be allowed to prove the facts to bring the case within this provision.

§ **116** (amended 1865 *to read as follows:*)

The guardian shall be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or, if under that age, upon the application of his general or testamentary guardian, if he has any, or of a relative or friend of the infant; if made by a relative or friend of an infant, notice thereof must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after service of the summons. If he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within this State; if he has

none, then to the infant himself if over fourteen years of age, and within the State; or, if under that age, and within the State, to the person with whom such infant resides. And in actions for the partition of real property, or for the foreclosure of a mortgage or other instrument, when an infant defendant resides out of this State, or is temporarily absent therefrom, the plaintiff may apply to the court in which the action is pending, at any special term thereof, and will be entitled to an order designating some suitable person to be the guardian for the infant defendant, for the purposes of the action, unless the infant defendant, or some one in his behalf, within a number of days after the service of a copy of the order, which number of days shall be in the said order specified, shall procure to be appointed a guardian for the said infant, and the court shall give special directions in the order for the manner of the service thereof, which may be upon the infant.

And in case an infant defendant having an interest in the event of the action shall reside in any State with which there shall not be a regular communication by mail, on such fact satisfactorily appearing to the court, the court may appoint a guardian *ad litem*, for such absent infant party, for the purpose of protecting the right of such infant in said action, and on such guardian *ad litem*, process, pleadings and notices in the action may be served in the like manner as upon a party residing in this State.

§ **118** (amended 1867 *to read as follows:*)

Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein; and in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or a right of possession to real estate may be made parties plaintiff or defendant, as the case may require, to any such action.

§ **132** (amended 1866 *to read as follows:*)

In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, or whenever a warrant of attachment, under chapter four of title seven, part second of this Code, shall be issued, or at any time afterwards, the plaintiff, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at the time of filing his answer, or at any time afterwards, if the same be intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the prop-

erty in that county affected thereby; and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently recorded, shall be deemed a subsequent purchaser or incumbrancer, and shall be bound by all proceedings taken after the filing of such notice, to the same extent as if he were made a party to the action. For the purposes of this section, an action shall be deemed to be pending from the time of filing such notice; provided, however, that such notice shall be of no avail unless it shall be followed by the first publication of the summons on an order therefor, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued, or abated, as is provided in section number one hundred and twenty-one, on application of any person aggrieved, and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized by this section to be canceled of record by the clerk of any county in whose office the same may have been filed or recorded; and such cancellation shall be made by an indorsement to that effect on the margin of the record, which shall refer to the order, and for which the clerk shall be entitled to a fee of twenty-five cents.

§ **136** (amended 1866 *to read as follows*:)

Where the action is against two or more defendants, and the summons is served on one or more of them, but not on all of them, the plaintiff may proceed as follows:

1. If the action be against defendants jointly indebted upon contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest against the persons of the defendants served; or

2. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.

4. If the name of one or more partners shall, for any cause, have been omitted in any action in which judgment shall have passed against the defendants named in the summons, and such omission shall not have been pleaded in such action, the plaintiff, in case the judgment therein shall remain unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he may not have been named in the original action; but the plaintiff shall have satisfaction of only one judgment rendered for the same cause of action.

§ **177** (amended 1866 *to read as follows:*)

The plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after the former complaint, answer or reply, or of which the party was ignorant when his former pleading was made, and either party may, by leave of the court, in any pending or future action, set up by a supplemental pleading the judgment or decree of any court of competent jurisdiction rendered since the commencement of such action, determining the matters in controversy in said action or any part thereof, and if said judgment be set up by the plaintiff, the same shall be without prejudice to any provisional remedy theretofore issued or other proceedings had in said action on his behalf.

§ **227** (amended 1866 *to read as follows:*)

In an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property, against a corporation created by or under the laws of any other State, government, or country, or against a defendant who is not a resident of this State, or against a defendant who has absconded or concealed himself, or whenever any person or corporation is about to remove any of his or its property from this State, or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors, as hereinafter mentioned, the plaintiff, at the time of issuing the summons, or any time afterwards, may have the property of such defendant or corporation attached, in the manner hereinafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover; and for the purposes of this section an action shall be deemed commenced when the summons is issued; provided, however, that personal service of such summons shall be made, or publication thereof commenced within thirty days.

§ **243** (amended 1865 *to read as follows :*)

The sheriff shall be entitled to the same fees and compensation for services, and the same disbursements, under this title, as are allowed for like services, and disbursements, under the provisions of chapter five, title one, and part two of the Revised Statutes. Provided, however, that no poundage or other compensation shall be allowed to the said sheriff (except his fee of fifty cents for making the levy, and such compensation for his trouble and expense in taking possession of and preserving the property as shall be fixed by the officer issuing the attachment), unless a settlement shall be had, or a judgment shall be recovered, and collected in whole or in part, in the action in which the attachment in this title referred to shall have issued. And where a judgment shall have been recovered and collected in part only, the amount of his poundage shall not be estimated upon any sum greater than the sum collected upon such judgment. And where a settlement shall be had, the amount of his poundage shall not be estimated upon any sum greater than the amount at which said settlement is made.

§ **244**, Subd. **4** (amended 1867 *to read as follows :*)

4. In the cases provided in this Code and by special statutes, when a corporation has been dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; and in like cases, of the property within this State of foreign corporations. Receivers of the property within this State of foreign and other corporations shall be allowed such commissions as may be fixed by the court appointing them, not exceeding five per cent. on the amount received and disbursed by them.

§ **256** (amended 1865 *to read as follows :*)

At any time after issue, and at least fourteen days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least eight days before the court, with a note of the issue containing the title of the action, the names of the attorneys, and the time when the last pleading was served, and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue. In the first judicial district there need be but one notice of trial, and one note of issue from either party, and the action shall then remain on the calendar until disposed of, and when called may be brought to trial by the party giving the notice. In every action in which issue of fact is now joined, and the action is now placed upon the calendar of the Supreme Court of the first judicial district, or of the Superior Court of the city of New York, or of the Court of Common Pleas for the city and county of New York,

the party who shall have filed such note of issue, shall, as a condition precedent to such action being brought to trial, pay to the clerk of the court the sum of three dollars; and in every action in either of the said courts, commenced after the passage of this act, the party who shall file therein a first note of issue of fact, shall, as a condition precedent to such filing, pay to the clerk of the court the sum of three dollars; and the amounts so received shall be accounted for under oath, and paid over monthly, by the clerk of each of said courts, to the comptroller of the city of New York, and by him deposited in the county treasury, to be used as a fund for the payment of the salaries of stenographers employed in said courts, as provided for in this section. If the fund thus created be inadequate to pay such salaries, the additional amount necessary for such payment shall be appropriated and paid from the fund of county contingencies, to which fund any surplus of the sums so paid over to the comptroller as hereinbefore provided shall be credited.

Each of the courts hereinbefore named shall appoint a stenographer for the circuit, trial term or special term at which issues of fact are tried, which constitutes a separate branch of such court, who shall be a sworn officer of the court, shall hold office during the pleasure of the court, and shall be paid a salary of twenty-five hundred dollars per annum, in like manner as the salaries of other officers of the courts are now paid. It shall be the duty of every stenographer so appointed for any circuit, trial term or special term, under the direction of the presiding judge thereof, to take full stenographic notes of all proceedings in every trial thereat; and in case the presiding judge shall require a transcript of said stenographic notes, he may order the expense thereof to be paid equally by the parties to the action, at the rate of ten cents for every one hundred words so transcribed, and may enforce payment thereof, and the amount so paid, together with the sum paid as a condition precedent to the cause being brought to trial, or to the first note of issue being filed as hereinbefore provided, shall be deemed a necessary disbursement within the meaning of section three hundred and eleven of the Code of Procedure, and shall be allowed as such to the prevailing party in the action.

At any extra circuit, trial term or special term of said courts, the presiding judge thereof shall appoint a stenographer for such extra circuit or term, who shall, in like manner as aforesaid, be a sworn officer, and who shall be paid a compensation at the rate and in the manner hereinbefore provided. When a court of Oyer and Terminer shall be held in and for the city and county of New York, the presiding judge thereof shall designate one of the stenographers of the Supreme Court to act as stenographer of such Court of Oyer and Terminer during its session, who shall, in like manner as aforesaid, be a sworn officer, but who shall receive no compensation in addition to his salary as hereinbefore provided, except that in case a transcript of his stenographic notes, taken on the trial of any criminal cause, be required for the use of the presiding judge, or the district attorney, the expense thereof shall, on the order of such judge or district attorney, be paid as a county charge, at the rate hereinbefore specified.

The surrogate of the county of New York is hereby authorized and directed to appoint a stenographer to the Surrogate's Court of said county, who shall be a sworn officer of the court, and shall be paid a salary of three thousand dollars a year, in like manner as the salaries of clerks in said court are now paid by law from the fees of said court, paid into the treasury of the county of New York. The stenographer so appointed, shall be skilled in the practice of his art, and shall hold his position during good behaviour, and so long as he efficiently discharges the duties of his office. He shall, under the direction of the said surrogate, take full stenographic notes of all proceedings in said court, in which oral proofs shall be given, which notes shall be fairly transcribed, and after being signed by the witnesses, deponent or affiant, shall be filed in the office of said surrogate. By consent of the parties to the proceeding in which such proofs shall be taken, and said surrogate, the signing of such record of proof by the witness, deponent or affiant, may be waived, in which case such record, after being authenticated by the certificate of said stenographer, or of said surrogate, shall be deemed to be the record of any proofs or proceedings so taken.

In other counties of this State, on trials of issues of fact, at any Circuit Court, or Court of Oyer and Terminer, it shall be lawful for the presiding justice, in his discretion, to employ a stenographer, who shall be entitled to such compensation as shall be certified by such justice, not exceeding five dollars for each day's attendance at such court, at the request of such justice, and ten cents a mile for travel from his place of residence to the place where the court is held, together with such sum for stationery as the presiding justice shall certify, which compensation shall be a charge upon the counties in which such courts shall be held respectively, and shall be allowed, and paid from the court fund, in like manner as other charges are allowed and paid from it. It shall be the duty of such stenographer to furnish to any party to such trials, upon request, a copy of the evidence and proceedings taken by him on such trials, or of such part thereof as may be required, on payment, on behalf of such party, of ten cents for every one hundred words of the copy so furnished.

267 (amended 1865 *to read as follows:*)

Upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law, separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk within twenty days after the court at which the trial took place. Judgment upon the decision shall be entered accordingly. If, upon motion, by either party, to a general or special term of the court, it shall be made to appear that the decision is unreasonably delayed, the court may make an order absolute for a new trial, or may order a new trial unless the decision shall be filed by a time to be specified in the order. The costs of the former trial shall abide the event of the new trial.

§ **268**, first paragraph (amended 1867 *to read as follows:*)

1. For the purposes of an appeal, either party may except to a decision on a matter of law arising upon such trial within ten days after notice in writing of the judgment, in the same manner and with the same effect as upon a trial by jury. Provided, however, that where the decision filed under section two hundred and sixty-seven does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may move for a new trial at general term, and for that purpose may within ten days after notice of the decision being filed, except thereto, and make a case or exceptions as above provided in case of an appeal.

§ **273** (amended 1865–1866 *to read as follows:*)

In all cases of reference the parties as to whom issues are formed in the action (except when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who shall be free from exception. And no person shall be appointed referee to whom all parties in the action shall object, except in actions for divorce. And no judge or justice of any court shall sit as referee in any action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate. The referee or referees shall make and deliver a report within sixty days from the time the action shall be finally submitted; and in default thereof, and before the report is delivered, either party may serve notice upon the opposite party that he elects to end the reference; and thereupon the action shall proceed as though no reference had been ordered, and the referees shall not in such case be entitled to any fees.

§ **282** (amended 1867 *to read as follows:*)

Upon filing a judgment-roll upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the county where the judgment-roll was filed, and in any other county, upon the filing with the clerk thereof a transcript of the original "docket," and shall be a lien on the real property in the county where the same is docketed, of every person against whom any such judgment shall be rendered, and which he may have at the time of the docketing thereof in the county in which such real property is situated, or which he shall acquire at any time thereafter, for ten years from the time of docketing the same in the county where the judgment-roll was filed. But the time during which the party recovering or owning such judgment shall be or shall have been restrained from proceeding thereon by any order of injunction, or other order,

or by the operation of any appeal, shall not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. But whenever an appeal from any judgment shall be pending, and the undertaking requisite to stay execution on such judgment shall have been given, and the appeal perfected as provided in the Code, the court in which such judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as they shall see fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is "secured on appeal," and thereupon it shall cease during the pendency of said appeal to be a lien on the real property of the judgment-debtor, as against purchasers and mortgagees in good faith.

§ **283** (amended 1866 *to read as follows:*)

Writs of execution for the enforcement of judgments as now used are modified in conformity to this title, and the party in whose favor judgment has been heretofore or shall hereafter be given, and in case of his death his personal representatives duly appointed, may, at any time within five years after the entry of judgment, proceed to enforce the same, as prescribed by this title.

§ **292**, Subd. **1** (amended 1867 *to read as follows:*)

1. When an execution against property of the judgment-debtor, or any one of several debtors in the same judgment issued to the sheriff of the county where he resides or has a place of business, or if he do not reside in the State, to the sheriff of the county where a judgment-roll or a transcript of a justice's judgment for twenty-five dollars or upward, exclusive of costs, is filed, is returned unsatisfied, in whole or in part, the judgment-creditor, at any time after such return made, is entitled to an order from a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the court of common pleas for the city and county of New York, when the execution was issued to such city and county, requiring such judgment-debtor to appear and answer concerning his property before such judge, at a time and place specified in the order, within the county to which the execution was issued. But in case of an order made by a justice of the Supreme Court all subsequent proceedings shall be had before some justice in the judicial district where the judgment-debtor resides, to be specified in the order.

§ 307 (amended 1866–67 *to read as follows:*)

When allowed costs shall be as follows:

1. To the plaintiff, for all proceedings before notice of trial in actions where judgment for failure to answer can be taken without application to the court, fifteen dollars; where judgment can only be taken on such application, twenty-five dollars; for all proceedings after notice of and before trial, fifteen dollars; for each additional defendant served with process, not exceeding ten, two dollars; and for each necessary defendant in excess of that number, served with process, one dollar.

2. To the defendant, for all proceedings before notice of trial, ten dollars; and for all proceedings after notice of and before trial, fifteen dollars.

3. To either party, where a new trial shall be had, for all proceedings after the granting of and before such new trial, twenty-five dollars; for attending upon and taking the deposition of a witness conditionally, or attending to perpetuate his testimony, ten dollars; for drawing interrogatories to annex to a commission for the taking of testimony, ten dollars; for attending the examination of a party before trial, ten dollars; for making and serving a case, or case containing exceptions, twenty dollars, except that where the case shall necessarily contain more than fifty folios, there shall be allowed ten dollars in addition thereto; and for making and serving amendments thereto, ten dollars. To the plaintiff for the appointment of a guardian of an infant defendant, ten dollars; but no more than ten dollars shall be allowed for the appointment of guardians in any one action. To the plaintiff for procuring an order of injunction, ten dollars.

4. To either party for the trial of an issue of law, twenty dollars; for every trial of an issue of fact, thirty dollars; and where the trial shall necessarily occupy more than two days, ten dollars in addition thereto.

5. To either party on appeal, except to the Court of Appeals, and except appeals in the cases mentioned in subdivisions one, three, four and five of section three hundred and forty-nine, and except in cases mentioned in the second paragraph of section three hundred and forty-four, before argument, twenty dollars; for argument, forty dollars; and the same costs shall be allowed to either party before argument, and for argument on application for judgment upon special verdict, or upon verdict subject to the opinion of the court, or for a new trial, on a case made and in cases where exceptions are ordered to be heard in the first instance at a general term, under the provisions of section two hundred and sixty-five.

6. To either party on appeal to the Court of Appeals, before argument, thirty dollars; for argument, sixty dollars; and when a judgment is affirmed, the court may, in its discretion, also award damages for the delay, not exceeding ten per cent. on the amount of the judgment; for preparing and serving a case, or case containing exceptions, in appeals to the Court of Appeals, twenty dollars.

7. To either party, for every circuit or term, not exceeding five circuits, and five special and five general terms, at which the cause is necessarily on the calendar and is not tried, or is postponed by order of the court, ten dollars; and for every term not exceeding ten, excluding the term at which the cause is argued in the Court of Appeals, ten dollars; but in an action hereafter brought to recover dower, before admeasurement, of real property aliened by the husband, the plaintiff shall not recover costs unless it appear that the dower was demanded before the commencement of the action and was refused.

The same costs shall be allowed to the plaintiff in proceedings under chapter two, title twelve, of the second part of this Code (sections three hundred and seventy-five to three hundred and eighty-one), as upon the commencement of an action.

§ **309** (amended 1865 *to read as follows:*)

These rates shall be estimated upon the value of the property claimed or attached, or affected by the adjudication upon the will or other instrument, or sought to be partitioned, or the amount found due or unpaid upon the mortgage in an action for foreclosure. And whenever it shall be necessary to apply to the court for an order enforcing the payment of an installment falling due, after judgment, in an action for foreclosure, the plaintiff shall be entitled to the rate of allowance in the last section prescribed, but to no more in the aggregate than if the whole amount of the mortgage had been due when judgment was entered. Such amount of value must be determined by the court or by the commissioners, in case of actual partitions. In difficult and extraordinary cases, where a defence has been interposed, or in such cases where a trial has been had, and in actions or proceedings for the partition of real estate, the court may also, in its discretion, make a further allowance to any party, not exceeding five per cent. upon the amount of the recovery or claim, or subject-matter involved.

§ **334** (amended 1865 *to read as follows:*)

To render an appeal effectual for any purpose, a written undertaking must be executed on the part of the appellant by at least two sureties, to the effect that the appellant will pay all costs and damages

which may be awarded against him on the appeal, not exceeding five hundred dollars, or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

§ **343** (amended 1866 *to read as follows :*)

The undertaking must be filed with the clerk with whom the judgment or order appealed from was entered. The provisions of this chapter as to the security to be given upon appeals, and as to the stay of proceedings, shall apply to appeals taken under subdivision three of section eleven.

§ **352** (amended 1865 *to read as follows :*)

When a judgment shall have been rendered by the general term of the Marine Court of the city of New York, or by a justice of a justice's court of that city, the appeal shall be to the Court of Common Pleas for the city and county of New York.

The appeal from the general term of the Marine Court prescribed herein shall be from an actual determination at such general term only, and shall be taken within twenty days after judgment by such general term. In the city of Buffalo, the appeals from the courts of justices of said city shall be to the Superior Court of said city. When rendered by any of the other courts enumerated in section three hundred and fifty-one, the appeal shall be to the county court of the county where the judgment was rendered. On such appeal, when the amount of the claim or claims for which judgment was demanded by either party in his pleadings in the court below shall exceed fifty dollars, or when, in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed fifty dollars, exclusive of costs, a new trial shall be had in the county court in the following appellate cases :

1. When the judgment was rendered upon an issue of law joined between the parties.

2. When it was rendered upon an issue of fact joined between the parties whether the defendant was present at the trial or not.

And when the appeal is to the Superior Court of Buffalo, in the cases in which, by the terms of this section, a new trial may be had, such new trial shall be had in the said Superior Court.

Provided, however, that the appellant may, in cases where the amount for which judgment is demanded by either party in his pleadings exceeds fifty dollars, or where, in an action to recover the possession of personal property, the value of the property as assessed and the damages recovered shall exceed fifty dollars exclusive of costs,

If the offer be made, and accepted by the appellant, the appellant shall recover all his disbursements on appeal, and all his costs in the court below. But the appellant shall not recover costs except as provided in this chapter. The respondent shall be entitled to recover costs where the appellant is not. Whenever costs are awarded to the appellant, he shall be allowed to tax as part thereof the costs and fees paid to the justice on making the appeal, as disbursements, in addition to the costs in the Appellate Court; and when the judgment in the suit before the justice was against such appellant, he shall further be allowed to tax the costs incurred by him which he would have been entitled to recover in case the judgment below has been rendered in his favor. If, upon an appeal, a recovery for any debt or damages be had by one party, and costs be awarded to the other party, the court shall set off such costs against such debt or damages, and render judgment for the balance. The following fees and costs, and no other, except fees of officers, disbursements, and witnesses' fees, shall be allowed on appeal, to the party entitled to costs as herein provided, when the new trial is in the County Court. For proceedings before notice of trial, ten dollars; for all subsequent proceedings before trial, seven dollars; for trial of an issue of law, ten dollars; for every trial of an issue of fact, fifteen dollars; for argument of a motion for a new trial on a case or a bill of exceptions, ten dollars; in all cases, to either party, for every term not exceeding five, at which the appeal is necessarily on the calendar and is not tried or is not postponed by the court, seven dollars. In other appeals the costs shall be as follows: To the appellant, on reversal, fifteen dollars; to the respondent, on the affirmance, twelve dollars. If the judgment appealed from be reversed in part and affirmed as to the residue, the amount of costs allowed to either party shall be such sum as the Appellate Court may award, not exceeding ten dollars. If the appeal be dismissed for want of prosecution, as provided by section three hundred and sixty-four, no costs shall be allowed to either party. In every appeal, the justice of the peace before whom the judgment appealed from was rendered, shall receive two dollars for his return. If the judgment be reversed for an error of fact in the proceedings, not affecting the merits, costs shall be in the discretion of the court. If in the notice of appeal the appellant shall not state in what particular or particulars he claims the judgment should have been more favorable to him, he shall not be entitled to costs unless the judgment appealed from shall be wholly reversed.

§ 379 (amended 1866 *to read as follows:*)

Upon such summons any party summoned may answer within the time specified therein, denying the judgment, or setting up any defence thereto which may have arisen subsequently to such judgment; and in addition thereto, if the party be proceeded against according to

section three hundred and seventy-five, he may make any defence which he might have made to the action if the summons had been served on him at the time when the same was originally commenced and such defence had been then interposed to such action.

§ **385** (amended 1866 *to read as follows:*)

The defendant may, at any time before the trial or verdict, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer, and give notice thereof in writing within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fail to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer; and in case the defendant shall set up a counter-claim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow said counter-claim to the amount specified with costs. If the defendant accept the offer, and give notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitle him to judgment, or the amount specified in said offer shall be allowed him in the trial of the action. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the defendant fail to recover a more favorable judgment or to establish his counter-claim for a greater amount than is specified in said offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer.

§ **399** (amended 1867 *to read as follows:*)

A party to an action or special proceeding in any and all courts and before any and all officers and persons acting judicially, may be examined as a witness on his own behalf, or in behalf of any other party, conditionally, on commission and upon the trial or hearing in the case, in the same manner and subject to the same rules of examination as any other witness; provided, however, that no party to the action or proceeding, nor any person who has a legal or equitable interest which may be affected by the event of the action or proceeding, nor any person who, previous to such examination, has had such an interest, however the same may have been transferred to or come to the party to the action or proceeding, nor any assignor of anything in controversy in the action, shall be examined in regard to any transaction or communication between such witness and a person at the

time of such examination deceased, insane or lunatic, as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, when such examination or any judgment or determination in such action or proceeding, can in any manner affect the interest of such witness or the interest previously owned or represented by him. But when such executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, survivor or committee, shall be examined on his own behalf in regard to such transaction or communication, or the testimony of such deceased or insane person or lunatic in regard to such transaction or communication (however the same may have been perpetuated or made competent), shall be given in evidence on the trial or hearing on behalf of such executor, administrator, heir-at-law, next-of-kin, assignee, legatee, devisee, survivor or committee, then all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transaction or communication on said trial or hearing. Nothing contained in section eight of this act shall be held or construed to affect or restrain the operation of this section.

§ **401** (amended 1867 by adding thereto as subdivision eight, the following:)

8. Whenever a motion shall be made in any cause or proceeding in any of the courts of this State, to obtain an injunction order, order of arrest, or warrant of attachment, or to vacate, modify or set aside any injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, it shall be the duty of the judge before whom such motion is made, to render and make known his decision on such motion within twenty days after the day upon which such motion shall or may be submitted to him for his decision.

§ **434** (amended 1867 *to read as follows:*)

When an action shall be brought by the Attorney-General, by virtue of this chapter, on the relation or information of a person having an interest in the question, the name of such person shall be joined with the people as plaintiff, and in every such case the Attorney-General may require as a condition for bringing such action, that satisfactory security shall be given to indemnify the people of this State against the costs and expenses to be incurred thereby; and in every case where such security is given, the measure of the compensation to be paid by such person or persons to the Attorney-General, shall be left to the agreement of the parties express or implied.

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